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Franchising and the Collective Rights of Franchisees

Robert W. Emerson

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Franchising and the Collective Rights of Franchisees

Robert W. Emerson*

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I. INTRODUCTION

A. *The Problem*

Assume that you are the franchisee of a nationwide restaurant chain. Your franchisor has acted contrary to what you believe to be in your best interest. For the franchisor, bigger is better: more outlets and discount programs mean higher sales volume and consequently additional franchise fees and royalties, with royalties typically being based on gross sales—not franchisee net profits. You are concerned that the franchisor is oriented more toward expansion than the well-being of existing franchisees. Franchisor assistance is less than you expected, but royalties and other charges seem steep.

Facing a strong franchisor that appears not to worry about an individual franchisee's complaints, you join with fellow franchisees to press your claims collectively. This association serves both as a communications clearinghouse and a means to increase franchisee bargaining power. In response, however, the franchisor challenges your group in the following ways: By setting up its own franchisee group or "advisory council," by seeking to terminate the franchises of supposedly disruptive franchisees, and by insisting that each franchisee—as a separately owned and operated business—must bargain alone. Even your attorneys apprise you of the limited rights that franchisee groups may have, and they warn you about potential antitrust violations.

Franchisee associations are often a natural, indeed necessary, development in a maturing franchise system. Why, then, does the law accord these groups few rights and much potential liability?

This Article describes the current state of the law, analyzes its validity and implications, and discusses proposals to protect franchisees, including franchisee collective bargaining rights and an antitrust exemption for franchisee associations. The following areas of the law are examined: Constitutional issues, state and federal franchise laws, procedural issues, labor relations law, and antitrust law. As franchising law continues to develop, the subject of franchisee collective rights ultimately will be on the cutting edge of the law, at the intersection of franchise, labor, and antitrust law. Thus, this Article analyzes and synthesizes these diverse areas of law, illustrates why none of them protect franchisees sufficiently, and then recommends changes to the current legal framework.

B. Review, Analysis, and Recommendations

This Article reveals an overly complex, misguided regulatory environment in need of simplification and other practical solutions. The introduction in Part I is followed by Parts II through VI, which lead to various conclusions about the present state of the law, discussion of the proposed antitrust exemption, and consideration of other proposals. Specifically, Part II considers the nature of franchising and the present and potential regulatory framework. Part III examines franchisees' rights of association under the first amendment, federal and uniform statutes, and state law. This Part demonstrates the restricted nature of the right of association, the lack of guidance that the law furnishes, and the small prospects for new franchisee associational rights legislation. Moving from statutes to case law, Part IV outlines alternatives to franchisee group bargaining with franchisors, such as class actions, offensive collateral estoppel, test cases, administrative measures, and arbitration. All of these alternatives have acute limitations when compared with collective bargaining; thus, Part V analyzes the application of labor relations law to franchisee associations. It discusses the possibilities concerning nonemployees, but determines that the present situation offers little affirmation of franchisee collective rights. Indeed, Part VI suggests that antitrust law may *negate* such collective rights by pushing even benevolent franchisors toward "busting" franchisee groups and providing an excuse for such "busting" by less benign franchisors.

Finally, Part VII of the Article concludes that, as present or potential sources of franchisee collective rights, federal labor relations laws are too far afield, first amendment principles are too general, state "right of association" statutes are too timidly worded, and group litigation or arbitration strategies prove too unwieldy. Franchisee associational rights need to be established clearly and should include the right to enforce lawful agreements between a franchisee group and its mem-

bers' franchisor. On the other hand, imposing a duty on franchisors to bargain collectively with franchisee associations would create numerous problems. Instead, franchisee associations should be protected, as are labor unions, from the use of antitrust laws against group organizing, collective negotiating, and other legitimate franchisee association activities.

II. THE REGULATORY FRAMEWORK FOR FRANCHISING

A. *The Franchising Concept*¹

For several decades franchising has been a growing phenomenon of business organization and sales or services distribution. Franchising has

1. In the words of one authority a franchise is:

an oral or written arrangement for a definite or indefinite period, in which a person [the franchisor] grants to another person [the franchisee] a license to use a trade name . . . and in which there is a community of interest in the marketing of goods or services at wholesale, retail, leasing, or otherwise in a business operation under said license.

H. BROWN, *FRANCHISING: REALITIES AND REMEDIES* § 1.03[2], at 1-17 (rev. ed. 1988) (noting that a number of state legislatures substantially have adopted this "generic definition"). Other definitions include the following: "Taking the collection of laws as a whole, the elements of a franchise generally include an agreement, an owned trademark or trade name under which others are authorized to operate, and a financial factor such as payment of a franchise fee or a 'community of interest.'"

1 Bus. Franchise Guide (CCH) ¶ 225, at 714 (1988).

[F]ranchising is a system of marketing and distribution whereby a small independent businessman (the franchisee) is granted—in return for a fee—the right to market the goods and services of another (the franchisor) in accordance with the established standards and practices of the franchisor, and with its assistance. *In its ideal state*, the franchise system forges the perfect marriage between big business and the small businessman: the franchisor obtains new sources of expansion capital, new distribution markets, and self-motivated vendors of its products, while the franchisee acquires the products, expertise, stability, and marketing savvy usually reserved only for larger enterprises.

Kaufmann, *Franchising: Business Strategies and Legal Compliance*, in P.L.I. COMMERCIAL LAW & PRACTICE No. 486, *FRANCHISING 1989: BUSINESS STRATEGIES & COMPLIANCE ISSUES* 11, 15 (1989) (emphasis added).

An alternative to formal integration of manufacturing and distributive activities into a single enterprise is franchising. Although subject to infinite variations, the basic franchise concept involves a contractual arrangement whereby one firm supplies certain products, equipment, and auxiliary services to another which sells the merchandise and disperses services to final users under terms set, in whole or in part, by the supplying firm. Under a franchise arrangement, the distributing or service firm gives up a certain amount of independence of action in return for the benefits, usually in the form of financial aid or management expertise, provided by the franchisor.

C. ROSENFELD, *THE LAW OF FRANCHISING* 14 (1970) (quoting Preston & Schramm, *Dual Distribution and Its Impact on Marketing Organization*, 8 CAL. MGMT. REV., Winter 1965, at 59, 61).

Fundamentally, the franchisor-franchisee relationship is based on a contract between the parties themselves. See generally *Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp.*, 100 N.J. 166, 495 A.2d 66 (1985); UNIFORM FRANCHISE AND BUSINESS OPPORTUNITIES ACT § 101(7) (Proposed Official Draft 1987), 1 Bus. Franchise Guide (CCH) ¶ 3600, at 4659-60 (1988) [hereinafter UNIFORM ACT]; N. AXELRAD & L. RUDNICK, *FRANCHISING: A PLANNING AND SALES COMPLIANCE GUIDE* 110 (1987); C. ROSENFELD, *supra*, at 14; Fels, *Franchising: Legal Problems and the Business Framework of Reference*, in *BUSINESS AND LEGAL PROBLEMS OF THE FRANCHISE* 9 (J. McCord & I. Cohen

its antecedents in feudalism and in licenses granted by kings.² Early American forerunners include brewer-licensed beer gardens³ and the I.M. Singer & Co. sewing machine firm,⁴ both of the 1850s. General Motors' system began in 1898,⁵ and Rexall Drugs began in 1902.⁶ However, in all but a few industries that already had applied the system, such as automobiles, gasoline, and soft drinks,⁷ the franchising boom began after World War II.⁸

Much has been written on the history, problems, and economics of franchising.⁹ It is axiomatic that franchising itself is not an industry.

eds. 1968); Kaufmann, *supra*, at 18; Rudnick, *The Franchise Relationship: Problem Areas for the 1980s: Part II—The Legal Status of the Franchise Relationship*, 2 FRANCHISE L.J., Winter 1983, at 3.

2. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 37-38 (1766); C. ROSENFELD, *supra* note 1, at 1-4. In the United States, public franchises arose from legislative grants for utilities such as canals, railroads, and banks. See C. ROSENFELD, *supra* note 1, at 4.

3. H. BROWN, *supra* note 1, § 1.01[1], at 1-2.

4. See S. LUXENBERG, ROADSIDE EMPIRES: HOW THE CHAINS FRANCHISED AMERICA 12-13 (1985); Kaufmann, *supra* note 1, at 13. Other authorities state that Singer franchising began in the 1860s. See, e.g., N. AXELRAD & L. RUDNICK, *supra* note 1, at 1; R. ROSENBERG, PROFITS FROM FRANCHISING 9 (1969); Rudnick, *An Introduction to Franchising*, in INTERNATIONAL FRANCHISING—AN OVERVIEW 2 (M. Mendelsohn ed. 1984).

5. See N. AXELRAD & L. RUDNICK, *supra* note 1, at 1; S. LUXENBERG, *supra* note 4, at 14.

6. See N. AXELRAD & L. RUDNICK, *supra* note 1, at 1; S. LUXENBERG, *supra* note 4, at 16.

7. See C. ROSENFELD, *supra* note 1, at 6; Fels, *The Franchising Phenomenon: An Overview*, in THE FRANCHISING PHENOMENON 1 (J. Rice ed. 1969); Rudnick, *supra* note 4, at 2-3.

8. P. ZEIDMAN, P. AUSBROOK & H. LOWELL, FRANCHISING: REGULATION OF BUYING AND SELLING A FRANCHISE, 34 C.P.S. (BNA) at A-1 (1983) [hereinafter P. ZEIDMAN]; Fels, *supra* note 7, at 1; Kaufmann, *supra* note 1, at 13-14; Rudnick, *supra* note 4, at 5. For some industries, such as "fast-food," the boom began earlier and became much more pronounced than in other fields. All franchised restaurants (not just fast-food outlets), however, account for little more than one-tenth of the sales made by firms engaged in franchising. U.S. DEP'T OF COMMERCE, FRANCHISING IN THE ECONOMY 1985-1987, at 5-6 (1987). Newer types of franchises—those other than restaurants (11%), gasoline (18%), and motor vehicles (58%)—have furnished much of the recent growth in franchising. Examples include a full range of services and products such as tax return preparation, footwear, photo development, hair styling, auto repair, recruiting services, clothes shops, modeling centers, oil change stations, education and training, car rental, home furnishing, printing and copying services, tools, pets, beverages, beauty aids, weight control, temporary services, real estate, books, electronics, garden supplies, child care, and health and recreational clubs. *Id.*; Roman, *Introduction*, in THE FLORIDA BAR, FLORIDA FRANCHISE LAW AND PRACTICE 3 (1984). For an extensive list of service-product categories and franchised systems, see B. WEBSTER, THE INSIDER'S GUIDE TO FRANCHISING 17-24, 238-88 (1986).

9. For some accounts of history, see H. BROWN, *supra* note 1, § 1.01, at 1-2 to 1-6; S. LUXENBERG, *supra* note 4; R. MUNNA, FRANCHISE SELECTION: SEPARATING FACT FROM FICTION 28-30 (1987); and C. ROSENFELD, *supra* note 1, at 1-8. For practical problems and economics, see E. DIXON, JR., THE FRANCHISE ANNUAL (1985); H. KURSH, THE FRANCHISE BOOM (rev. ed. 1968); P. NORBACK & C. NORBACK, DOW-JONES-IRWIN GUIDE TO FRANCHISES (rev. ed. 1982); U. OZANNE & S. HUNT, THE ECONOMIC EFFECTS OF FRANCHISING, REPORT TO THE SENATE SELECT COMM. ON SMALL BUSINESS, 92d Cong., 1st Sess. 132 (Comm. Print 1971); S. RAAB & G. MATUSKY, THE BLUEPRINT FOR FRANCHISING A BUSINESS (1987); W. SIEGEL, FRANCHISING (1983); B. SMITH & T. WEST, BUYING A FRANCHISE (1986); and B. WEBSTER, *supra* note 8 at 113. For theoretical economic concepts, see Caves & Murphy, *Franchising: Firms, Markets, and Intangible Assets*, 42 S. ECON. J. 572 (1976);

Instead, it is a method of business that has been employed in various industries.¹⁰ Franchising is thus both a structure and the action taken pursuant to that structure. It is a distribution technique that integrates the distribution system by contract instead of by a centrally controlled chain of ownership.¹¹

There are two principal franchising forms. The predominant form,¹² "product and trade name franchising," generally concerns the licensing of a product line from one company (the franchisor) to a wholesaler or retailer (the franchisee). Typical examples are automobile dealerships and gasoline service stations. Occasionally, the franchisee even may have a role in production, as is the case with many soft drink bottlers.¹³

The other main form of franchising is "business format franchising."¹⁴ While smaller in number and total revenue than product and trade name franchises, it has accounted for most of franchising's growth over the last four decades.¹⁵ Examples of business format franchising include restaurants, convenience stores, and personal and business services.¹⁶ This franchise form consists of a "package" of services or products passed on to the franchisee and requires the franchisee to adhere to certain operational standards. Usually, a franchisor has developed successfully a product or service and a business format suitable to the particular business.¹⁷ The franchisor contracts with franchisees to have them sell the product or service to the public in accordance with the franchisor's business format and under the franchisor's trademarks and service marks.¹⁸

In either form, the arrangement between franchisor and franchisee typically is expected to be long-term.¹⁹ The franchisee pays the franchisor an initial franchise fee plus royalties thereafter and is bound

Mathewson & Winter, *The Economics of Franchise Contracts*, 28 J.L. & ECON. 503 (1985); and Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223 (1978).

10. Fels, *supra* note 1, at 9 (stating that franchising is a "form and method of doing business . . . adopted by and used in many varied industries") (emphasis in original omitted).

11. *Id.*

12. U.S. DEP'T OF COMMERCE, *supra* note 8, at 1.

13. *Id.*

14. *Id.* at 3.

15. *Id.*

16. *Id.*

17. Fels, *supra* note 1, at 10.

18. *Id.*

19. See 15 G. GLICKMAN, *FRANCHISING* § 9A.01, at 9A-2 (1990) (stating that the franchise agreement establishes a relationship that is intended to last a long time); Caffey & Kaufmann, *The Law of Franchise Relationships: Termination, Nonrenewal, and Transfer*, in P.L.I. COMMERCIAL LAW & PRACTICE No. 486, *FRANCHISING 1989: BUSINESS STRATEGIES & COMPLIANCE ISSUES* 457, 459 (1989) (observing that there is a 10- to 20-year term for most franchise agreements).

by a formalized system of control designed to protect the uniformity of the entire franchised system.²⁰ Franchisors often have concomitant duties to train, attempt to attract customers for, and otherwise assist the franchisees. Because the franchise contract usually is determined by the franchisor via a standard form agreement, however, most of the express contractual obligations fall upon the franchisee.²¹

B. State Legislation and the FTC Rule

Recognizing that prospective franchisees often face their initial investment decision without adequate information, many state legislatures have enacted statutes that require franchisors to meet registration and disclosure obligations. These statutes fall into two categories: Those that specifically address franchising and those that are geared more broadly toward all nonexempted "business opportunity" ventures.²² The statutes require franchisors to disclose information directly

20. See 15 G. GLICKMAN, *supra* note 19, § 9.03[8], at 9-21 to 9-22.

21. See *Seegmiller v. Western Men, Inc.*, 20 Utah 2d 352, 353-54, 437 P.2d 892, 894 (1968) (stating that franchise contracts almost always are drawn up by the franchisor and presented to dealers for acceptance without negotiation over terms); S. LUXENBERG, *supra* note 4, at 262-63 (stating that because "the franchise contract is usually drawn up by the parent, the terms are usually one-sided"); R. MUNNA, *supra* note 9, at 116 (noting "highly negative [to franchisees] aspects of a typical franchise agreement," and stating that such documents "are not designed for human relations [but] are more appropriate in a museum of torture devices, as guillotines or impaling tools"); see also G. GLICKMAN, *supra* note 19, at 9-1 to 9-53 (discussing various agreement provisions to be considered by both parties).

One countervailing trend is the tendency of many potential franchisees to "shop" for the best franchise available. Presumably, this could lead to greater competition among franchisors and more bargaining power for prospective franchisees.

22. Several states have registration or disclosure provisions in both franchise laws and business opportunity acts, but they may be merely duplicative, or the differences may be reconciled elsewhere in the statutes thereby clarifying franchisor compliance procedures. Often states simply exempt those franchisors covered by the state franchise statutes from the business opportunity registration and disclosure requirements.

The states with franchise legislation are: California, CAL. CORP. CODE §§ 31,000-31,516 (West 1977 & Supp. 1990); Hawaii, HAW. REV. STAT. § 482E (1988 & Supp. 1989); Illinois, Franchise Disclosure Act of 1987, 1987 Ill. Laws, P.A. 85-551, ILL. ANN. STAT. ch. 121½ paras. 1701-1744 (Smith-Hurd Supp. 1990); Indiana, IND. CODE ANN. §§ 23-2-2.5-1 to 23-2-2.5-51 (Burns 1989); Maryland, MD. ANN. CODE art. 56, §§ 345-365 (1988 & Supp. 1989); Michigan, MICH. COMP. LAWS §§ 445.1501-455.1546 (1989 & Supp. 1990); Minnesota, MINN. STAT. ANN. §§ 80C.01-80C.30 (West 1986 & Supp. 1990); Nebraska, NEB. REV. STAT. §§ 87-401 to 87-410 (1987) (no registration required); New York, N.Y. GEN. BUS. LAW §§ 680-695 (McKinney 1984 & Supp. 1990); North Dakota, N.D. CENT. CODE §§ 51-19-01 to 51-19-17 (1989); Oregon, OR. REV. STAT. §§ 650.005-650.250 (1988); Rhode Island, R.I. GEN. LAWS §§ 19-28-1 to 19-28-15 (1989); South Dakota, S.D. CODIFIED LAWS ANN. §§ 37-5A-1 to 37-5A-87 (1986 & Supp. 1990); Virginia, VA. CODE ANN. §§ 13.1-557 to 13.1-574 (1985 & Supp. 1988); Washington, WASH. REV. CODE ANN. §§ 19.100.010-19.100.940 (1989); and Wisconsin, WIS. STAT. ANN. §§ 553.01-553.78 (West 1989) ("Franchise Investment Law"); Wis. STAT. ANN. §§ 135.01-135.07 (West 1989) ("Fair Dealership Law"). The District of Columbia also has franchise legislation: D.C. CODE ANN. §§ 29-1201 to 29-1208 (Supp. 1990).

The states with business opportunity legislation are: Alabama, Deceptive Trade Practices Act

to prospective franchisees.²³ In addition, franchisors may be obliged to register and file documents with state authorities.²⁴ Most states mandate the posting of a surety or performance bond, and most state regulatory agencies can conduct investigations. Almost all states that require registration give their regulatory bodies the authority to deny registration for failure to meet statutory or administrative standards.²⁵

(1981), ALA. CODE § 8-19-5(20) (1984) (providing solely substantive regulation, with no disclosure or registration requirements); California, CAL. CIV. CODE §§ 1812.200-1812.221 (West 1985 & Supp. 1990); Connecticut, CONN. GEN. STAT. ANN. §§ 36-503 to 36-521 (1987 & Supp. 1990); Florida, FLA. STAT. ANN. §§ 559.80-559.815 (West 1988 & Supp. 1990); Georgia, GA. CODE ANN. §§ 10-1-410 to 10-1-417 (1989); Indiana, IND. CODE ANN. §§ 24-5-8-1 to 24-5-8-21 (Burns Supp. 1990); Iowa, IOWA CODE ANN. §§ 523B.1-523B.11 (West 1988); Kentucky, KY. REV. STAT. ANN. §§ 367.801-367.990 (Michie 1987 & Supp. 1988); Louisiana, LA. REV. STAT. ANN. §§ 51:1821-51:1824 (West 1987 & Supp. 1990) (providing solely substantive regulation, including surety bond filing, with no disclosure or registration requirements); Maine, ME. REV. STAT. ANN. tit. 32, §§ 4691-4700B (1988 & Supp. 1989); Maryland, MD. ANN. CODE art. 56, §§ 401-415 (1988 & Supp. 1989); Michigan, MICH. COMP. LAWS §§ 445.902-445.903b (1989); Nebraska, NEB. REV. STAT. §§ 59-1701 to 59-1761 (1987) ("Seller-Assisted Marketing Plans"); North Carolina, N.C. GEN. STAT. §§ 66-94 to 66-100 (1989); Ohio, OHIO REV. CODE ANN. §§ 1334.01-1334.99 (Anderson Supp. 1989); Oklahoma, OKLA. STAT. ANN. tit. 71, §§ 801-827 (West 1987 & Supp. 1990); South Carolina, S.C. CODE ANN. §§ 39-57-10 to 39-57-80 (Law. Co-op. 1985 & Supp. 1989); South Dakota, S.D. CODIFIED LAWS ANN. §§ 37-25A-1 to 37-25A-54 (1986 & Supp. 1990); Texas, TEX. REV. CIV. STAT. ANN. arts. 5069-16.01 to 5069-16.17 (Vernon 1987 & Supp. 1990) (requiring disclosure only); Utah, UTAH CODE ANN. §§ 13-15-1 to 13-15-7 (1986 & Supp. 1990); Virginia, VA. CODE ANN. §§ 59.1-262 to 59.1-269 (1987); Washington, WASH. REV. CODE ANN. §§ 19.110.010-19.110.930 (1989).

23. For example, states have required the franchisor to provide the following: A description of the franchised business; background on the franchisor's officers, directors, and other principals; the franchisor's and principals' litigation and bankruptcy history; the franchisee's initial fee, prospective royalties fees, and other fees; the franchisee's total start-up costs; franchisee financing terms available through the franchisor or an affiliate; franchisee obligations concerning sales, purchases, and operations; the franchisor's pertinent intellectual property—trademarks, service marks, and patents; franchisor supervision and assistance of franchisees, including the initial training program and the site selection process (when applicable); explanations of franchisee exclusive territories; terms on renewal, termination, repurchase, amendment, or assignment of the franchise agreement; copies of all pertinent contracts (such as the franchise contract, leases, and purchase agreements); actual, average, projected, or forecasted franchisee sales, profits, or earnings; the number of franchises canceled, not renewed, or reacquired by the franchisor; prospective franchise sales in the next year; financial statements on the franchisor; and the names and addresses of in-state franchisees. *See supra* note 22 and statutes cited therein. The information required often varies greatly from state to state, although use of the Uniform Franchise Offering Circular has reduced somewhat the divergence. *See infra* note 36 and accompanying text.

24. Some examples of document requirements include: Copies of proposed advertisements and promotions; information identifying the franchisor and its officers, directors, and sales agents; copies of the offering circular to be used to discharge franchisor disclosure requirements; page cross references between subjects discussed in the franchise prospectus and franchise agreement; and a filing fee. *See supra* note 22 and statutes cited therein. Filing requirements can vary tremendously depending on the state.

25. Large-scale, financially sound franchisors that exceed a specified net worth (*e.g.*, \$5 million) and have had a certain number of operating franchises (*e.g.*, 25) in the state over a relatively long time period (*e.g.*, 5 years) often are exempted from some or all of the registration requirements. *See, e.g.*, CAL. CORP. CODE § 31,101 (West 1977 & Supp. 1990); IND. CODE ANN. § 23-2-2.5-3 (Burns 1989); MD. ANN. CODE art. 56, § 348(4) (1988) (exemption promulgated by administrative

In addition to requiring disclosures and registration, many state statutes regulate the ongoing franchise relationship. These statutes reflect a legislative perception that franchisors possess most of the bargaining leverage and may abuse this power.²⁶ These regulatory statutes typically give franchisees some protection against indiscriminate termination. In most instances, these laws bar franchisors from cancelling or refusing to renew franchises except for "good cause."²⁷ In addition to good cause requirements for termination or nonrenewal, many other subjects are governed by these franchise relationship statutes.²⁸

regulation pursuant to this statute); N.Y. GEN. BUS. LAW §§ 684.2-684.3 (McKinney 1984); N.D. CENT. CODE § 51-19-04.1 (1989); R.I. GEN. LAWS § 19-28-4(b) (1989); S.D. CODIFIED LAWS § 37-5A-12 (1986); WASH. REV. CODE ANN. § 19.100.030(4)(b)(i) (1989); WIS. STAT. ANN. § 553.22 (West 1989).

26. Of course, legislation is not always a prerequisite to correcting alleged franchising abuses. The law of misrepresentation certainly remains quite important. Moreover, in a few cases, courts have used the common law to declare unlawful a termination or other franchisor behavior that may have been unfair but not actually fraudulent. *See, e.g.,* Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973) (New Jersey Supreme Court finding that, despite contractual language to the contrary, public policy in effect created a "good cause" requirement for terminations, and that there was an implied covenant of lease renewability for a gasoline dealer who rented the station premises from his franchisor, Shell), *cert. denied*, 415 U.S. 920 (1974); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978) (imposing good faith obligations relating to nonrenewals); *see also* Conoco, Inc. v. Inman Oil Co., 774 F.2d 895 (8th Cir. 1985) (applying good faith principles so that franchisee-dealer was not deprived of its contractual "bargain"); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979) (holding that franchisor's predatory conduct violated both antitrust laws and a common-law duty of good faith); deTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971) (holding that equity limits a contractual right to terminate at will). The substantial expansion of law in this field, however, has its roots in legislation, not judicial fiat.

27. Sixteen states, the District of Columbia, Puerto Rico, and the Virgin Islands now have good cause requirements. These jurisdictions are: Arkansas, ARK. STAT. ANN. § 4-72-204 (1987); California, CAL. BUS. & PROF. CODE §§ 20,020-20,026 (West 1987); CAL. CORP. CODE §§ 31,101, 31,119, 31,125 (West 1977 & Supp. 1990); Connecticut, CONN. GEN. STAT. ANN. § 42-133f (West 1987); Delaware, DEL. CODE ANN. tit. 6, § 2552 (1974 & Supp. 1988); District of Columbia, D.C. CODE ANN. §§ 29-1201 to 29-1203 (Supp. 1990); Hawaii, HAW. REV. STAT. § 482E-6(2)(H) (1988); Illinois, Franchise Disclosure Act of 1987, 1987 Ill. Laws, P.A. 85-551, ILL. ANN. STAT. ch. 121½, para. 1719 (Smith-Hurd Supp. 1990); Indiana, IND. CODE ANN. § 23-2-2.7-1(7) (Burns 1989); Michigan, MICH. COMP. LAWS § 445.1527(c) (1989); Minnesota, MINN. STAT. ANN. § 80C.14 (West 1986 & Supp. 1990); Nebraska, NEB. REV. STAT. § 87-404 (1987); New Jersey, N.J. STAT. ANN. § 56:10-5 (West 1989); Puerto Rico, P.R. LAWS ANN. tit. 10, §§ 278-278b (Supp. 1988); South Dakota, S.D. CODIFIED LAWS ANN. § 37-5A-51 (1986 & Supp. 1990) (prohibiting unfair or inequitable practices); Tennessee, TENN. CODE ANN. § 47-25-1503 (Supp. 1989); Virgin Islands, V.I. CODE ANN. tit. 12A, § 132 (1982); Virginia, VA. CODE ANN. § 13.1-564 (1985); Washington, WASH. REV. CODE ANN. § 19.100.180(2)(j) (1989); and Wisconsin, WIS. STAT. ANN. § 135.03 (West 1989) ("Fair Dealership Law"). Each of these good cause for cancellation or nonrenewal states has a registration or disclosure statute with the exception of Arkansas, Delaware, New Jersey, and Tennessee. These four states, however, do prohibit or restrict certain franchisor practices. *See infra* notes 28 and 38 and accompanying text.

28. The areas covered by statute include, *inter alia*, franchise advertising, franchisee associations, the financial condition of prospective franchisors, repurchases of franchises or franchisee property, minimum time limits for notices prior to franchise termination or nonrenewal, minimum initial duration of franchise term, discriminatory treatment among franchisees, rebates from sup-

State-by-state regulation of franchised operations can be costly and confusing.²⁹ Multistate franchised operations must run a gauntlet of various disclosure, registration, and practices requirements. Thus, compliance creates much higher costs than would compliance under a uniform system of laws. Historically, however, Congress and federal administrative agencies have been quite cautious in promoting a uniform system. In the 1960s franchising grew so rapidly that many referred to a "franchise boom."³⁰ Economic growth outpaced the development of a legal theory to deal with the franchisor-franchisee relationship.³¹ Despite numerous hearings and proposals, however, nothing has emerged from Congress.³² As for federal administrative law, the Federal Trade Commission (FTC) failed to promulgate a trade regulation on franchising until October 21, 1979, after nearly a decade of proposals and hearings.³³ The rule, entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,"³⁴ requires the franchisor to disclose numerous items to prospective franchisees, but it does not require registration.³⁵ Disclosure can be made

pliers to franchisors, franchisee covenants not to compete, franchisee waivers of statutory rights, franchisees' exclusive territories, franchise transfers by the franchisee, franchisee managerial personnel, purchase requirements imposed on franchisees, and the general performance standards required of franchisees. *See supra* note 27 and statutes cited therein. State statutes tend to prohibit or restrict franchisor actions or franchisor-imposed contract terms concerning one or more (usually many) of the above matters. Each state statute is unique; indeed, the differences between states can be considerable. Each statute must be reviewed for the specific rules applicable within that state—a task beyond the scope of this Article.

29. In addition to general franchise and business opportunities legislation, *see supra* note 22, all states have statutes geared specifically toward certain industries. As of January 1990, 36 states, the District of Columbia, and the United States had statutes pertaining to gasoline franchise-dealers. *See, e.g.*, Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978) (codified at 15 U.S.C. §§ 2801-2806, 2821-2824, 2841 (1988)). Likewise, at the start of 1990, all but one state (Alaska) had a statute concerning motor vehicle dealerships. The federal law that covers this subject is the Automobile Dealers Franchise Act, Pub. L. No. 84-1026, 70 Stat. 1125 (1956) (codified at 15 U.S.C. §§ 1221-1225 (1988)). Farm equipment and alcoholic beverage sales have been two other frequent topics for specialized franchise-dealership legislation by the states. Thirty-eight states have laws about the former, and thirty-two about the latter.

30. *See, e.g.*, H. KURSH, *supra* note 9.

31. P. ZEIDMAN, *supra* note 8, at A-1 & n.7; *see also* H. BROWN, FRANCHISING: TRAP FOR THE TRUSTING 31 (1969); C. ROSENFELD, *supra* note 1, at 24-25; Zeidman, *Federal/State Franchise and Dealership Laws*, in P.L.I. CORPORATE LAW & PRACTICE No. 589, DISTRIBUTION & MARKETING 1988, at 105, 162 (1988).

32. Congress held hearings as early as 1963, and many franchise bills have been introduced, but ultimately were defeated. P. ZEIDMAN, *supra* note 8, at A-1 & nn.11-12. Indeed, the only federal enactments concern specific industries—gasoline (Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, 2821-2824, 2841 (1988) (enacted in 1978)) and car dealerships (Automobile Dealers Franchise Act, 15 U.S.C. §§ 1221-1225 (1988) (enacted in 1956))—and not franchising generally.

33. These regulations were promulgated pursuant to the Federal Trade Commission's (FTC) rulemaking authority under 15 U.S.C. § 46(g) (1988).

34. 16 C.F.R. §§ 436.1-436.3 (1990). This regulation is referred to popularly as the FTC Rule.

35. *Id.* The required disclosures concern, *inter alia*, the following: Franchisor trademarks and

via a format prescribed by the FTC or by use of the comprehensive twenty-three-item Uniform Franchise Offering Circular Guidelines (UFOC).³⁶

Compared with the numerous state enactments during the 1970s, there has been relatively little new state legislation since the promulgation of the FTC Rule. Indeed, some franchisors and commentators have opined that the FTC Rule has eliminated the need for state regulation.³⁷ The fact remains, however, that the FTC neither regulates franchising practices nor requires registration, the two key aspects of numerous state regulatory schemes. Many franchising problems arise during the relationship, not just at its formation. Moreover, while disclosure is a fundamental step toward providing some information to prospective franchisees, only franchisor registration provides for public exposure and gives authorities the chance to examine franchisor information to ensure that it meets the disclosure standards.

Franchising law remains a hodgepodge of disclosure formats, registration requirements, and regulation of actual practices.³⁸ It is therefore an area of law in need of reform.

C. *The Proposed Uniform Act and the Potential Amendment of the FTC Rule*

The Uniform Franchise and Business Opportunities Act (the Uniform Act) was adopted in August 1987 by the National Conference of Commissioners on Uniform State Laws and subsequently was sup-

service marks, business experience, criminal and civil liabilities, bankruptcies, and audited balance sheets; franchisee payments, financing, training, and suppliers; site selection; franchise operation, termination, modification, repurchase, and assignment; total number of franchises and company-owned outlets; and the number of outlets terminated, not renewed, or reacquired.

36. The UFOC was adopted on September 2, 1975, by the Midwest Securities Commissioners Association, now the North American Securities Administrators Association. The FTC acknowledged that compliance with the UFOC results in protection to prospective franchisees that is equal to or greater than that provided by the rule. Final Guides to the Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49,966, 49,970 (1979); *see also* Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59,621, 59,722-23 (1978).

37. *See, e.g.,* Downs, *Franchise Regulation: Comprehensive State Regulation Now Unnecessary*, 49 UMKC L. REV. 292 (1981).

38. Because of the FTC Rule, limited disclosure is required in all 50 states. For those states that have franchise statutes providing greater franchisee protections than those under the FTC Rule, there is no federal preemption of those protections. *See* 16 C.F.R. § 436.3 note 2 (1990); P. ZEIDMAN, *supra* note 8, at A-21 to A-22. With the UFOC alternative, individual state alterations to the UFOC disclosure, and occasional preemption by the FTC Rule of some less protective state disclosure formats, there is no uniformity even with respect to franchising disclosure.

Particular state (or territory) laws fall into six broad categories, listed in the table on page 1567 on a continuum ranging from the least to the most regulatory requirements.

ported by the American Bar Association House of Delegates.³⁹ The Uniform Act underwent numerous revisions prior to adoption and continues to face harsh criticism from many commentators, franchisors, franchisees, and regulators. Even many of the Uniform Act's proponents acknowledge that, "[a]bsent further federal intervention, uniformity is a mythical goal."⁴⁰ Supporters concede that varying results should be anticipated because of the different political situations in each state.⁴¹ Indeed, in many states the Uniform Act is unlikely to be enacted in any form whatsoever. It faces formidable opposition from the North American Securities Administrators Association (NASAA),⁴² the very group responsible for UFOC.⁴³ The Uniform Act, thus, seems quite likely to join numerous other uniform acts rejected by state legislatures.⁴⁴

39. The House of Delegates passed a resolution on February 9, 1988. 15A G. GLICKMAN, *supra* note 19, § 13.04[1A], at 13-201; *see also* Marcotte, Moss & Hengstler, *ABA Passes AIDS Resolutions: Action Taken on INF Treaty, Amnesty for Aliens*, A.B.A. J., Apr. 1, 1988, at 141, 142.

40. Barkoff, *Walking the Uniform Franchise and Business Opportunities Act to and Through the State Legislatures*, 7 FRANCHISE L.J., Winter 1988, at 7, 8. One commentator wrote, "While the Uniform Act received intense scrutiny during its fabrication, its many compromises engendered opposition from virtually every quarter. Therefore it has no constituency to advocate its enactment, and its reception to date in the state legislatures has been uniformly negative." Selden, *Public Regulation of Franchising: Choking the Goose that Lays the Golden Eggs?*, 9 FRANCHISE L.J., Fall 1989, at 1.

41. Barkoff, *supra* note 40, at 7-8; *see also* UNIFORM FRANCHISE AND BUSINESS OPPORTUNITIES ACT, 7A U.L.A. 75 (Supp. 1990) (listing no adopting jurisdictions through the end of 1989, for the Uniform Franchise and Business Opportunities Act); Gurnick & Zaid, *Highlights of the Eleventh Annual Forum on Franchising*, 8 FRANCHISE L.J., Winter 1989, at 7 (noting the Oct. 7, 1988, prediction of H. Bret Lowell, former editor of the *Franchise Law Journal*, that the Uniform Franchise and Business Opportunities Act will be adopted by few, if any, states). *See generally* Selden, *supra* note 40.

42. *See* H. BROWN, *supra* note 1, at 6-32 n.1; *see also* Bus. Franchise Guide (CCH), No. 91, at 5 (Oct. 20, 1987). A NASAA committee since has issued its own proposed Model Franchise Investment Act. Bus. Franchise Guide (CCH), No. 112 (Aug. 3, 1989) (original draft); Business Franchise Guide (CCH), No. 125, Part II (June 1990) (revised draft for public comment); Bus. Franchise Guide (CCH) ¶ 3700, at 4775 (1990) (briefly discussing the Model Act). The first draft, released on July 17, 1989, and—to a somewhat lesser extent—the revised draft issued June 15, 1990, are oriented much more toward a full administrative overview of franchisor disclosure documents than is the Uniform Act. This Model Act is still in an embryonic stage, however, and has not received nearly the scrutiny garnered by the Uniform Act and the recent FTC proposal. *See infra* notes 45-48 and accompanying text. Indeed, NASAA has been criticized severely for allegedly formulating its first draft without telling the franchising community or the FTC of its plans. This "secrecy" is all the more remarkable given the extremely active posture NASAA has taken with respect to both the Uniform Act and FTC proposals. *See* Fox & Hoppenfeld, *A Review of NASAA's Model Franchise Investment Act*, 9 FRANCHISE L.J., Fall 1989, at 7.

43. *See supra* note 36 and accompanying text.

44. *See* Shanker, *The American Experience on Harmonization (Uniformity) of State Laws*, 12 CANADIAN BUS. L.J. 433, 436 (1987) (noting that only two uniform acts proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) have been adopted in every state, while 16 have been adopted by none, and that about 75% of proposed acts have been enacted by less than half of the states). According to DIRECTORY OF UNIFORM ACTS DRAFTED BY THE

As for recent federal efforts, on February 16, 1989, the FTC proposed amending the portion of the FTC Rule that covers earnings claims and the preemption of state laws.⁴⁵ The proposal did not call for federal registration or prohibitions on certain supposedly unfair franchisor practices.⁴⁶ Under the amendment, the FTC Rule would remain just a disclosure rule: while perhaps the FTC might someday consider preempting all state laws, the proposed amendments, at most, call for preemption of all state disclosure requirements, not preemption of all state laws related to franchising.⁴⁷ Accordingly, even if the FTC promulgates the proposed changes, state prohibition or restriction of franchisor practices during the course of the franchising relationship will be preempted only if they directly conflict with federal disclosure requirements.⁴⁸

D. *The Probable Continuation of Diverse Regulation*

Few people would argue that the present, confusing set of state laws creates a satisfactory regulatory environment. Franchisors and

NCCUSL & RECOMMENDED FOR ADOPTION IN ALL STATES, U.L.A. III (Supp. 1990), there are now more than 160 such proposed laws.

45. The Rule's sections on earnings claims and preemption are found at 16 C.F.R. §§ 436.1 (b)-(e) (1990) and 16 C.F.R. § 436.3 note 2 (1990), respectively. The FTC proposal is found at 54 Fed. Reg. 7041 (1989).

46. 54 Fed. Reg. 7041-45; Lowell, *The Preemption Mirage*, 8 FRANCHISE L.J., Spring 1989, at 1, 23; Brown, *FTC Proposes Limiting State Franchise Rules*, Wall St. J., Feb. 17, 1989, § 2, at 1, col. 4. Franchisee groups and state regulators, however, oppose a preemption proposal that might eliminate extra franchisee protections under state disclosure laws.

47. See 54 Fed. Reg. 7041-45. The preemption provision presently states that the Rule has no effect on state or local laws or regulations "except to the extent that those laws or regulations are inconsistent with any provision of [the Rule], and then only to the extent of the inconsistency." 16 C.F.R. § 436.3 note 2 (1990). Furthermore, there is no inconsistency "if the protection such [state or local] law or regulation affords any prospective franchisee is equal to or greater than that provided by the Rule." *Id.*

As one would expect, NASAA opposes FTC preemption, and the leading franchisor organization, the International Franchise Association, supports it. Kaufmann & Morton, *Recent Judicial and Regulatory Developments*, in P.L.I. COMMERCIAL LAW & PRACTICE NO. 525, FRANCHISING 1990: BUSINESS STRATEGIES & COMPLIANCE ISSUES 105, 126 (1990).

48. Telephone interviews with Craig Tregillus, Franchise Rule Coordinator, Federal Trade Commission (July 10, 1989 and Sept. 24, 1990); see 54 Fed. Reg. 7041-45 (showing that the proposal focuses on FTC and state disclosure requirements and, to a lesser extent, state registration laws); see also Brown, *ABA Likely to Back FTC Franchise Plan*, Wall St. J., Apr. 19, 1989, § 2, at 1, col. 2 (noting that the comments of the American Bar Association's Section of Antitrust Law are expected to support preemption, but only insofar as it concerns disclosure and, in a few states, the regulatory review process required before franchises can be sold); Brown, *supra* note 46, § 2, at 1, col. 4 (stating that most franchise lawyers believe that political pressure from states and franchisees will prevent the FTC from preempting state laws entirely, and that the lawyers question the FTC's authority to preempt state regulations without congressional approval); Lowell, *supra* note 46, at 23 (stating that the FTC's notice of proposed rulemaking does not appear to contemplate preemption of relationship laws).

franchisees alike agree that it is inefficient and costly for franchising regulation to vary so much from state to state. Neither franchisors nor franchisees, however, value uniformity if it comes at the expense of what they consider generally more favorable, though diverse, state laws. This conclusion is demonstrated empirically by franchisor and franchisee opposition to the Uniform Act and their vehement objections to FTC proposals for change. For advocates and opponents, fear of an uncertain, perhaps substantively worse, franchising law exceeds the desire to refashion what has been called "a crazy quilt" of disclosure and registration statutes.⁴⁹

III. FRANCHISEES' RIGHTS OF ASSOCIATION

A. *Constitutional Law*

In their collective activities, franchisees generally receive no more legal protection than do other businesspersons acting through trade associations.⁵⁰ Franchisees need more protection because they depend on a franchisor who will not always act in their best interest. There is, of course, a constitutional right of association that may provide a legal mechanism for protecting franchisee rights.⁵¹ In several cases, the Su-

49. Brown, *supra* note 46, § 2, at 1, col. 4; *see also* R. Barkoff, Franchise Sales Regulation: A Revisionist's Approach, Remarks at the ABA's Fifth Annual Forum on Franchising 8-9 (Nov. 4, 1982) (referring to a "regulatory maze" with minimal benefits to the public). Mr. Barkoff concluded, "Not only are there too many laws, but there is too much inconsistency in their administration and interpretation, resulting from both subtle and obvious distinctions in state laws, and administrative and judicial idiosyncrasies. As a result, without reform, franchising will continue to be legally intensive—but unreasonably so." *Id.* at 40. Attorney Barkoff, however, listed seven interest groups—franchisors, franchisees, state legislators, state franchise administrators, state securities laws administrators, the FTC, and Congress—each of which is predisposed against change, "[l]ike [a] street gang[] . . . out to protect its turf." *Id.* at 43. Eight years later, Barkoff's comments still ring true. Indeed, the outlook for each of the three initiatives—the Uniform Act, the FTC preemption proposal, and the NASAA Model Act, *supra* note 42—is bleak. *See* Selden, *supra* note 40, at 1, 18.

50. H. BROWN, *supra* note 1, § 10.08[5][a], at 10-100; Brown, *Collective Bargaining for Franchisees*, 177 N.Y.L.J., Jan. 11, 1977, at 5, col. 2; *see also* G. WEBSTER, *THE LAW OF ASSOCIATIONS* § 17.07[1] (1990).

51. *See* U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition for a redress of grievances"). The entire first amendment applies to the states, not just Congress, via its incorporation into the fourteenth amendment's due process clause, as interpreted by the Supreme Court. *See* *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (prohibiting any establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (upholding the free exercise of religion); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (affirming freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (discussing freedom of the press); *Stromberg v. California*, 283 U.S. 359 (1931) (discussing freedom of speech); *Fiske v. Kansas*, 274 U.S. 380 (1927) (discussing freedom of speech); *Gitlow v. New York*, 268 U.S. 652 (1925) (discussing freedom of speech and the press); *see also* U.S. CONST. amend. XIV.

preme Court has upheld these protections in the litigation context by construing the first amendment guarantee of freedom of speech and assembly to include the freedom to associate together for the purpose of bringing disputes to court.⁵²

The Supreme Court has not considered the constitutional guarantee of free association to franchisees. A federal district court case, *McAlpine v. AAMCO Automatic Transmissions, Inc.*,⁵³ is notable because it acknowledges this constitutional freedom of association in the context of franchisees' rights. In *McAlpine* a dozen franchisees in the Detroit area sued AAMCO, the largest franchisor of transmission repair shops in the United States. When the franchisees filed suit they broke away from AAMCO and formed Interstate Transmissions, a competing transmission repair business. The lawsuit alleged that AAMCO's tie-in and marketing practices breached the franchise agreements and violated antitrust laws. AAMCO counterclaimed with several allegations: conspiracy, unfair competition, wrongful termination of the franchises, interference with contractual relations, violation of antitrust laws, infringement on AAMCO's trademark, and misappropriation of the AAMCO merchandising system.⁵⁴

The district court⁵⁵ concluded that the dispute arose from the very success of the AAMCO franchises. Initially, the franchisees' benefits—profit incentives, reduced risk of failure, and independence greater than that of employees—made the arrangement seem reasonable. As the franchises became successful, however, the system began to appear "burdensome."⁵⁶ Having learned the trade by operating under AAMCO's business format, the franchisees were eager to become independent and free themselves of restrictive franchise fees and royalty payments.⁵⁷

The court was not sympathetic to the franchisees' second thoughts

52. See, e.g., *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

53. 461 F. Supp. 1232 (E.D. Mich. 1978).

54. *Id.* at 1232, 1253, 1255, 1259, 1269, 1273.

55. Federal District Judge Ralph B. Guy, Jr., presided over the case. Judge Guy since has been appointed to the United States Court of Appeals for the Sixth Circuit, effective Oct. 17, 1985.

56. *McAlpine*, 461 F. Supp. at 1239.

57. In the words of Judge Guy:

The franchisee whose hard work has enabled him to carve out a niche of profitability comes to regard the payment of franchise fees as restricting that profitability. The franchisee who has learned a system and has reaped its benefits wonders if his new-found knowledge of the trade could enable him to prosper to a greater degree as an independent. Status, success, name, and product all seem brighter to an independent businessman or as franchisee under different terms.

Id.

about their relationship with AAMCO, nor was it receptive to the franchisees' claims. It ruled against all but one of the contentions raised in the case: it found the franchisees liable for wrongful termination of the franchise agreements.⁵⁸

The court, however, did speak favorably of franchisee rights generally, recognizing the franchisees' first amendment right to assemble.⁵⁹ The court quoted the 1974 version of the franchisee freedom of association provision found in Michigan's Franchise Investment Law.⁶⁰ In language that accords to franchising the same unfair balance of power concerns prevalent in an employment relationship (concerns that led to labor law protections), the court then stated:

One of the traditional control mechanisms of a franchisor has been to keep its franchisees disorganized. Franchisees, by necessity, must have access to the franchise group in order to act together to deal with common problems, whether those problems be the oppressiveness of the franchisor or some less momentous concern. The fact that a contract might have been breached as a direct result of franchisee organization means nothing more than that the franchisor would have a cause of action for breach of contract.⁶¹

This, according to the court, would not result necessarily in a tortious conspiracy, unfair competition, antitrust violations, or an interference with contractual relations.⁶²

Thus, the court found nothing actionable in the *McAlpine* fran-

58. *Id.* at 1253. This was the franchisor's breach of contract claim. The court found no anti-trust violations by either side; no breach of contract by AAMCO; and no unfair competition, conspiracy, interference with contractual relations, trademark infringement, or misappropriation by the franchisees.

59. The court stated:

Franchisees, like all other persons in the United States, enjoy the right pursuant to the First Amendment of the United States Constitution to assemble, subject only to those exceptions specifically provided for by statute. Although a franchisee cannot combine with a competitor to fix prices, 15 U.S.C. § 1, for example, franchisee gatherings, and joint activities which do not violate the law cannot, standing alone, be actionable.

Id. at 1273 (citations omitted).

60. *Id.* The law is found at MICH. COMP. LAWS §§ 445.1501-445.1546 (1989). At the time of the *McAlpine* decision in 1978, the statute forbade any franchisor from "restrict[ing] the right of a franchisee to join an association of franchisees, or requir[ing] a franchisee to join an association." MICH. COMP. LAWS § 445.1527 (Supp. 1975) (emphasis added). The emphasized portion effectively was deleted, not just rewritten, in a 1984 amendment to the Michigan Franchise Investment Law. The section now declares "void and unenforceable" any provision in "any documents relating to a franchise" that contains "[a] prohibition on the right of a franchisee to join an association of franchisees." MICH. COMP. LAWS § 445.1527(a) (1989).

State statutes providing franchisees with a right of association are discussed *infra*, Part III(C). The proposed uniform law is discussed *infra* at text accompanying notes 74-83, 87-90.

61. *McAlpine*, 461 F. Supp. at 1273-74. The quotation's first two sentences, along with Michigan's freedom of association provision, *see supra* note 60, and comparable New Jersey and Washington statutes, *see infra* notes 99-101, 103, are cited in Brief for Petitioner at 29, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172).

62. *McAlpine*, 461 F. Supp. at 1274.

chisees' secret meetings and in their cautioning one another not to discuss matters outside of these meetings.⁶³ While one should not overemphasize the court's language and its decision with respect to franchisee association rights,⁶⁴ the case ultimately may be important for citing a franchisee right of association statute⁶⁵ and for placing a judicial imprimatur on franchisee groups.⁶⁶ In essence, the court appreciated the franchisee associations' historical underpinnings and interpreted the associations as serving some essential, lawful purposes. Absent evidence of an illegitimate method or goal, the court was loath to impinge on the natural development of franchisee associations.⁶⁷ As

63. *Id.*

64. In *McAlpine* the court acknowledged that rights of association are limited by statutes such as antitrust laws. *Id.* at 1273. Thus, they certainly are not coextensive with labor union rights inasmuch as the unions are, when acting alone, exempt from antitrust law coverage. 15 U.S.C. § 17 (1982). See *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

65. This type of reference was a first. Since *McAlpine* only one other reported case has invoked franchisees' statutory rights of association. In *Ricky Smith Pontiac v. Subaru of New England*, 14 Mass. App. Ct. 396, 400, 440 N.E.2d 29, 33, *appeal denied*, 441 N.E.2d 260 (1982), Subaru franchisee Ricky Smith Pontiac (Smith) sued its franchisor, Subaru of New England (SNE), after the franchisor awarded a new, competing franchise about 10 miles from Smith's site. The defendant counterclaimed that Smith breached the franchise agreement and conspired with other Subaru dealers to prevent SNE from granting additional franchises. *Id.* at 398-400, 440 N.E.2d at 33-35.

SNE's charge of antitrust violations (the alleged conspiracy) focused on Smith's participation in establishing and running the New England Subaru Dealers' Council, Inc. (the Council). As described by the court:

In essence, the Council's members pooled resources to gather information about SNE's business practices, to obtain legal counsel for advice on practical ways to correct those difficulties, and to support (by financial assistance and the offer of relevant documentary evidence and oral testimony) litigation brought by members against SNE for claimed violations of State and Federal automobile dealer protection statutes.

Id. at 420, 440 N.E.2d at 45. Both the trial and appeals courts found no antitrust violations, holding that "a mere showing of close relations or frequent meetings" was grossly insufficient. *Id.* at 419, 440 N.E.2d at 45. Without more substantial proof, "an association of automobile dealers handling the same line make, formed for the purposes of processing mutual grievances against their common franchisor, and safeguarding market areas defined and entrusted to the dealers by State statute, does not violate the antitrust laws." *Id.* at 419-20, 440 N.E.2d at 45.

Although making no reference to *McAlpine* or the Constitution, the Massachusetts appellate decision does note the trial court's finding that "the Council was a prototype of the sort contemplated by" a section in the Massachusetts statute regulating business practices between motor vehicle manufacturers, distributors, and dealers. *Id.* at 419, 440 N.E.2d at 44. MASS. GEN. L. ch. 93B, § 10 (1985) states that "[e]very franchisee shall have the right of free association with other franchisees for any lawful purpose." For further discussion of state right of association statutes, see *infra* Part III(C).

66. Presently, *McAlpine* has only potential significance. The decision has been cited in a few texts or articles. See, e.g., H. BROWN, *supra* note 1, at 10-103 nn.28-29, 12-60 n.20, 12-61 un.23-24; 15 G. GLICKMAN, *supra* note 19, § 9A.02[2], at 9A-16 to 9A-17; Rudnick, *supra* note 1, at 12 & nn.14-15 (discussing issues other than rights of association). The franchisee association portion of the opinion, however, has yet to become part of a body of case law; instead, it still stands alone.

67. Finding nothing objectionable with the meetings themselves, the court stated:

The plaintiffs did not commence their secret meetings in September, 1973, with the objective of conspiracy to break away from AAMCO. The meetings were begun in order to discuss the

it stands, however, *McAlpine* remains the only reported case discussing franchisee associations and declaring a constitutional right of association.⁶⁸

B. Federal Franchising Laws and the Proposed Uniform Act

No federal statutory or administrative law expresses a franchisee's right to associate with other franchisees. The FTC Rule⁶⁹ speaks of disclosures to prospective franchisees, but not of practices between franchisors and existing franchisees. Moreover, the two federal statutes specifically geared toward franchising also overlook franchisee associations. The Automobile Dealers Franchise Act⁷⁰ requires that automobile manufacturers-franchisors act in good faith when performing the terms of a franchise, terminating a franchise, or refusing to renew a franchise.⁷¹ Although couched in more specific language than the automobile dealers statute, the Petroleum Marketing Practices Act⁷² permits gas station franchisors to terminate franchises only if a franchisee fails to make a good faith effort in carrying out provisions of the franchise agreement, or if a franchisee does not comply with a reasonable, materially significant provision in the franchise agreement.⁷³ Thus, in contrast to the FTC Rule, these two Acts govern franchising practices beyond just disclosure. The Acts, however, never even mention rights of association.

Article II of the proposed Uniform Act,⁷⁴ entitled "General Stan-

franchisees' concern over AAMCO's proposed marketing plan of placing more AAMCO franchises in the Detroit area . . . Separation from AAMCO was discussed as a last resort, and plans were subsequently drawn only in the event that such a contingency might occur. Not until November 20, 1973, at the last meeting the plaintiffs would hold as AAMCO franchisees, did the franchisees vote to terminate their Franchise Agreements. . . . Accordingly, those meetings, begun as a lawful vehicle for discussing legitimate business concerns, cannot rise to the level of a tortious conspiracy particularly in light of the protections afforded by the First Amendment of the Constitution of the United States.

McAlpine, 461 F. Supp. at 1274. Ironically, just two years after the *McAlpine* decision, the W.H. McAlpine Company, apparently formed by one of the AAMCO breakaway franchisees, became ensnarled in litigation over a covenant not to compete with its new franchisor, Interstate Automatic Transmissions Company, Inc. In fact, Interstate was formed by the very breakaway franchisees whose departure prompted the McAlpine-AAMCO lawsuit. See generally *Interstate Automatic Transmissions Co. v. W.H. McAlpine Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,538 (N.D. Ohio 1981).

68. Other cases have dealt with franchisee collective activities. A notable example is *New York v. Carvel Corp.*, 84 A.D.2d 727, 448 N.Y.S.2d 87 (App. Div. 1981), discussed *infra* at notes 85-86 and accompanying text.

69. The Rule is discussed *supra* at notes 33-37 and accompanying text.

70. 15 U.S.C. §§ 1221-1225 (1988).

71. 15 U.S.C. § 1222 (1988).

72. 15 U.S.C. §§ 2801-2806, 2821-2824, 2841 (1988).

73. 15 U.S.C. § 2802(b)(2) (1988). Also, the Act limits nonrenewal of franchises under 15 U.S.C. § 2802(b)(3) (1988).

74. See *supra* notes 39-44 and accompanying text.

dards of Conduct," has just two sections. Section 201 imposes a duty of good faith on both franchisors and franchisees. Section 202, entitled "Right of Free Association," states that "[a] party to a franchise or business opportunity has a right to form or join a trade or other lawful association whose purposes are related to the business of the franchise or business opportunity."⁷⁵ The comment to Section 202 notes that franchisees "may not be penalized" for associating with "other members of the same system or others similarly situated [in order] to advance their common business interests."⁷⁶ The comment also notes that a right of free association "does not insulate conduct that is anticompetitive,"⁷⁷ nor does it protect actions harmful to the goodwill of a trademark used in the franchise.⁷⁸ Perhaps the comment most undermines the significance of free association by stating that "it does not create independent substantive contractual rights or a duty to bargain."⁷⁹

Although the proposed Uniform Act appears unlikely to be adopted by most states,⁸⁰ it may influence future state legislation. In one respect, it augurs well for franchisees that the Uniform Act even has a provision on the right of free association; most general franchise statutes do not.⁸¹ On the other hand, with its qualifier that the association's purposes are to be "related to the business of the franchise,"⁸² the proposed section may be interpreted more narrowly than existing state statutes containing no such qualifier. Additionally, by eliminating any duty to bargain, which may well be the centerpiece of labor relations law and is certainly a prerequisite to most collective bargaining, the comment to Section 202, if accepted by courts, would ensure that franchisors retain the right to ignore completely their franchisee associations. The inability of franchisee associations to invoke a duty to bargain collectively, coupled with the lack of independent substantive contractual rights, limits the usefulness of associations,⁸³ and suggests

75. UNIFORM ACT, *supra* note 1, §§ 201-202, at 4665-67.

76. *Id.* § 202 comment, at 4667.

77. *Id.* The § 202 comment about anticompetitive conduct is a point already established in antitrust and labor law cases, which indicate that franchisee groups have no labor law exemption. See *infra* Part VI; see also *infra* note 211.

78. UNIFORM ACT, *supra* note 1, § 202 comment, at 4667.

79. *Id.*

80. See *supra* notes 39-44 and accompanying text.

81. See *infra* Part III(C)(1) & (2). Only nine states have a general franchisee right of association statute or regulation. If, however, one adds the other states with right of association provisions covering just one industry (*e.g.*, automobile dealerships or gas stations), the total comes to over half of the states. See *infra* notes 109-13 and accompanying text.

82. See *supra* text accompanying note 75.

83. This also may be the case with the Section's own language on "purposes . . . related to the business of the franchise." UNIFORM ACT, *supra* note 1, § 202, at 4665-67; see *supra* text accompanying note 75.

that Section 202 simply may recognize a franchisee right to associate without granting franchisees the power to use that right effectively.

The litany of overreaching franchisor practices⁸⁴ demonstrates that strikingly different legal and practical ramifications arise from the difference in stating, and the difference in interpreting, a right of association statute. For example, in *New York v. Carvel Corp.*⁸⁵ New York brought a state antitrust action against the franchisor for invading and disrupting lawful meetings held by franchisees who were attempting to gather support for franchise legislation pending in the United States Congress.⁸⁶ In effect, Carvel tried its best to "bust" a budding franchisee "union."

New York has no right of association statute. Even if it were to adopt the Uniform Act,⁸⁷ would Section 202 protect franchisees—as in *Carvel*—who forcibly expelled the franchisor's attorney from a franchisee meeting? Perhaps, as in *Carvel*, a franchisor's allegedly unlawful behavior of resisting an association could be a basis for a franchisee lawsuit. An awkward or weakly worded franchisee association statute, however, easily could be diluted further by interpretations that view the franchisee group more as an advisory council⁸⁸ than as an independent association.⁸⁹ Unless the franchisees have full control in determining

84. For a broad array of these practices, see, e.g., *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979) (involving a photography franchisor that, having decided to convert its franchised system to a vertically integrated operation, saturated franchisees' territories with company-owned outlets and otherwise violated a common-law obligation of good faith by engaging in "dirty tricks" designed to drive its franchisees out of business), *cert. denied*, 445 U.S. 917 (1980); H. BROWN, *supra* note 1, at 4-2 to 4-38 (providing numerous examples); S. LUXENBERG, *supra* note 4, at 252-53, 263-66; and B. WEBSTER, *supra* note 8, at 119-20, 187-89 (discussing extra charges unrelated to benefits supposedly to be conferred upon franchisees; charges for every conceivable franchisor service, even rudimentary information and trouble-shooting; and excessive prices for merchandise and services sold to franchisees). Luxenberg gives several specific examples of overreaching franchisor practices. One involves Carvel ice cream franchisees who paid royalties to the franchisor based on volume purchased. Carvel initiated a "Buy One, Get One Free" advertising campaign, which in effect forced franchisees to buy a product and then give some away, while Carvel received increased royalties because of higher overall volume. S. LUXENBERG, *supra* note 4, at 252-53. Another example discusses a franchisor who increased the number of franchised units in an area to raise overall sales, which reduced or eliminated individual franchisees' profits. *Id.* at 263. Luxenberg also discusses problems with the Arthur Treacher's chain, and allegedly huge markups by Howard Johnson on products that it forced its franchisees to buy. *Id.* at 264-66.

85. 84 A.D.2d 727, 448 N.Y.S.2d 87 (App. Div. 1981).

86. *Id.* at 728, 448 N.Y.S.2d at 88.

87. See *supra* notes 39-44 and accompanying text.

88. Thus, the franchisee group would be tied legally to the system as a whole, not just the franchisees.

89. See *infra* Part V(A).

their organization's purposes⁹⁰ and membership,⁹¹ many subjects such as lobbying and the collective filing of complaints with state regulatory authorities may be deemed outside the realm of legitimate associational activity. This is true particularly if franchisee control is viewed by franchisors and courts as contrary to the interests of the franchised system as a whole.⁹²

C. State Law

1. General Statutes

Franchisee right of association statutes can be found in the general

90. Such purposes have included lobbying, filing complaints with federal and state regulatory authorities, and financing lawsuits. *See, e.g.*, 15 G. GLICKMAN, *supra* note 19, § 9A.01[3], at 9A-9 (noting that after PepsiCo bottling franchisees failed to obtain FTC recognition of their stake in an FTC proceeding against soft drink syrup manufacturers, they succeeded in lobbying Congress to remove FTC jurisdiction); *id.* § 9A.02[2], at 9A-12 nn.11-12 (remarking that the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, 2821-2824, 2841 (1988), the Automobile Dealers Franchise Act, 15 U.S.C. §§ 1221-1225 (1988), and state laws protecting automobile dealers and farm equipment dealers mainly resulted from organized dealer lobbying); Strauss, *Board Previews New Orleans and Finds It Exciting*, AVANTI, THE VOICE OF THE 7-ELEVEN FRANCHISEES, July-Aug. 1984, at 22 (stating that the National Coalition of Associations of 7-Eleven Franchisees would act as an opposing lobby in all states where the franchisor, Southland Corporation, "continues to support legislation detrimental to the welfare of franchisees and franchising"; also noting the National Coalition's unanimous support of the New York 7-Eleven Franchise Owners Association's lobbying on behalf of a New York Fair Franchise Bill). Franchisees may not have a right to such control under § 202 of the Uniform Act. *See supra* text accompanying notes 82-83.

91. For example, franchise groups can exclude all franchisor-owned outlets and franchisor representatives. *See* T. Fine & G. Aaron, Franchisee Trade Associations Workshop Outline, Remarks at the ABA's Seventh Annual Forum on Franchising 5 (1984) (noting that the International Pizza Hut Franchise Holders Association, originally a "functional arm" of the franchisor, was reformed as an organization completely independent of Pizza Hut, Inc. and the company-owned restaurants; there remained no franchisor ownership interests or representatives); Fine, *Adopt These Principles for Business Success*, AVANTI, *supra* note 90, at 38, 40 (reporting on the need for the National Coalition of Associations of 7-Eleven Franchisees to maintain an independent trade association that is controlled and financed solely by franchisees, and opining that nonindependent advisory councils may "go the way of the dinosaurs"); *cf.* Rodgers, *The Perspective of In-House Council*, in P.L.I. COMMERCIAL LAW & PRACTICE No. 412, FRANCHISING 1987: BUSINESS STRATEGIES & LEGAL COMPLIANCE 401, 495 (1987) (stating that, despite franchisees' objections, franchisor Southland Corporation continues to require that one of its lawyers be present at franchisee advisory council meetings).

92. *See supra* text accompanying notes 90-91. This result would occur if courts looked at the franchisor as well as any other interested party, not just franchisees. *But see* Fine, *supra* note 91, at 40, which states:

Franchisors that have dealt with truly independent trade associations of franchisees (such as Holiday Inn, Pizza Hut, Midas Muffler, Hertz, Kentucky Fried Chicken, Southland) have found that they obtain the best ideas and solutions from such independent trade groups. This is true even though the discussion and negotiations can be much more difficult than in the case of nonindependent groups.

franchising laws of Arkansas,⁹³ California,⁹⁴ Hawaii,⁹⁵ Illinois,⁹⁶ Michigan,⁹⁷ Nebraska,⁹⁸ New Jersey,⁹⁹ and Washington.¹⁰⁰ The statutes themselves are fairly straightforward and broad enough to cover a wide range of practices. In both Nebraska and New Jersey, it is a violation for any franchisor "[t]o prohibit directly or indirectly the right of free association among franchisees for any lawful purpose."¹⁰¹ Arkansas's right of association statute is substantially the same.¹⁰² Hawaii's statute is modeled after the Washington act, which prohibits the franchisor from "[r]estrict[ing] or inhibit[ing] the right of the franchisees to join an association of franchisees."¹⁰³ The three other state statutes are phrased somewhat differently. Michigan specifically addresses infringement on franchisee associational rights in franchise documents,¹⁰⁴ and the California and Illinois statutes both talk of, *inter alia*, the franchisees' right to join trade associations.¹⁰⁵ Aside from *McAlpine v. AAMCO Auto-*

93. Arkansas Franchise Practices Act (1977), ARK. STAT. ANN. § 4-72-206(2) (1987).

94. California Franchise Investment Law (1970), CAL. CORP. CODE § 31,220 (West 1977 & Supp. 1990).

95. Hawaii Franchise Investment Law (1974), HAW. REV. STAT. § 482E-6(2)(A) (1988).

96. Illinois Franchise Disclosure Act of 1987, 1987 Ill. Laws, P.A. 85-551, § 17, ILL. ANN. STAT. ch. 121½, para. 1717 (Smith-Hurd Supp. 1990).

97. Michigan Franchise Investment Law (1974) (amended 1984), MICH. COMP. LAWS § 445.1527(a) (1989).

98. Nebraska Franchise Practices Act (1978), NEB. REV. STAT. § 87-406(2) (1987).

99. New Jersey Franchise Practices Act (1971), N.J. STAT. ANN. § 56:10-7(b) (West 1989).

100. Washington Franchise Investment Protection Act (1972), WASH. REV. CODE ANN. § 19.100.180(2)(a) (1989).

101. NEB. REV. STAT. § 87-406(2) (1987); N.J. STAT. ANN. § 56:10-7(b) (West 1989).

102. The only real difference with the Arkansas statute is in the placement of the words "directly or indirectly." The Arkansas statute begins: "It shall be a violation of this chapter for any franchisor, through any officer, agent, or employee, to engage directly or indirectly in any of the following practices. . . ." ARK. STAT. ANN. § 4-72-206 (1987).

103. WASH. REV. CODE ANN. § 19.100.180(2)(a) (1989). The Hawaii statute, in pertinent part, is similar, stating that "it shall be an unfair or deceptive act or practice or an unfair method of competition for a franchisor or subfranchisor to . . . [r]estrict the right of the franchisees to join an association of franchisees." HAW. REV. STAT. § 482E-6(2)(A) (1988).

104. The statute reads in pertinent part: "Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise: . . . A prohibition on the right of a franchisee to join an association of franchisees." MICH. COMP. LAWS § 445.1527(a) (1989). A 1984 revision of the 1974 Michigan franchise law included an amendment to the right of association statute. The original statute not only prohibited restrictions on the franchisees' right to join an association, but also forbade any requirement that franchisees must join an association. See *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1273 (E.D. Mich. 1978); see also *supra* note 60.

105. A trade association includes business competitors *among* its members. G. WEBSTER, *supra* note 50, § 15.03[3], at 15-22.1; OPEN-PRICE TRADE ASSOCIATIONS, S. Doc. No. S276, 70th Cong., 2d Sess. 1 (FTC 1969). While a system's franchisees may compete for business, the economically dependent and operationally monolithic franchisees of one franchisor are not typical, independent business competitors. They are bound to follow an established set of private standards more usual for wholly owned businesses than separate entities. See *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (deciding against "business league" tax exemption for an association made up exclusively of the franchisees from one franchisor).

California's statute labels it a civil violation for "any franchisor, directly or indirectly, through any officer, agent or employee, to restrict or inhibit the right of franchisees to join a trade associa-

matic Transmissions, Inc.,¹⁰⁶ no reported cases have discussed or interpreted any of these general franchisee right of association statutes.

2. Regulations and Industry-Specific Statutes

Of the forty-two states without express right of association statutes generally covering franchisees, only Minnesota has made such a law by administrative regulation.¹⁰⁷ In effect, the rule reads the same as most franchisee right of association statutes. No cases are reported. Even though other state regulatory bodies have the power to enact a similar regulation, given the passage of time since the creation of state regulatory powers,¹⁰⁸ such administrative rulemaking seems unlikely.

Many states, however, do include a franchisee freedom of association provision¹⁰⁹ in one or more of their industry-specific statutory

tion or to prohibit the right of free association among franchises for any lawful purpose." CAL. CORP. CODE § 31,220 (West 1977 & Supp. 1990). The Illinois provision states: "It shall be an unfair franchise practice and a violation of this Act for a franchisor to in any way restrict any franchisee from joining or participating in any trade association." 1987 Ill. Laws, P.A. 85-551, § 17, ILL. ANN. STAT. ch. 121½, para. 1717 (Smith-Hurd Supp. 1990).

106. 461 F. Supp. 1232 (E.D. Mich. 1978). *McAlpine* is discussed *supra*, Part III(A). See also *supra* note 65 (discussing *Ricky Smith Pontiac v. Subaru of New England*, 14 Mass. App. Ct. 396, 440 N.E.2d 29, appeal denied, 441 N.E.2d 260 (1982), a case that refers to a franchisee right of association statute found in a Massachusetts motor vehicle distributor and dealer law).

107. The Minnesota franchise law has a section stating that no person "shall engage in any unfair or inequitable practice in contravention of such rules as the commissioner [in charge of regulating franchising] may adopt defining as to franchises the words 'unfair and inequitable.'" MINN. STAT. ANN. § 80C.14 (subd.1) (West 1986 & Supp. 1990). Pursuant to that section, the Securities Division of the Minnesota Department of Commerce promulgated the following rule: "It shall be 'unfair and inequitable' for any person to . . . [r]estrict or inhibit, directly or indirectly, the free association among franchisees for any lawful purpose." MINN. R. pt. 2860.4400 (S. Div. 1714) (1975) (approved by Attorney General Jan. 10, 1975, and filed with Secretary of State and Commissioner of Administration Jan. 13, 1975).

108. Most states' regulatory powers came into being in the 1970s with the enactment of franchising or business opportunity laws. See, e.g., CAL. CORP. CODE § 31,502 (West 1977) (1970 law); HAW. REV. STAT. § 482E-8(d) (1988) (1974 law); MICH. COMP. LAWS § 445.1541 (1989) (1974 law); R.I. GEN. LAWS § 19-28-13(C) (1989) (1973 law); S.D. CODIFIED LAWS ANN. §§ 37-5A-51, 37-5A-54 (1986) (1974 law); VA. CODE ANN. § 13.1-572 (1989) (1972 law); WASH. REV. CODE ANN. § 19.100.250 (1989) (1972 law).

109. The provision usually includes the qualifying phrase, "for any lawful purpose." See, e.g., ALA. CODE § 8-20-10 (1988) (motor vehicle dealers) (enacted 1981); ARIZ. REV. STAT. ANN. § 44-1554(1) (1987) (gasoline dealers) (enacted 1974); ARK. STAT. ANN. § 4-72-206(2) (1987) (enacted 1977); CAL. CORP. CODE § 31,220 (West Supp. 1990) (enacted 1977); CAL. VEH. CODE § 11,713.3(n) (West 1987) (motor vehicle dealers) (enacted 1973); CONN. GEN. STAT. ANN. § 42-133cc(7) (West 1987) (motor vehicle dealers) (enacted 1982); CONN. GEN. STAT. ANN. § 42-133l(f)(2) (West 1987) (petroleum product franchisees) (enacted 1977); DEL. CODE ANN. tit. 6, § 4913(b)(6) (Supp. 1988) (motor vehicle franchisees) (enacted 1983); FLA. STAT. ANN. § 563.022(5)(b)(10) (West Supp. 1990) (beer manufacturers or distributors) (enacted 1987); GA. CODE ANN. § 10-1-662(a)(8) (Supp. 1990) (motor vehicle dealers) (enacted 1983); IDAHO CODE § 49-1613(3)(f) (1988) (motor vehicle dealers) (enacted 1988); 19 Ill. Laws, P.A. 81-43, § 10, ILL. ANN. STAT. ch. 121½, para. 760 (Smith-Hurd Supp. 1990) (motor vehicle franchisees) (enacted 1979); KY. REV. STAT. ANN. § 190.070(2)(h) (Michie 1989) (motor vehicle dealers) (enacted 1982); ME. REV. STAT. ANN. tit. 10, § 1180 (1980)

schemes. Provisions can be found in twenty-seven states.¹¹⁰ Looking at these laws by subject matter, we find the following: Nineteen of the forty-nine states with motor vehicle dealership-franchise laws contain a right of association statute;¹¹¹ twelve of the thirty-six states with gasoline franchisee-dealer laws have right of association statutes;¹¹² and of the thirty-two states with statutes covering breweries, beer wholesalers and suppliers, wineries, wine wholesalers, or other liquor distributors, four have right of association provisions.¹¹³ With the exception of one

(automobile dealers) (enacted 1975); MASS. GEN. LAWS ANN. ch. 93B, § 10 (West 1984) (motor vehicle franchisees) (enacted 1970); MINN. STAT. ANN. § 80E.13(g) (West 1986 & Supp. 1990) (motor vehicle dealers) (enacted 1981); MO. ANN. STAT. § 407.825 (11) (Vernon 1990) (motor vehicle franchisees) (enacted 1980); NEB. REV. STAT. § 87-406(2) (1987) (enacted 1978); NEV. REV. STAT. ANN. § 598.655(1) (Michie 1986 & Supp. 1989) (petroleum product wholesalers and gas station operators) (enacted 1975 and amended 1987); N.H. REV. STAT. ANN. § 357-C(10) (1984) (motor vehicle franchisees) (enacted 1981); N.J. STAT. ANN. § 56:10-7(b) (West 1989) (enacted 1971); N.C. GEN. STAT. § 20-305(21) (1989) (new motor vehicle dealers) (enacted 1973 and amended 1983); PA. STAT. ANN. tit. 73, § 202-4(2) (Purdon Supp. 1990) (lessee dealers of gasoline, petroleum products, and motor vehicle accessories) (enacted 1975); R.I. GEN. LAWS § 3-13-10 (1987) (malt beverage suppliers or wholesalers) (enacted 1982); R.I. GEN. LAWS § 31-5.1-10 (1982) (automobile dealers) (enacted 1974); TENN. CODE ANN. § 55-17-114(c)(16) (1989) (motor vehicle dealers) (enacted 1977); UTAH CODE ANN. § 13-12-3(2) (1986) (gasoline dealers) (enacted 1975); VT. STAT. ANN. tit. 9, § 4097(7) (1984 & Supp. 1989) (new motor vehicle dealers) (enacted 1981); VA. CODE ANN. § 4-118.59 (Supp. 1990) (wineries or wine wholesalers) (enacted 1985 and amended 1989); VA. CODE ANN. § 4-118.19 (1988) (breweries or beer wholesalers) (enacted 1978); WASH. REV. CODE § 46.94.020(19) (1989) (motorcycle dealers) (enacted 1985); W. VA. CODE § 47-11C-3(8) (1986) (petroleum product dealers) (enacted 1976); WYO. STAT. § 31-16-108(c)(vi) (1989) (new motor vehicle dealers) (enacted 1988). Of the eight states with general franchise statutes containing a franchisee right of association provision, four of them—Arkansas, California, Nebraska, and New Jersey—qualify that right with the phrase, “for any lawful purpose,” as does the Minnesota regulation in this area. See *supra* notes 101-02, 105, 107 and accompanying text.

110. These 27 states are Alabama, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. The citations to most of the statutes are provided *supra* at note 109. The remaining statutes are: MASS. GEN. LAWS ANN. ch. 93E, § 6 (West 1984) (gasoline dealers) (enacted 1972); N.H. REV. STAT. ANN. § 339-C(6) (1984) (gasoline dealers) (enacted 1974); OR. REV. STAT. § 650.205(3) (1988) (motor fuel franchisees) (enacted 1987); R.I. GEN. LAWS § 5-55-6 (1987) (motor fuel dealers) (enacted 1976); TENN. CODE ANN. § 47-25-624 (1988) (petroleum or related products dealers) (enacted 1977); VT. STAT. ANN. tit. 9, § 4106 (1984) (gasoline dealers) (enacted 1975).

111. The states are Alabama, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, North Carolina (for dealers of new vehicles), Rhode Island, Tennessee, Vermont (for dealers of new vehicles), Washington (for motorcycle dealers), and Wyoming (for dealers of new vehicles). For citations see *supra* note 109.

112. The states are Arizona, Connecticut, Massachusetts, Nevada, New Hampshire, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and West Virginia. Note the overlap: Six states have provisions both as to motor vehicle dealer associations and gas station dealer associations. See *supra* note 111. For citations see *supra* notes 109 & 110.

113. The states are Florida (beer manufacturers or distributors), Minnesota (breweries, beer wholesalers), Rhode Island (malt beverage suppliers and wholesalers), and Virginia (breweries, wineries, and beer and wine wholesalers). For citations see *supra* note 109.

Massachusetts case between an automobile dealer and the dealer's franchisor,¹¹⁴ no reported cases deal with these subject-specific franchisee right of association statutes.

3. Enforcement of Right of Association Statutes

In most states the remedies for a violation of the franchisees' rights of association are the same as those for other proscribed franchisor practices. States usually provide a public cause of action for the state attorney general and a private cause of action for aggrieved franchisees. Of the eight states with general franchising statutes that include a right of association provision, six permit franchisees to sue for injunctive relief, damages, reasonable attorney's fees, and other costs.¹¹⁵ Enforcement statutes rarely allow treble or punitive damages.¹¹⁶

Many state statutes specifically mention that all other statutory and common-law remedies remain available.¹¹⁷ When one considers also the typical statutory causes of action, which often provide broad remedies, it is clear that both state and private enforcement measures are accessible. The dearth of reported cases, therefore, must be attributable to some other factor—perhaps lack of violations, franchisee ignorance of the law, substantial litigation costs, reduced or demoralized state enforcement personnel, predominance of other franchisee and state enforcement concerns, or settlement of cases. Additionally, one must remember the limited nature of the underlying substantive law: franchisors have a negative duty to avoid interfering with membership,

114. *Ricky Smith Pontiac v. Subaru of New England*, 14 Mass. App. Ct. 396, 440 N.E.2d 29, appeal denied, 441 N.E.2d 260 (1982), discussed *supra* at note 65.

115. See ARK. STAT. ANN. § 4-72-208(b) (1987); HAW. REV. STAT. § 482E-9 (1988); 1987 Ill. Laws, P.A. 85-551, § 26, ILL. ANN. STAT. ch. 121½, para. 1726 (Smith-Hurd Supp. 1990) (not providing for attorney's fees); NEB. REV. STAT. § 87-409 (1987); N.J. STAT. ANN. § 56:10-10 (West 1989); WASH. REV. CODE ANN. § 19.100.190 (1989). California and Michigan provide only for actions by state authorities. See CAL. CORP. CODE § 31,400 (West 1977 & Supp. 1990); MICH. COMP. LAWS §§ 445.1535, 445.1538 (1989).

For civil enforcement sections covering right of association statutes for specific industries (discussed *supra* at notes 109-13 and accompanying text), see ALA. CODE § 8-20-11 (1984); GA. CODE ANN. §§ 10-1-623 to 10-1-626 (1989); MASS. GEN. LAWS ANN. ch. 93B, § 12A (1984); MASS. GEN. LAWS ANN. ch. 93E, § 7 (1984); MINN. STAT. ANN. § 325B.08 (West 1981); MO. REV. STAT. § 407.835 (1990); N.H. REV. STAT. ANN. § 339-C(7)(I)(d) (1984); OR. REV. STAT. § 650.250 (1988); PA. STAT. ANN. tit. 73, § 202-6 (Purdon Supp. 1990); R.I. GEN. LAWS § 3-13-11 (1987); VT. STAT. ANN. tit. 9, § 4099 (1984); and VT. STAT. ANN. tit. 9, § 4107 (1984).

116. See, e.g., GA. CODE ANN. § 10-1-623(b) (1989) (awarding punitive damages for "aggravated or continued multiple intentional violations"); HAW. REV. STAT. § 482E-9(c) (1988) (providing court with discretion to treble the actual damages award); WASH. REV. CODE ANN. § 19.100.190(3) (1989) (providing court with discretion to treble the actual damages award).

117. See, e.g., CAL. CORP. CODE § 31,306 (West 1977 & Supp. 1990); GA. CODE ANN. § 10-1-626 (1989); 1987 Ill. Laws, P.A. 85-551, § 28, ILL. ANN. STAT. ch. 121½, para. 1728 (Smith-Hurd Supp. 1990); MICH. COMP. LAWS § 445.1534 (1989); MO. REV. STAT. § 407.835 (1990); N.H. REV. STAT. ANN. § 339-C(7)(II) (1984); WASH. REV. CODE ANN. § 19.100.910 (1989).

but no affirmative duty to communicate with the franchisee association. Without the right to force such contacts, franchisees simply are left to beg the franchisor for collective bargaining rights,¹¹⁸ recognition of franchisee "unions," or other purely voluntary measures.

4. No Collective Bargaining Requirement

a. General Interpretations

Although courts have not ruled on these statutes, it is apparent that freedom of association does not compel franchisors to deal with franchisee associations. These statutes are not the equivalent of state Wagner Acts for franchisees giving, for example, a right to collective bargaining. Indeed, one commentator contended that the Washington statute accomplishes very little because it "merely invalidates 'yellow dog' provisions in franchise contracts."¹¹⁹

From the franchisors' viewpoint, avoidance of collective bargaining is a prime advantage of franchising. In some cases, the driving force behind the conversion of fully integrated, employee-operated businesses to franchised operations is an attempt to prevent or remove the supposedly harmful effects of unionization and thereby increase profits.¹²⁰ Indeed, franchisors have been accused of using all of the same strong-arm and disingenuous tactics employed by virulent "union busters."¹²¹ Most established franchisors, as well as the International Franchise Association (IFA), the primary trade association for franchisors, generally encourage cooperation with and respect for franchisee groups. There are, however, limits: the IFA and most franchisors consider it a fundamental axiom that franchisee organizations must never be accorded the collective bargaining status of a union.¹²²

Unlike a union, a franchisee association generally cannot bind its members.¹²³ Still, there may be a tendency by both franchisors and

118. See *infra* Part III(C)(4).

119. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 WASH. L. REV. 291, 371 (1973).

120. See, e.g., *NLRB v. Servette, Inc.*, 313 F.2d 67, 69 (9th Cir. 1962) (stating that "[a]s the time of expiration of [the Company's collective bargaining agreement with the union] neared, the Company took steps to change its method of operation in Los Angeles to that of the other cities, it having been determined that the independent retailer method of doing business [franchising] was more advantageous to the Company").

121. See Brown, *Franchising: Fraud, Concealment, and Full Disclosure*, 33 OHIO ST. L.J. 517, 544 (1972) (duplicating language found in H. BROWN, *supra* note 1, at 4-34).

122. See *infra* notes 123-25, 159, 161, 164 and accompanying text.

123. Rodgers, *supra* note 91, at 502. As Attorney Rodgers states:

A franchisor should recognize that an association is composed of individual franchisee members who have separate, and in some instances different, franchise agreements with the franchisor. The franchisor should not forget the independent contractor nature of those franchisees and should preserve a communication vehicle that allows for input of systemic issues

franchisees to view the association as a labor union of sorts.¹²⁴ Franchisor attorneys seek to counter this perception with the standard refrain, "associations are not labor unions, do not represent the franchisee members in that way, and the treatment of them like that could harm the independent contractor status."¹²⁵

b. Specific Enactments

Among the original, but deleted, sections in a 1970 Massachusetts bill¹²⁶ were provisions that specifically would have given to automobile dealers all of the collective bargaining rights and procedural protections found in the Massachusetts Labor Relations Act.¹²⁷ The following year Massachusetts Senate Bill 110, which was intended to accord collective bargaining powers to all franchisees, likewise failed to pass. In the ensuing onslaught of franchising legislation throughout the country, during which many states passed franchisee right of association statutes,¹²⁸ only New Hampshire and Vermont gave any type of collective bargaining rights to their franchisees.¹²⁹

New Hampshire's law on gasoline dealers, enacted in 1974, prohibits suppliers from hindering, coercing, or threatening a dealer for the purpose of preventing him from joining a dealer trade association. Dealers can select bargaining agents who, in turn, can negotiate with suppliers, and the suppliers must bargain in good faith with the agents.¹³⁰

by, and communication to and from, all franchisees (even those who are not members of an association).

Id. at 501-02.

124. M. Davis, Outline of Practical Considerations in Dealing with Franchisee Associations, Remarks at the 18th Annual Legal Symposium of the International Franchise Association (IFA) 11 (May 6-7, 1985) (available from IFA, Washington, D.C.).

125. *Id.*

126. The enacted law is found in MASS. GEN. LAWS ANN. ch. 93B (1984 & Supp. 1990) and is entitled "Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers."

127. MASS. GEN. LAWS ANN. ch. 150A, §§ 1-12 (West 1982 & Supp. 1990). The deleted collective bargaining sections of the auto dealers act are briefly discussed in Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. INDUS. & COM. L. REV. 757, 811-12 (1971).

128. It is important to count not only the eight general state statutes discussed *supra* notes 93-105 and accompanying text, but also the many right of association statutes found in subject-particular state franchising laws. See *supra* notes 109-13 and accompanying text.

129. See N.H. REV. STAT. ANN. § 339-C(6) (1984); VT. STAT. ANN. tit. 9, § 4106 (1984). As discussed *infra* notes 172 & 205, other nations also have decided against giving collective bargaining rights to franchisees.

130. The statute provides in full:

No supplier shall hinder, coerce or threaten any dealer for the purpose of preventing him from joining any trade association made up of dealers. Dealers shall have a right to select bargaining agents to negotiate and deal with suppliers on matters having to do with their supplier-dealer relationship. Suppliers shall be obliged to bargain in good faith with agents so selected by the dealers. Such bargaining activity shall be pursued to the maximum extent

Vermont's law operates similarly,¹³¹ and both states expressly permit dealers to bring actions for damages, including attorney's fees, resulting from a violation of these dealer trade association laws.¹³² Once again, however, no cases are reported. Additionally, there appears to have been no administrative oversight of either provision.¹³³ Both legislative

permitted by law.

N.H. REV. STAT. ANN. § 339-C(6) (1984). The second sentence of the statute resembles a section from the model law entitled "Franchising Fair Dealing Act," introduced in a number of states in the 1970s. Brief for Petitioner at 28, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172). That section reads, "Franchisees shall have the right to association and to select a collective bargaining agent of their own choosing to negotiate and deal with franchisors on matters having to do with their franchise relationship." *Id.* at 28-29. Note that New Hampshire's statute goes beyond this organizational right and mentions specifically the gasoline supplier's obligation to bargain with the franchisees' representatives. Only Vermont, *see infra* note 131, and Rhode Island have provisions even remotely resembling New Hampshire's or the model statute on franchise fair dealings.

The Rhode Island statute, also on gasoline dealers, reads the same as New Hampshire's except that the bargaining agents are "to negotiate and deal with suppliers on an individual basis." R.I. GEN. LAWS § 5-55-6 (1987) (emphasis added). The distinction appears crucial. Rhode Island's law is clearly intended *not* to provide collective bargaining rights. It matches the New Hampshire statute word for word, but pointedly includes the additional phrase indicating that each bargaining agency is for one person only.

No pertinent cases are reported in Rhode Island. For more on the history, interpretation, and operation of the New Hampshire and Vermont statutes, *see infra* notes 131-36 and accompanying text.

131. The Vermont statute on gasoline dealers states:

No supplier shall coerce or threaten any dealer for the purpose of preventing him from joining any trade association made up of dealers. An individual dealer shall have a right to select a representative to negotiate and deal with suppliers on matters having to do with his supplier-dealer relationship. Suppliers shall be obliged to negotiate in good faith with the representative so selected by the dealer.

VT. STAT. ANN. tit. 9, § 4106 (1984). Note that the language is in the singular form: "individual dealer," "his supplier-dealer relationship." Unlike Rhode Island's statute, which speaks of individual negotiations, *see supra* note 130, perhaps the Vermont law permits individual dealers to designate one particular representative to act jointly on their behalf. The Vermont legislation does not seem to contemplate such group behavior, but the Rhode Island statute appears, in fact, to proscribe it. *See supra* note 130.

The Vermont statute, however, can be fully operational without ever reaching the issue of collective bargaining. Indeed, as with the New Hampshire and Rhode Island laws, the state legislature in Vermont failed to adopt the model "Franchising Fair Dealing Act" terminology about a collective bargaining agent. *See supra* note 130. For more on the history, interpretation, and operation of the Vermont and New Hampshire statutes, *see infra* notes 133-36 and accompanying text.

132. N.H. REV. STAT. ANN. §§ 339-C(7)(I)(d), 339-C(7)(II) (1984); VT. STAT. ANN. tit. 9, § 4107 (1984).

133. Telephone interviews with Paul Doran, paralegal, Consumer Protection Division, New Hampshire Office of the Attorney General, and others at the New Hampshire Public Utilities Commission, Division of Motor Vehicles, and Department of Agriculture, Concord, New Hampshire (July 24, 1989 and Sept. 5, 1990); telephone interview with Daniel Bokan, clerk, Consumer Assistance Program, Vermont Office of the Attorney General, Burlington, Vermont (Sept. 13, 1989); telephone interview with Cynthia Buska, clerk, Vermont Public Service Board, Montpelier, Vermont (Sept. 5, 1990); telephone interview with Jay Ashland, attorney, Consumer Fraud Division, Vermont Office of the Attorney General, Burlington, Vermont (Sept. 5, 1990).

history and subsequent application confirm that the New Hampshire and Vermont statutes really are just right of association statutes, with no emphasis placed on their potential collective bargaining significance.¹³⁴

As with other states' freedom of association provisions, the New Hampshire and Vermont statutes either may be quietly accomplishing their purposes¹³⁵ or simply may have gotten lost amid more pressing legal issues in dealer regulation and litigation. With no complaints being filed with state administrators and no published court decisions, the New Hampshire and Vermont statutes furnish little legal guidance. Practical guidance likewise is limited; despite the bargaining rights granted by the two statutes, there has been absolutely no collective bargaining.¹³⁶ If, as Justice Oliver Wendell Holmes said, our federal system permits "the making of social experiments . . . in the insulated chambers afforded by the several states"¹³⁷ (thus allowing a type of testing program before undertaking what might prove to be a precipitous na-

134. The franchisees' chief advocate, attorney John D. Clifford, believes that the New Hampshire provision was a response to one supplier's threat to terminate dealers who joined a trade association. The response was directed toward freedom of association, not necessarily collective negotiations. Telephone interviews with John D. Clifford, General Counsel, Tri-State Gasoline and Automotive Dealers Association, Inc. (Tri-State) (trade association covering Maine, New Hampshire, and Vermont) (Sept. 22, 1989 and Sept. 5, 1990). The language about bargaining agents in both the New Hampshire and Vermont statutes was intended to proclaim a dealer association's right to represent individual dealers with respect to individual, supplier-dealer problems. *Id.* The actual practice has been for the dealer's own attorney to represent the dealer's interests. *Id.* That attorney clearly could be an association-recommended lawyer such as the association's own counsel. *Id.*

135. This purpose is to protect the franchisees' right to form and maintain a franchisee association. Another purpose suggested by Attorney Clifford might be to prevent suppliers from claiming that the dealers' trade association tortiously interfered with a supplier-dealer contract. *Id.*

136. No collective bargaining has occurred between any Maine, New Hampshire, or Vermont gasoline dealers and their suppliers. Telephone interviews with James Connolly, President, Tri-State (Sept. 22, 1989 and Sept. 5, 1990); telephone interviews with John D. Clifford, *supra* note 134. According to Clifford, each dealer has a distinct contract with the supplier, making it impractical even to try collective bargaining. Telephone interviews with John D. Clifford, *supra* note 134. That individual contracts come up for renewal at different times would impede further any attempt at collective action. *Id.* The gasoline dealers' regional trade association—Tri-State—and the Service Station Dealers of America, their national association, merely serve as advisers and information clearinghouses. Telephone interviews with James Connolly, *supra*. They do not act as bargaining representatives. *Id.*; telephone interviews with John D. Clifford, *supra* note 134.

Rhode Island also has no gasoline dealer collective bargaining, nor any prospects thereof. Telephone interview with Nathaniel J. Nazareth, Counsel to the Rhode Island Section of the Connecticut-Rhode Island Gasoline Retailers and Garage Owners Association, Inc. (Sept. 5, 1990). Dealers often are extremely independent. Even if they were willing to grant bargaining powers to a trade association, any attempt at collective negotiations would have to surmount the practical difficulties of distinct dealer contracts with different renewal dates. *Id.* In general, the state law on gasoline franchises has "no teeth." *Id.* Rhode Island dealers and their attorneys tend to prefer the federal Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806, 2821-2824, 2841 (1988). *Id.*

137. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Hohnes, J., dissenting).

tionwide change), then meaningful results seem still to need a larger, more active, scientific sample of potential franchisee "unions" than the franchised gasoline dealers in two small states.

5. Legislative Trends

In the 1970s many states enacted laws to protect franchisees and other persons who were offered certain business opportunities.¹³⁸ Since then, the pace of state legislation has slackened considerably.¹³⁹ With little impetus for new state franchising laws in general, the likelihood of states enacting a specialized measure on associational rights seems bleak. It is highly improbable that a number of states now will undertake that which none has done in the past decade: either enact a general franchise relationship law including a franchisee right of association provision, or add such a provision to an existing general statutory scheme.

The FTC probably also has dampened the prospects for further associational rights legislation, albeit temporarily and unintentionally. This dampening likely has occurred because further state substantive laws about the franchise relationship can be held back for as long as the FTC considers preempting or otherwise reducing state regulation of franchisor disclosures. Many state administrators and franchisee groups apparently believe it fundamental to fight disclosure law reductions or outright preemption,¹⁴⁰ and their time or resources may be insufficient to push for action in other areas of franchising law.

IV. ALTERNATIVES TO COLLECTIVE BARGAINING: FRANCHISEE GROUP MEASURES IN COURT, BY ADMINISTRATIVE ACTION, OR THROUGH ARBITRATION

The Federal Rules of Civil Procedure,¹⁴¹ as well as many state rules, permit class actions by franchisees against a franchisor. If successful, these actions can force major systemic changes in a franchised operation,¹⁴² something most individual suits are far less likely to accomplish. Class actions, however, generally are expensive, often provoke

138. See *supra* Part II(B).

139. See *supra* text accompanying note 37.

140. See *supra* note 46; see also *supra* notes 39-43 and accompanying text.

141. See FED. R. CIV. P. 23.

142. For examples of changes, see *In re International House of Pancakes Antitrust Litig.*, 536 F.2d 261 (8th Cir. 1976); *Hawkins v. Holiday Inns, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 64,001 (W.D. Tenn. 1981); *HEW Corp. v. Tandy Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,424 (D. Mass. 1979); and *In re Clark Oil & Refining Corp. Antitrust Litig.*, 422 F. Supp. 503 (E.D. Wis. 1976); *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part, rev'd in part, and remanded*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

franchisor retaliatory measures (particularly against franchisee class representatives),¹⁴³ and frequently engender procedural combat in which the parties bleed themselves dry by exhausting every procedure and appeal during several years of litigation.¹⁴⁴ While class actions can lead to a court-sanctioned, negotiated settlement between franchisor and franchisees,¹⁴⁵ the ultimate effects of filing a class action are unpre-

143. M. Klein, *Alternative Routes Available for the Resolution of Disputes Between Franchisee and Franchisor*, Remarks at the University of Missouri at Kansas City's Second Annual Franchise Law Seminar 4-10 to 4-11 (1980). Klein stated that one "can expect the franchisor to come out swinging in every direction, sometimes below the belt," and to use "every ounce of its vast economic superiority, both in court and otherwise, to rid itself not only of the [class action] lawsuit, but very likely of the franchisee [who filed it] as well." *Id.* at 4-10. According to Klein, franchisees in one class action were told by the franchisor's president that once the class action was over, the franchisor was going to take "very firm action to rid itself of the class representatives." *Id.* at 4-10 to 4-11. In another instance, a franchisee class representative was advised that his franchisor, who leased the franchisee's business premises from a third party, was giving up the lease at the expiration of its term, and building another store nearby, which it would franchise to a third party. *Id.* at 4-11; see also *In re International House of Pancakes Franchise Litig.*, 1972 Trade Cas. (CCH) ¶ 73,797 (W.D. Mo. 1972) (discussing a class action brought by franchisees, during which the franchisor was enjoined from terminating, threatening to terminate, or interfering with the business relationships of any of its franchisees except for delinquency on payments in excess of 45 days).

Additionally, franchisors may attempt to induce other franchisees to avoid the litigation. See, e.g., *In re International House of Pancakes Antitrust Litig.*, 1972 Trade Cas. (CCH) ¶ 73,864 (W.D. Mo. 1972) (refusing to let franchisor communicate with franchisee class members in order to buy them out); *Merit Motors, Inc. v. Chrysler Corp.*, 1973 Trade Cas. (CCH) ¶ 74,288 (D.D.C. 1972) (ordering Chrysler to cease "soliciting, coercing, intimidating, or otherwise interfering with the decision of class members [dealers] in regard to their response to the Class Notice"). Further pre-trial decisions in the *Merit Motors* case may be found at *Merit Motors, Inc. v. Chrysler Corp.*, 1973 Trade Cas. (CCH) ¶ 74,346 (D.D.C. 1973); and *Merit Motors, Inc. v. Chrysler Corp.*, 1972 Trade Cas. (CCH) ¶ 74,116 (D.D.C. 1972). Chrysler ultimately won the case. 417 F. Supp. 263 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977).

144. See Brown, *supra* note 50, at 5, col. 1; accord M. Klein, *supra* note 143, at 4-10 to 4-11. As just one example of what franchisors will do to win a class action, Klein refers to a senior partner in one of the large firms that defended the franchisor in *In re International House of Pancakes Franchise Litig.*, 1972 Trade Cas. (CCH) ¶ 73,797. This attorney apparently "flew some 800 miles to another city to personally visit the restaurant of one of the class representatives and obtain evidence of its alleged filthy condition." M. Klein, *supra* note 143, at 4-10. The franchisor also hired private detectives. *Id.*

145. H. Brown, *supra* note 1, § 10.08[5][b] (stating that franchisee class actions presently are the only alternative to collective bargaining because "[t]here the parties can achieve some equality of bargaining power; and counsel may legally negotiate the settlement of all issues involved in such adversary proceedings [with the] settlement . . . subject to court approval" (emphasis added)). As described by Mark J. Klein:

One factor encouraging franchisees to request class certification is that, once certified, settlement negotiations are usually expedited. Preparing a class action for trial is a heavy burden on all parties and their counsel. A large franchisor may decide to stay with an individual action much longer, hopefully wearing out the franchisee and his counsel.

M. Klein, *supra* note 143, at 4-11. To be sure, franchisors may decide to fight a class action much more vigorously than less threatening individual action. See *supra* notes 142-44 and accompanying text.

dictable. Many classes never receive certification,¹⁴⁶ others are waylaid by problems with the class representatives,¹⁴⁷ and still others proceed only to lose at a later stage of the litigation.¹⁴⁸ Even a franchisee win may prove a Pyrrhic victory, leaving the franchisor financially too weak to serve the franchisees' purposes.

Class actions are court actions based on claims of illegality and seeking the intervention of a party (the court) often unfamiliar with the intricacies of the franchised operation. As such, class actions are an inadequate substitute for direct collective bargaining between franchisor and franchisees. Collective bargaining typically is much less expensive, less time consuming, and less sidetracked by noncontractual issues that may dominate a lawsuit.¹⁴⁹ The most important distinctions between the two are: (1) a class action requires a legal foundation, not simply a desire for both parties to thrash out their differences; and (2) once a negotiated agreement is approved by the franchisor and franchisees, a class action requires that the parties obtain court approval.

Other procedures, such as offensive collateral estoppel,¹⁵⁰ test cases,¹⁵¹ and consolidations of discovery and trial for common-issues cases,¹⁵² suffer from some of the same defects as does the class action. Even if these procedures reduce costs and avoid some procedural issues (such as class certification), the two central problems persist: Actions using these procedures also require a legal basis for their initiation,¹⁵³

146. See, e.g., *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976) (overturning district court's grant of class certification); *Chase Parkway Garage, Inc. v. Subaru of N.E., Inc.*, 1982-2 Trade Cas. (CCH) ¶ 64,840 (D. Mass. 1982); *Wardell v. Certified Oil Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,477 (S.D. Ohio 1981); *Smith v. Denny's Restaurants, Inc.*, 62 F.R.D. 459 (N.D. Cal. 1974); *Free World Foreign Cars, Inc. v. Alfa Romeo, Inc.*, 55 F.R.D. 26 (S.D.N.Y. 1972); *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972).

147. See, e.g., *Murphy v. Alpha Realty, Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,566 (N.D. Ill. 1977); *McCoy v. Convenient Food Mart, Inc.*, 69 F.R.D. 337 (N.D. Ill. 1975); *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440 (E.D. Pa. 1975).

148. See, e.g., *Krehl v. Baskin-Robbins Ice Cream Co.*, 1979-2 Trade Cas. (CCH) ¶ 62,806 (C.D. Cal. 1979) (granting defendant's motion to dismiss at trial); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263 (D.D.C. 1976) (granting defendant summary judgment), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977).

149. Examples of possible noncontractual issues include procedures and questions of past fault.

150. See generally *H. BROWN*, *supra* note 1, § 11.13; see also *Woo v. Great S.W. Acceptance Corp.*, 565 S.W.2d 290 (Tex. Civ. App. 1978) (holding that a franchisee may rely upon collateral estoppel for proof of unfair and deceptive acts found in prior FTC proceeding).

151. *H. BROWN*, *supra* note 1, § 11.13, at 11-39 n.3. *Brown* refers to *Kypta v. McDonald's Corp.*, 1978-1 Trade Cas. (CCH) ¶ 62,106 (S.D. Fla. 1978), in which the parties assented to the "test case" approach taken in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

152. See, e.g., 28 U.S.C. § 1407(a) (1988) (allowing transfer and consolidation of civil actions involving common questions of fact, including pretrial proceedings).

153. A claim of antitrust violation, for example, would be a valid legal basis.

and the ultimate decision maker is a judge, not the franchisor and its franchisees. Thus, as with class actions, there are too many uncertainties, procedural difficulties, and potentially high costs to make the test case, collateral estoppel, or consolidation an effective substitute for collective bargaining.

Another option is to seek administrative recourse by filing a complaint with the FTC or with state authorities. If an agency pursues the case, it is empowered to issue a consent decree, cease and desist order, or other sanction having consequences for the franchised system as a whole. In effect, the administrative route can produce worthwhile results without the tremendous expenditure of private resources.¹⁵⁴ There is no guarantee, however, that the government will take any action; likewise, if the government does act, there is no control over its recommendations. In short, franchisees that believe a disputed matter is crucial probably would prefer bringing a private action, either individual or class, over which they would have more control.

Finally, arbitration is an alternative to litigation.¹⁵⁵ While usually

154. See, e.g., *FTC v. Lady Foot Int'l, Inc.*, Bus. Franchise Guide (CCH) ¶ 8979 (E.D. Pa. 1987) (imposing civil penalty against two executives of defunct franchisor for misrepresentations to prospective franchisees); *United States v. Comprehensive Accounting Corp.*, 53 Antitrust & Trade Reg. Rep. (BNA) Report No. 1328, at 251 (N.D. Ill. 1987) (issuing consent decree in FTC action to pay up to \$3.5 million to franchisees for FTC disclosure misrepresentations); *FTC v. Kitco of Nevada, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,658 (D. Minn. 1985) (ordering restitution for misrepresentation of the business and of its earnings potential); *Towle Mfg. Co.*, Trade Reg. Rep. (CCH) ¶ 21,694 (FTC 1980) (issuing a cease and desist order to prohibit resale price maintenance schemes imposed on retailers); *Hartz Mountain Corp.*, Trade Reg. Rep. (CCH) ¶ 21,606 (FTC 1979) (barring a manufacturer from fixing retail prices, restricting territories, falsely disparaging competitors, setting up exclusive dealing arrangements, discriminating on prices, and compelling certain "promotional" activities); *Howard Johnson Co.*, Trade Reg. Rep. (CCH) ¶ 21,577 (FTC 1979) (requiring Howard Johnson to permit its 253 franchisees to buy all but 23 of 170 products from manufacturers other than Howard Johnson); *Oregon v. Pioneer Northwest, Inc.*, 44 Antitrust & Trade Reg. Rep. (BNA) Report No. 1106, at 602 (Or. Cir. Ct. 1983) (preventing wholesale distributors from setting dealers' prices by monitoring sales and giving special discounts to cooperative dealers); *California v. Morris-Tait Assocs.*, 1981-2 Trade Cas. ¶ 64,160 (Cal. Super. Ct. 1981) (barring state antitrust pricing violations imposed on dealers by manufacturer); *Investment Servs. Int'l*, Antitrust & Trade Reg. Rep. (BNA) Report No. 969, at E-5 (June 19, 1980) (action by Connecticut attorney general resulting in a consent decree, with company agreeing to pay damages to people who bought into the company's allegedly deceptive marketing of business opportunities).

155. Most arbitration cases are brought under an arbitration clause found in the franchise agreement; otherwise, a case goes to court unless both parties choose arbitration. There are, however, a few limited areas of nonconsensual arbitration such as "court-annexed" arbitration now found in some federal district courts and state courts. See, e.g., N.D. CAL. R. 500; M.D. FLA. R. 8.01-8.06; W.D. MICH. R. 43; W.D. MO. R. 30; D.N.J. R. 47; E.D.N.Y. ARB. R. §§ 1-7; M.D.N.C. R. 601-11; S.D. OHIO R. 4.4.1; S.D. OHIO ARB. R. 1.0-11.3; W.D. OKLA. R. 43; E.D. PA. R. 8; W.D. TEX. R. CIV. P. 300-9; see also Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISPUTE RESOLUTION 1, 16-18 & nn.72-74; Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, 12 STATE CT. J., Spring 1988, at 4, 6-8. Arbitration is no more significant for franchise matters, however, than for other court cases.

considered an efficient, less expensive method for dispute resolution that is geared especially toward parties who have a continuing business relationship,¹⁵⁶ arbitration generally cannot substitute for collective bargaining.¹⁵⁷ Like court actions, it requires a claim—a contention that there has been some wrong that should be redressed. A desire simply to negotiate differences is insufficient.¹⁵⁸ Most importantly, without an effective arbitration clause binding the franchisor to negotiate with franchisees collectively, franchisors simply cannot be forced to deal with the franchisees as a group. Arbitration is thus subject to the will of the franchisor; absent the franchisor's consent, it is unlikely to include any collective bargaining.

V. LABOR LAW

A. Franchisee Advisory Councils and Franchisee Associations

Franchisors have advanced essentially five reasons for forming and assisting franchisee advisory councils: (1) promoting and improving communications between franchisees and franchisor; (2) promoting and increasing understanding of the particular franchised system; (3) strengthening and professionalizing the working relationship between franchisees and the franchisor's management; (4) developing a forum for discussing ways to enhance franchisee and franchisor profits; and (5) exploring "growth opportunities" for both franchisees and the

156. See *Arbitration Clauses—Valuable Methods for Solving Business Problems Arising in Long-Term Business Arrangements*, 28 BUS. LAW. 585 (1973) (discussing arbitration in several distinctive continuing business relationships); see also, e.g., B. WEBSTER, *supra* note 8, at 188 (stating that in most cases, arbitration is quicker and less expensive than litigation); Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219, 221-22 & n.15 (1986) (concluding that arbitration is private, faster, cheaper, more likely to have an expert decision maker, and more likely to preserve commercial ties between disputants); Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 433-40, 472-77 (1988) (agreeing with Allison and listing arbitration advantages such as flexibility, informality, and efficiency).

157. Indeed, some see binding arbitration as a means to control franchisees and limit or forestall class actions. See, e.g., Brown, *supra* note 121, at 545. The Federal Arbitration Act, 9 U.S.C. §§ 1-15 (1988), can further these uses of arbitration because § 2 of the Act—requiring enforcement of an arbitration provision in a contract involving interstate commerce—preempts conflicting state franchise laws. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Good (E) Business Sys. v. Raytheon Co.*, 614 F. Supp. 428 (W.D. Wis. 1985).

158. Arbitration is adversarial rather than conciliatory in nature. See Faure, *The Arbitration Alternative: Its Time Has Come*, 46 MONT. L. REV. 199, 200 (1985) (noting that arbitration is neither mediation nor facilitation); Stipanowich, *supra* note 156, at 425 n.1; Stulberg, *Negotiation Concepts and Advocacy Skills: The ADR Challenge*, 48 ALB. L. REV. 719, 720 (1984) (stating that arbitration "incorporate[s] substantially the same operating assumptions of the adversarial process"). An operative collective bargaining arrangement may provide a process by which future differences could be mediated or arbitrated, even though no legal wrong has been committed.

franchisor.¹⁵⁹ The advisory council often deals with product development, operations, training, system standards, firm policy and planning, customer demands, advertising and other marketing strategies, inventory, equipment, and services. It may function as advisor to both franchisees and franchisor, negotiator—in a very limited sense—with the franchisor on behalf of the franchisees, and purchaser of products and services.¹⁶⁰ The advisory council, however, definitely is not a collective bargaining agent.¹⁶¹

As franchising systems mature—both in industry and in particular franchised operations—more and more franchisors encounter franchisee associations. Although franchisors initiate or otherwise encourage franchisee advisory councils in order to meet the needs of the franchisor as well as the franchisees, associations are completely independent of the franchisor. For example, the association of Midas muffler shop franchisees lists as its purposes: Promoting the interests of its members, advancing members' trade, promoting cooperation among members, encouraging the exchange of ideas among members, and securing and disseminating to members essential or helpful information.¹⁶² The emphasis is entirely on the franchisees' interests; nothing is included about the franchise system as a whole. Furthermore, the Midas franchisee association asserts that its primary *raison d'être* is "the redress of the traditional economic imbalance between franchisor and franchisee."¹⁶³

The distinction between advisory councils and associations is significant: franchisors historically have been more receptive to the advisory council—a system whereby franchisees can voice their concerns without really forming a collective threat to franchisor power and deci-

159. Davis, *The Prospective [sic] of In-House Counsel: Organization, Compliance/Enforcement Programs, Negotiated Sales, Transfer, Termination, and Advertising and Franchisee Councils*, in P.L.I. COMMERCIAL LAW & PRACTICE NO. 486, FRANCHISING 1989: BUSINESS STRATEGIES & COMPLIANCE ISSUES 561, 641 (1989) (providing in appendix 4 the purposes and goals of the 7-Eleven National Advisory Council).

160. Rudnick, *Structuring the Franchise Relationship*, in P.L.I. COMMERCIAL LAW & PRACTICE NO. 412, FRANCHISING 1987, BUSINESS STRATEGIES & LEGAL COMPLIANCE 97, 153-54 (1987); INTERNATIONAL FRANCHISE ASS'N, HOW TO ORGANIZE A FRANCHISEE ADVISORY COUNCIL (rev. ed. 1985) [hereinafter INTERNATIONAL FRANCHISE ASS'N].

161. This principle is implicit in IFA publications such as *How to Organize a Franchise Advisory Council*. This document contains several sample bylaws for advisory councils, each emphasizing their *advisory* and communicative role, with the concept of franchisor-council negotiations (let alone such talks leading to system-wide binding agreements) conspicuously absent from any listed powers or purposes. INTERNATIONAL FRANCHISE ASS'N, *supra* note 160.

162. Petition for Writ of Certiorari at 27a, Appendix—Plaintiff's Exhibit 6 (Bylaws of National Muffler Dealers Association, Inc., dated April 1971), *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172).

163. Reply Brief for Petitioner at 8, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172); see also *supra* notes 122-25, 159 and accompanying text.

sion making.¹⁶⁴ Although advisory councils serve many unquestionably useful functions,¹⁶⁵ they can be likened also to "company unions,"¹⁶⁶ which are proscribed by the National Labor Relations Act of 1935 (NLRA).¹⁶⁷ As long as the franchisor-franchisee relationship is not subject to the NLRA,¹⁶⁸ however, these advisory councils avoid the fate of

164. See, e.g., Brown, *supra* note 50, at 5, col. 3; see also *supra* notes 122-25, 160-61 and accompanying text. John H. Rodgers, the general counsel for Southland Corporation, noted the usefulness of the IFA guidelines for setting up advisory councils, and remarked that "advisory councils serve a useful purpose in communicating franchisee interests to the franchisor," and warned franchisors to "make the council's rules clear and make it a body that *does no more than provide input or recommendations to the franchisor.*" Rodgers, *supra* note 91, at 499 (emphasis added).

165. See *supra* text accompanying notes 159-60.

166. For instance, in writing about automobile manufacturers and their dealers-franchisees, commentators have found similarities between advisory councils and company unions. One author stated: "Ford [Motor Company] backs the National Dealer Council as the grievance and bargaining panel in much the same way industrial employers once supported company unions whose allegiances, at best, were split. Those who disagree with the policy are terminated." Note, *Contracts—Smith v. Ford Motor Company: Limitation on a Franchisor's Right to Interfere with Contracts Between a Franchisee and an Employee*, 54 N.C.L. Rev. 1284, 1293 (1976) (footnotes omitted). Harold Brown has noted, "Rather than tolerate collective bargaining as a means toward equalizing power, franchisors have sought to employ every 'busting' strategy borrowed from the field of labor relations, ranging from simple persuasion to *company-sponsored councils*, and threatened termination for the leaders to favored treatment for the sheep." H. BROWN, *supra* note 1, at 4-34 (emphasis added). In addition, Brown states that the "independence of . . . associations affords a marked contrast to the ineffectiveness of the regional 'Dealer Councils' created by the individual manufacturers One possible reason for the general ineffectiveness of such councils is their close identity with the individual manufacturer." Brown, *supra* note 127, at 815.

167. 29 U.S.C. § 158(a)(2) (1988). As amended, the provision states: "(a) It shall be an unfair labor practice for an employer. . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." *Id.*

Company unions flourished during the 1920s and early- to mid-1930s. They were employee organizations initiated or assisted by the employer. Although sometimes independent of the employer, the company unions often were established to create subservient entities that would turn collective bargaining into a "colloquy between one side of [the employer's] mouth and the other." R. BROOKS, *UNIONS OF THEIR OWN CHOOSING: AN ACCOUNT OF THE NATIONAL LABOR RELATIONS BOARD AND ITS WORK* 68-69 (1939). *But cf.* A. SHOSTAK, *AMERICA'S FORGOTTEN LABOR ORGANIZATION* 3 (1962). Arthur Shostak notes severe abuses, but remarks that many single-firm, "company" unions served legitimate purposes by "offer[ing] members local autonomy, low dues, industrial harmony, [and] competitive labor contracts." *Id.*

The leading case on company domination of or interference with a "labor organization" (a broadly construed term) remains *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). In *Cabot Carbon* the Court noted that the NLRA definition of "labor organization," currently found at 29 U.S.C. § 152(5) (1988), states that at least part of the organization's purpose is "dealing with employers," a term much broader than what is commonly referred to as "collective bargaining." *Cabot Carbon*, 360 U.S. at 213. Thus, an employer is barred even from interference with, domination of, or support for a "labor organization," which according to the *Cabot Carbon* definition may include an employee committee intended not to negotiate with the employer, but merely to handle employee grievances and make proposals.

168. See McGuire, *The Labor Law Aspects of Franchising*, 13 B.C. IND. & COM. L. REV. 215, 251 (1971) (concluding that "the franchisor in the larger enterprise need not be concerned with the possibility that . . . the [National Labor Relations] Board will classify him as the employer of [the] franchisees"). As for smaller, single-distributor franchisees, the question of Board jurisdiction

the company unions.

B. Franchisees as Independent Contractors or Employees

The NLRA generally does not secure any rights at all for franchisees as independent contractors. The Act neither requires franchisor-franchisee collective bargaining¹⁶⁹ nor outlaws unfair franchisor practices.¹⁷⁰ In the Labor Management Relations Act (1947), which amended and added to the NLRA, Congress specifically exempted independent contractors from NLRA coverage. The Act states, "When used in this Act . . . the term 'employee' . . . shall not include . . . any individual having the status of an independent contractor. . . ."¹⁷¹

Courts have applied this statute in several franchising cases as well as analogous (*e.g.*, dealership) cases. By adopting the common-law master-servant test, the critical labor law focus is on whether the franchisor controls the manner by which a result is to be accomplished (thus establishing an employment relationship subject to the NLRA), or reserves control only as to the overall result sought (thus establishing an independent contractor arrangement beyond the NLRA's scope).¹⁷²

revolves around whether the franchisee is an employee of the franchisor. In other words, does the franchisor satisfy the common-law concept of being the master of the franchisee through a substantial right of control? *See id.* at 226-31, 250; *see also* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (stating that both the NLRB and courts used common-law principles of agency to resolve the independent contractor-employee question). More often than not, the distributor-dealer-franchisee is found to be an independent contractor. *See infra* notes 178-86 and accompanying text.

169. *See* National Labor Relations (Wagner) Act §§ 7, 8(a)(5), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 157, 158(a)(5) (1988)) (covering collective bargaining rights of employees and duties of employers, respectively), quoted *infra* at notes 190-91.

170. If the NLRA were applicable, unfair labor practices by a franchisor (an NLRA "employer") would include, *inter alia*, creating company-controlled (franchisor-controlled) councils and terminating the franchises held by franchisee association leaders (if only because of their association activities, not for legitimate reasons). National Labor Relations Act § 8(a)(1),(2),(3), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(1),(2),(3) (1988)).

171. Labor Management Relations (Taft-Hartley) Act § 2(3), 61 Stat. 136, 137-38 (1947) (codified as amended at 29 U.S.C. § 152(3) (1988)). The definition also excludes supervisors and managerial employees. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 679-82 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-90 (1974). This area of the law is discussed *infra* Part V(C).

172. *See* Mister Softee of Indiana, Inc., 162 N.L.R.B. 354 (1966); *see also* United Ins. Co. of Am., 390 U.S. at 256; McGuire, *supra* note 168, at 226-31, 250, 256.

The United States is not alone in this approach. In FRANCHISING COMMITTEE SECTION OF ANTI-TRUST LAW (ABA), SURVEY OF FOREIGN LAWS AND REGULATIONS AFFECTING INTERNATIONAL FRANCHISING 29 (Belgium part), 43 (Canada part), 40 (Italy part), 30 (Sweden part) (P. Zeidman 2d ed. 1990) [hereinafter FOREIGN SURVEY], it is expressly noted that the labor laws of Belgium, Canada, Italy, and Sweden do not cover independent contractors such as franchisees. Other sections of the text note that franchisors are not vicariously liable for their franchisees' torts unless the franchisors retain control over the franchisees' conduct (*i.e.*, are essentially employers). *Id.* at 46 (France part), 37 (Japan part), 27 (Switzerland part) (stating, "that a franchisor [in Switzerland] will be held liable for negligence of a franchisee (respondeat superior principle) is highly unlikely,

As the case law has developed, some courts—although consistently retaining the use of a right to control test—have suggested the need to look at other factors to determine whether a hiree is an employee or an independent contractor. Each court employing this approach generally has examined numerous factors. These factors include the parties' intent; the hiree's risk of loss, ownership of equipment, work skills, and ability to hire others; the work conditions for the hiree compared to acknowledged employees; the type of goods or services in question; the mode of compensation; the methods for supervising the hiree; and the hiree's form of business (e.g., sole proprietorship, partnership, or corporation).¹⁷³

Because they deal with the broad, fundamental concepts of agency law, National Labor Relations Board (NLRB) determinations, and subsequent court reviews, are highly dependent on the facts of each case. Two unanimous NLRB decisions, decided roughly at the same time and with essentially the same Board members, demonstrate how decisions turn on the substance of the franchisor-franchisee relationship, not simply the language of the franchise agreement. In *Fugazy Continental Corp.*¹⁷⁴ the NLRB held that franchised limousine drivers were employees. Specifically, the Board found that the "franchises" were short-term (two years); the franchisor had complete discretion over renewal; and the franchisor chose the franchisee's vehicle, level of insurance, uniform, and fare structure.¹⁷⁵ In *Kallmann*,¹⁷⁶ however, the Board reached a different result with respect to restaurateurs. In *Kallmann* restaurant franchisees were held to be independent contractors. The Board

as a franchisee is deemed to be an independent contracting business"). Although Mexico and a few other nations broadly construe the employment concept for purposes of applying their social welfare legislation, *id.* at 28-29 (Mexico part), it seems implicit from the discussions of foreign franchising that franchisees typically will be viewed not as potential unionizers, but as independent contractors with employees of their own. *See, e.g., id.* at 46 (Australia part), 29 (Denmark part), 19 (Israel part), 29 (South Korea part), 21 (Spain part), 26 (South Africa part), 19 (Taiwan part), 30 (United Kingdom part). Exceptions always can be found: in 1969, "the Labor Court of Sweden held that the gasoline station dealers of Esso were entitled to collective bargaining rights in view of the dominant economic power of the oil company and the control inherent in the fact that the dealers had to look to the company as their sole source of supply." Brown, *supra* note 127, at 813; *see also infra* note 205.

173. *See, e.g.,* NLRB v. Amber Delivery Serv., 651 F.2d 57, 61 (1st Cir. 1981); Associated Gen. Contractors of Cal., Inc. v. NLRB, 564 F.2d 271, 279-82 (9th Cir. 1977); Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 447-48 (2d Cir. 1975); NLRB v. Deaton, Inc., 502 F.2d 1221, 1223-24 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); News-Journal Co. v. NLRB, 447 F.2d 65, 67-68 (3d Cir. 1971).

174. 231 N.L.R.B. 1344 (1977), *enforced*, 603 F.2d 214 (2d Cir. 1979), *supp. enforcement proceedings*, 276 N.L.R.B. 152 (1985), and 106 Lab. Cas. (CCH) ¶ 12,389 (2d Cir. 1987).

175. *Fugazy*, 231 N.L.R.B. at 1344-45.

176. 245 N.L.R.B. 78 (1979), *aff'd in part, remanded in part on other grounds sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

found that the franchisees selected suppliers, established prices, and made large initial investments; the franchisees made hiring decisions and controlled labor relations; the franchises were long-term affiliates (over fifteen years); and the franchisees were responsible for paying assessments, taxes, and insurance.¹⁷⁷

Many NLRB franchising cases have concerned "owner-drivers" or "salesman-drivers" such as truck drivers, taxi drivers, and traveling salesmen. In some of the cases, these groups have been found to be employees.¹⁷⁸ Most ruling bodies, however, have held that these franchisee-lessees or owner-operators are actually independent contractors.¹⁷⁹ Another frequent type of case has concerned newspaper dealer-franchisees. In these cases the Board has found the affiliates to be employees in some instances and independent contractors in others.¹⁸⁰

177. *Kallmann*, 245 N.L.R.B. at 78-79.

178. See, e.g., *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131 (1st Cir. 1981) (finding driver-salesmen to be employees), *cert. denied*, 455 U.S. 940 (1982); *Amber Delivery Serv.*, 651 F.2d at 57 (holding that package-delivery drivers were employees, despite employer's attempts to convert them into independent contractors in an attempt to avoid unionization); *City Cab Co. v. NLRB*, 628 F.2d 261 (D.C. Cir. 1980) (holding that "contract" drivers were employees, not franchisees); *Fugazy*, 231 N.L.R.B. at 1344 (finding "franchisee" limousine drivers to be employees); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974) (declining to call truck driving distributors franchisees); *Mister Softee*, 162 N.L.R.B. 354 (1966) (declaring "franchisee" salesmen to be employees).

179. See, e.g., *Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983) (lessee taxi drivers); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912 (11th Cir. 1983) ("daily lessee" cabdrivers); *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982) (taxi drivers operating under concession agreement with airport); *NLRB v. Tri-State Transp. Corp.*, 649 F.2d 993 (4th Cir. 1981) (lessor-operator of tractor-trailer); *NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379 (3d Cir. 1979) (owner-operator truck drivers); *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978) (lessee cab drivers); *Merchants Home Delivery Serv. v. NLRB*, 580 F.2d 966 (9th Cir. 1978) (owner-operators of delivery trucks); *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977) (owner-operators of dump trucks and other construction vehicles); *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445 (2d Cir. 1975) (route salesman-distributors of snack foods); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975) (drivers in a taxi drivers' association); *Carnation Co. v. NLRB*, 429 F.2d 1130 (9th Cir. 1970) (company-financed owner-drivers of dairy delivery trucks); *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697, 702 (10th Cir. 1970) (unionized milk truck drivers who had become owner-operator-distributors); *Frito-Lay, Inc. v. NLRB*, 385 F.2d 180 (7th Cir. 1967) (snack food distributors who were owner-operators of the delivery trucks); *NLRB v. Servette, Inc.*, 313 F.2d 67 (9th Cir. 1962) (unionized driver-salesmen who had become franchisees); *International Bhd. of Teamsters v. NLRB*, 280 F.2d 665 (D.C. Cir.) (unionized milk truck drivers who had become owner-operators), *cert. denied*, 364 U.S. 892 (1960); *National Van Lines v. NLRB*, 273 F.2d 402 (7th Cir. 1960) ("contract" drivers who furnished their tractor-trailers); *Precision Bulk Transp., Inc.*, 279 N.L.R.B. 437 (1986) (owner-operator truck drivers); *Don Bass Trucking, Inc.*, 275 N.L.R.B. 172 (1985) (owner-operator truck drivers); *Tarheel Coals, Inc.*, 253 N.L.R.B. 563 (1980) (owner-operator truck drivers); *Gold Medal, Inc.*, 199 N.L.R.B. 895 (1972) (driver-salesmen who owned and maintained their own trucks); *Bambury Fashions, Inc.*, 1969 N.L.R.B. Dec. (CCH) ¶ 21,326 (independent traveling salesmen of apparel); *Pure Seal Dairy Co.*, 1962 N.L.R.B. Dec. (CCH) ¶ 10,826 (distributors who furnished their own trucks).

180. See, e.g., *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759 (8th Cir. 1982) (stating that

For a long while, the NLRB apparently tried to expand NLRA coverage beyond mere common-law employees.¹⁸¹ On the whole, however, its efforts have been checked. The D.C. Circuit Court of Appeals, in *Yellow Taxi Co. v. NLRB*,¹⁸² noted that in slightly more than ten years the NLRB was overruled a dozen times after finding lessees, dealers, or owner-operators to be employees rather than independent contractors.¹⁸³

In short, while the facts of each case control, and sham franchises will not remove an employer from the grasp of federal labor law,¹⁸⁴ NLRA coverage never extends to a typical franchise. Indeed, except for a few special areas such as taxis, trucking, single-product distributors, and newspaper dealers,¹⁸⁵ reported cases are rare. Franchisees seeking relief from an oppressive franchise or a franchisor's abusive treatment typically do not look to federal labor relations law for help.¹⁸⁶

newspaper carriers were so controlled by company as to be employees); *Brown v. NLRB*, 462 F.2d 699 (9th Cir.) (holding news dealer to be independent contractor), *cert. denied*, 409 U.S. 1008 (1972); *News-Journal Co. v. NLRB*, 447 F.2d 65 (3d Cir. 1971) (determining that truck driver deliverymen were employees), *cert. denied*, 404 U.S. 1016 (1972); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971) (holding that newspaper distributors were employees); *Fort Wayne Newspapers, Inc.*, 263 N.L.R.B. 854 (1982) (finding newspaper distributors to be independent contractors); *Oakland Press Co.*, 249 N.L.R.B. 1081 (1980) (holding that owner-drivers who delivered newspapers were employees); *Donrey, Inc.*, 223 N.L.R.B. 744 (1976) (newspaper dealers who owned their delivery trucks were independent contractors); *Las Vegas Sun, Inc.*, 219 N.L.R.B. 889 (1975) (newspaper home delivery dealers were independent contractors); *Denver Post, Inc.*, 196 N.L.R.B. 1162 (1972) ("independent merchant" distributors held to be independent contractors); *News Syndicate Co.*, 1967 N.L.R.B. Dec. (CCH) ¶ 21,327 (franchisees held to be employees); *Long Island Daily Press Publishing Co. v. Tomitz*, 12 Misc. 2d 480, 176 N.Y.S.2d 215 (Sup. Ct. 1958) (franchisees held to be independent contractors); *see also* *Retail Clerks Int'l Union v. Quick Shop Markets, Inc.*, 604 F.2d 581 (8th Cir. 1979) (finding owners of franchised stores not to be employees, although union prevailed on other grounds); *Brown v. NLRB*, 462 F.2d at 702 n.2, 703 n.3, 705, 706 (citing numerous cases); *Site Oil Co. of Mo. v. NLRB*, 319 F.2d 86 (8th Cir. 1963) (stating that gas station franchisees were not employees); *S.G. Tilden, Inc.*, 1968-2 N.L.R.B. Dec. (CCH) ¶ 20,024 (franchisees of automotive repair shops are independent contractors); *Southland Corp.*, 1968-1 N.L.R.B. Dec. (CCH) ¶ 22,351 (franchisees of convenience stores are not employees).

181. *See, e.g., Yellow Taxi*, 721 F.2d at 383-84 n.39; *Lorenz Schneider Co.*, 517 F.2d at 453 n.15; *see also* *Adelstein & Edwards, The Resurrection of NLRB v. Hearst: Independent Contractors Under the National Labor Relations Act*, 17 U. KAN. L. REV. 191 (1969).

182. 721 F.2d 366 (D.C. Cir. 1983).

183. *Id.* at 382 n.37.

184. *See, e.g., Fugazy*, 231 N.L.R.B. at 1344 (stating that failure to pay striking limousine drivers money to which they were entitled in retaliation for drivers exercising their rights under § 7 of the National Labor Relations Act constituted an unfair labor practice); *Borden, Inc.*, 181 N.L.R.B. 109 (1970) (finding that employer who compelled employees to become "franchisees" or else risk having their sales routes sold to others violated the employer's NLRA duty to bargain collectively with the employees' representatives because it bypassed the employees' certified collective bargaining agent), *reaffirmed*, 192 N.L.R.B. 31 (1971).

185. *See supra* notes 178-80 and accompanying text.

186. For more overview, *see* *Linder, Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. 555 (1989); *McGuire, supra* note 168; and *Com-*

C. Labor Law Rights for Nonemployees and Supervisors

1. Independent Contractors: *Scott* and the NLRA

While the key statutes have not been altered significantly since the Labor Management Relations Act of 1947, Board and court opinions continue to broaden, narrow, and otherwise alter incrementally prior statutory interpretations. Occasionally, however, a holding or dictum seems to emphasize a new approach and not simply a variation. In the 1985 case of *Scott v. Brotherhood of Teamsters, Local No. 70*¹⁸⁷ a federal trial court hinted at shifting the emphasis away from previous authorities' exclusive focus on whether a claimant is an employee or represents employees. In eliminating certain injunctions on picketing by a union representing exclusively independent contractors, the court stated, "[t]he fact that the NLRA is primarily concerned with employer-employee relationships and that § 2(3) [29 U.S.C. § 152(3)] provides a definition of 'employee' does not mean this definition should be read into every section of the Act, regardless of whether a given section makes reference to conduct by 'employees.'"¹⁸⁸ Conceivably, if this broader view of the NLRA were extended beyond the picketing issues in *Scott*, franchisees could seek some relief under portions of the NLRA.¹⁸⁹

The statute itself, however, suggests the contrary. NLRA Sections 7 (declaring fundamental labor rights) and 8(a) (listing employer unfair labor practices) seem to require employee status. Section 7¹⁹⁰ declares

ment, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 INDUS. REL. L.J. 278 (1977). Marc Linder notes that Sweden, the Federal Republic of Germany, and several Canadian provinces have accorded collective bargaining rights to persons who, under present interpretation of the National Labor Relations Act, would be considered unprotected nonemployees. Linder, *supra*, at 599. He proposes that American law extend organizational rights to these "employee-like" persons. *Id.* at 557, 601. Linder's analysis, however, is based on class, and thus only reaches those who are not "capital accumulators" but are in need of a facilitated "transition to employee status." *Id.* at 601. Franchisees, as capitalists, still would not be protected under this expanded NLRA coverage.

187. 633 F. Supp. 121 (N.D. Cal. 1985).

188. *Id.* at 128; see also *Chipman Freight Servs. v. NLRB*, 843 F.2d 1224 (9th Cir. 1988) (corresponding to *Scott*, and finding that union of independent contractors had right to strike and picket peacefully).

189. See, e.g., 29 U.S.C. § 158(b)(4)(ii)(B) (1988) (expressly allowing primary picketing).

190. Section 7 of the NLRA (codified as amended at 29 U.S.C. § 157 (1988)), states: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)]. The italicized portion was added via the Labor Management Relations Act, tit. I, sec. 7, 61 Stat. 140 (1947).

rights for "employees," and Section 8(a)¹⁹¹ concerns interference with "employees" and administration of or membership in "labor organizations." The definitions of "employee" outlined in 29 U.S.C. Section 152(3)¹⁹² and "labor organization" stated at 29 U.S.C. Section 152(5) apply whenever used in the NLRA.¹⁹³ Because the term "labor organization" refers to "any organization of any kind, or any agency or employee representation committee or plan, *in which employees participate*,"¹⁹⁴ Sections 8(a)(2) and (3) on "labor organizations" are inapplicable to groups that are not composed of some employees. Thus, the court in *Scott* seemed to view "labor organizations" as distinct from "employees" in a way that the statutory definitions do not.¹⁹⁵

2. Supervisory Employees

Some circuit courts actually have treated unions composed solely of supervisors in a way that seems to overlook the 29 U.S.C. Section 152(5) requirement that a labor organization include "employees," which under Section 152(3) specifically excludes, *inter alia*, independent contractors and supervisors. In effect, these courts have held that under 29 U.S.C. Section 185¹⁹⁶ supervisor unions can sue or be sued in

191. The National Labor Relations Act § 8(a), 29 U.S.C. § 158(a) (1988), states: It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title [29 U.S.C. § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title [29 U.S.C. § 159(a)].

192. See *supra* note 171 and accompanying text.

193. 29 U.S.C. §§ 152-168 (1988). The Labor Management Relations Act, 61 Stat. 136 (1947) not only amended these provisions of the NLRA (via Title I), but also added new sections (Titles II, III, IV, and V). 29 U.S.C. §§ 141-197 (1988).

194. National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1988) (emphasis added).

195. The court noted that the applicable Labor Management Relations Act amendment to NLRA § 8(b)(4)(B) refers to a "labor organization," but does not mention specifically "employees." Therefore, the court assumed that a labor organization may consist exclusively of nonemployees (independent contractors). *Scott* 633 F. Supp. at 128. For purposes of the NLRA, however, a labor organization must include employees. See *supra* notes 171, 192-94 and accompanying text.

196. Enacted via § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988) states, in part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

federal court with respect to violations of collective bargaining agreements.¹⁹⁷ Indeed, in *Majewski v. B'nai B'rith Int'l*¹⁹⁸ the D.C. Circuit Court held that when a supervisory employee sues an employer for allegedly violating the collective bargaining agreement between the employer and the supervisors' association, federal labor law requires that the suit be filed under 29 U.S.C. Section 185, not as a diversity action.¹⁹⁹

Scott fails to mention any of these cases, perhaps for the simple reason that independent contractors are nonemployees beyond even a fair or useful analogy to the supervisors, who actually *are* employees, in these 29 U.S.C. Section 185 cases. Independent contractors, thus, do not have the attributes that moved Congress and the courts to accord supervisory employees the limited right to organize collectively and to sue or be sued on their collective bargaining agreements.²⁰⁰

3. Franchisees

In finding authority for court enforcement powers under 29 U.S.C. Section 185, federal courts have emphasized the special nature of supervisory employees and their unions. After the Labor Management Relations Act, supervisory employees no longer were guaranteed a right of collective bargaining, but otherwise still enjoyed many traditional labor

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

197. See, e.g., *District 2, Marine Eng'rs Beneficial Ass'n v. Amoco Oil Co.*, 554 F.2d 774 (6th Cir. 1977); *Dente v. International Org. of Masters, Mates & Pilots, Local 90*, 492 F.2d 10 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974); *National Marine Eng'rs Beneficial Ass'n v. Globe Seaways, Inc.*, 451 F.2d 1159, 1160 n.1 (2d Cir. 1971); see also *infra* note 207. But cf. *International Org. of Masters, Mates & Pilots v. NLRB*, 351 F.2d 771, 775 (D.C. Cir. 1965); *A.H. Bull Steamship Co. v. National Marine Eng'rs Beneficial Ass'n*, 250 F.2d 332 (2d Cir. 1957) (reasoning later overruled by *National Marine*, 451 F.2d at 1159), cert. denied, 355 U.S. 932 (1958). These courts have not held, however, that supervisor unions can sue under § 7 employee rights or § 8(a) unfair labor practices by employers.

198. 721 F.2d 823 (D.C. Cir. 1983).

199. Diversity jurisdiction, 28 U.S.C. § 1332 (1988), is generally inappropriate because the matter cannot arise under state law, which is preempted by federal law; however, 29 U.S.C. § 185 does not exclude the state courts. They, too, may hear pleas for enforcement of collective bargaining agreements. State courts simply must apply federal law in deciding cases. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

200. Under § 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3) (1988), specific rights granted by the NLRA, 29 U.S.C. §§ 152-168 (1988), are unavailable to supervisors as well as independent contractors. For examples of such rights, see NLRA §§ 7 and 8(a), 29 U.S.C. §§ 157 & 158(a) (1988), and *supra* notes 190-91. See also *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 188 (1965) (holding that the enactment of the Labor Management Relations Act meant that "§ 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities under the umbrella of § 8").

rights. Independent contractors, including most franchisees, have no such labor law heritage. The comments in *Scott*, therefore, may be read as stretching the literal and historical bounds of the NLRA well beyond what was done in court decisions dealing with supervisors.²⁰¹ Even if construed most liberally in favor of franchisee groups, however, *Scott* and the supervisory employee cases²⁰² would not force franchisors to recognize a franchisee association, to refrain from tactics that discourage franchisee membership in associations, or to negotiate with the association. If the law did recognize franchisees as supervisory employees,²⁰³ or if franchisees otherwise retained labor law rights, the franchise relationship could be affected when franchisors voluntarily bargain with franchisee groups. In these instances, franchisees might be permitted to proceed under 29 U.S.C. Section 185 in federal district court for breaches of the contract between "employer" (franchisor) and "labor organization" (franchisee association). No ruling of this kind has

201. See *infra* note 205 and accompanying text. With respect to matters covered by the Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1988)), see *Corporate Printing Co. v. New York Typographical Union No. 6*, 555 F.2d 18, 21 (2d Cir. 1977) (stating that suits dealing with independent contractors may come within the definition of "labor dispute" (citing *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968))). *Corporate Printing Co.* is discussed *infra* at notes 208 & 210.

202. See *supra* notes 187-89, 196-98 and accompanying text; *infra* note 207 and accompanying text.

203. As stated by Professor Raymond McGuire, "the contractual lines of control held by the franchisor are often so taut that it is difficult to distinguish the franchisee from an employee-supervisor." McGuire, *supra* note 168, at 226. The franchise agreement is generally a set form prepared by the franchisor, with little room for negotiation. See *supra* note 21 and accompanying text. In such a case, the franchisee's independence really may be no more than that of a hired manager. See, e.g., *Hearings on Franchising Practices Reform Act: Hearings Before U.S. House of Representatives Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 194 (1976) (statement of Rep. James H. Scheuer); *Hearings on the Impact of Franchising on Small Business, Before U.S. Senate Subcomm. on Urban and Rural Economic Development of the Select Comm. on Small Business, Part 1*, 91st Cong., 2d Sess. 309, 319 (1970) (statement of FTC General Counsel Buffington); E. DIXON, JR., *supra* note 9, at H-43 (explaining that though the franchisee is manager-owner of the franchise, the emphasis is always on "manager" because the franchisee "must take orders from headquarters"); S. LUXENBERG, *supra* note 4, at 285 (stating that "[f]ranchisees function as managers"); B. SMITH & T. WEST, *supra* note 9, at 3 (stating that a franchisor says, "It's your business, but I control what you do"); Brown, *supra* note 121, at 544 (paraphrasing the statement of a leading franchisor who likened the franchisee to a store manager, but noted that the franchisee, because of a substantial capital outlay, is not able to quit and "come out whole"); Goodwin, *Franchising in the Economy: The Franchise Agreement as a Security Under Securities Acts, Including 10b-5 Considerations*, 24 BUS. LAW. 1311, 1320 (1969) (explaining that there is a "ministerial instead of discretionary participation quality in the franchisee's 'managing and operating his own business'"); O'Donnell, *No Entrepreneurs Need Apply*, FORBES, Dec. 3, 1984, at 124 (contending that "[r]unning a franchised business means giving up your independence and playing by someone else's rules," and that franchising is for people (franchisees) who want to manage what someone else (the franchisor) has created and for those who "don't have a product or the skills to establish [their] own company").

been reported, and—despite *Scott* and the supervisor cases—a ruling in the future seems unlikely.

D. Summary

The problem for franchisees seeking to invoke the NLRA is that they generally do not meet the NLRA definition of employees.²⁰⁴ Thus, United States labor law is in most, if not all, respects of no benefit to franchisees seeking to advance their collective rights.²⁰⁵

204. See *supra* notes 169-71, 179, 184-86 and accompanying text. Even the supervisory employee cases—which somewhat favor unionization and collective negotiations—concern the rights of employees, not independent contractors. See *supra* text following note 200.

Assuming *arguendo* that a “franchisee-as-employee” status could be attained and would be desirable for purposes of collective bargaining and other labor law safeguards, franchisees would seek to avoid that status in other areas of the law. For instance, as an “employee” the franchisee would have little standing to pursue antitrust claims against its “employer,” the franchisor. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983); *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983). Under standards announced in *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the franchisee-employee may have to show participation as a competitor or consumer in the same market as the alleged malefactors, that the sustained injury was the kind that the antitrust laws were intended to forestall, that the alleged antitrust violations caused the injury, that the measure of harm would not be speculative, and that the handling of the case would be “within judicially manageable limits” (*i.e.*, avoiding the problems inherent to complex damages apportionment or duplicative recoveries). *Id.* at 534-45.

In *Associated Gen. Contractors* the Supreme Court denied standing to a labor union that claimed the defendant association conspired to restrain the union’s business activities by coercing contractors, landowners, and others to deal with nonunion contractors. The Court found no nexus between the quality of competition and the union’s interests, and no indication that, as competition increased, the union’s interests also would rise. *Id.* at 539. If the franchisee really has the characteristics or status of an employee, restraints on competition must affect him within his own market as a franchisee-employee. Absent restraints on this particular labor market, the clear trend is for courts to admonish the plaintiff employee to sue for wrongful discharge, or breach of contract, but not for antitrust violations. See *Adams v. Pan Am. World Airways*, 828 F.2d 24 (D.C. Cir. 1987); *Lucas v. Bechtel Corp.*, 800 F.2d 839 (9th Cir. 1986); *Gregory Mktg. Corp. v. Wokefern Food Corp.*, 787 F.2d 92 (3d Cir. 1986); *In re Industrial Gas Antitrust Litig.*, 681 F.2d at 514. *But cf. Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984) (holding that plaintiff had standing because he was the victim of a boycott in the labor market), *cert. dismissed*, 469 U.S. 1200 (1985); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423 (S.D.N.Y. 1986) (finding that plaintiffs who were coerced into participating in an illegal scheme had standing).

205. See, *e.g.*, *Hanna Mining*, 382 U.S. at 181; *Amoco Oil*, 554 F.2d at 774; *Dente*, 492 F.2d at 10; see also *supra* note 200.

Other nations have considered proposals to give franchisees collective bargaining rights against their franchisor. See, *e.g.*, Gast, *Franchising in Europe—France*, in *INTERNATIONAL FRANCHISING—AN OVERVIEW* 379, 380-81 (M. Mendelsohn ed. 1984). Gast notes that the French government has been considering the enactment of a law specifically about franchising, with one of the two main proposals being “that the franchisees merge into associations, with which the franchisor would be obliged to negotiate agreements and disputes.” *Id.* As best can be determined, no such collective bargaining franchisee “union” laws have been put into effect *anywhere*. In fact, only in the past year did France adopt a law on franchising, one concerned only with disclosure, and not with any substantive rights such as collective bargaining. Telephone interview with Philip F. Zeidman, First Chairman of ABA Antitrust Law Section’s Committee on Franchising, and

Franchisee hopes must focus on broad statutory changes or on franchisor recognition of nonemployee collective bargaining units composed of franchisees. Statutory changes seem unlikely, and the recognition of nonemployee units is strictly voluntary.²⁰⁶ Indeed, while a franchisor's recognition of these units perhaps could bind the parties before a court under 29 U.S.C. Section 185(a),²⁰⁷ one court has stated that a company cannot be estopped from challenging workers' employee status even though it had recognized those workers previously as employees.²⁰⁸ Under this interpretation, recognition must not only arise freely, but always must remain voluntary.

Although franchisees presumably have the right to organize,²⁰⁹ and federal courts may be powerless to issue injunctions against franchisee organizational efforts or strikes,²¹⁰ the antitrust issues still remain a

Washington Counsel to the International Franchise Association (Sept. 7, 1990). The only nations with perhaps even some prospect of granting collective bargaining rights to franchisees are in the "Socialist World." *Id.*; see also FOREIGN SURVEY, *supra* note 172.

206. See *Newspaper Drivers & Handlers Local 372 v. NLRB*, 735 F.2d 969, 971 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Amoco Oil*, 554 F.2d at 778 n.3. Both cases dealt with unions composed of supervisors. The Court in *Hanna Mining* discussed the Labor Management Relations Act's amendment of 29 U.S.C. § 152(3), which excluded supervisory workers from the definition of "employees." The Court stated Congress's "propelling intention was to relieve employers from any compulsion under the [NLRA] and under state law to countenance or bargain with any union of supervisory employees." *Hanna Mining*, 382 U.S. at 189.

207. In such cases, the NLRB would have no jurisdiction. See *Majewski*, 721 F.2d at 826 (stating that "for more than a dozen years now, district and appellate courts have uniformly concluded that § 301 [29 U.S.C. § 185 (1982)] does apply to agreements involving labor organizations that contain supervisors"); *District 2, Marine Eng'rs Beneficial Ass'n v. Grand Bassa Tankers*, 663 F.2d 392, 398 n.6 (2d Cir. 1981) (stating that the definition of "employee" in 29 U.S.C. § 152(3) has nothing to do with federal jurisdiction under 29 U.S.C. § 185(a)); *accord Amoco Oil*, 554 F.2d at 774; *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355 (3d Cir. 1976); *Dente*, 492 F.2d at 10; *Isbrandsten Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 256 F. Supp. 68 (E.D.N.Y. 1966); see also *supra* notes 196-97 and accompanying text.

208. *Newspaper Drivers & Handlers Local 372*, 735 F.2d at 971. However, while franchisors are not subject to collective bargaining with their franchisees, they apparently cannot obtain the type of relief frequently given to employers before 1932: federal court injunctions against strikes. If franchisees call a nonviolent strike, they should be protected by the Norris-LaGuardia Act, 47 Stat. 70 (1932), which very broadly deprives federal district courts of the power to issue injunctions as to labor disputes. 29 U.S.C. §§ 104, 113 (1988). The Norris-LaGuardia Act specifically states that the labor disputants need not "stand in the proximate relation of employer and employee" to be covered by the Act. 29 U.S.C. § 113(c) (1982). The dispute even can be drawn between "employers" and other "employers." 29 U.S.C. § 113(a)(2) (1988); see also *Corporate Printing Co.*, 555 F.2d at 20-21 (noting the broad meaning of "labor dispute" under the Norris-LaGuardia Act); *A.H. Bull*, 250 F.2d at 338-39 (citing 29 U.S.C. § 113 and overturning an injunction, but noting that "Bull can refuse to bargain [with its supervisors or] discharge the supervisors, and be guilty of no unfair labor practice or conduct proscribed by any other law, either national or local, relating to collective bargaining").

209. See *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 661 (1974) (holding that the Labor Management Relations Act "does not forbid anyone to organize" (quoting H.R. REP. NO. 245, 80th Cong., 1st Sess. 17 (1947))).

210. *Corporate Printing Co.*, 555 F.2d at 19-22 (determining that managerial or supervisory

barrier. Absent an exemption similar to that available for unions, the collective efforts of franchisees are subject to effective attack under antitrust law or other unfair competition principles.²¹¹

VI. ANTITRUST LAW: THE BROODING OMNIPRESENCE

Absent a labor organization exemption²¹² for franchisees, antitrust law excuses what might otherwise stand exposed as simply an attempt by franchisors to eradicate franchisee organizations. Antitrust law (and, more broadly, the law on unfair competition) actually may be the primary rationale for dissolving franchisee associations.

Antitrust law, however, is more than merely an excuse to "bust" franchisee "unions." Without careful planning, franchisee group activities can constitute an illegal combination in restraint of trade, an attempt to monopolize trade, or some other antitrust violation.²¹³ Regardless of whether a court speaks of a per se violation or the "rule of reason,"²¹⁴ franchisees and similar parties such as dealers and distributors have been found liable under antitrust law for the following

employees have no collective bargaining rights and no protection against retaliatory discharge and replacement by nonunion workers, but that their organizing efforts cannot be enjoined by the federal courts); *A.H. Bull*, 250 F.2d at 338-39.

211. See *infra* Part VI. As to the antitrust limits placed on a state franchise law's right of association statute, see *supra* notes 60, 64 and accompanying text (Michigan statute), and *supra* note 65 (Massachusetts automobile dealers statute). For the same limits on the proposed Uniform Act's right of free association provision, see *supra* note 77 and accompanying text; see also Brown, *supra* note 127, at 813 & nn.283-84 (noting that the Teamsters' effort to organize California gasoline station dealers was attacked successfully as a common-law criminal conspiracy, as were seminal attempts to organize labor unions in the 1920s). A limited antitrust exemption is proposed *infra* at text accompanying notes 262-69.

212. See *infra* text accompanying notes 262-69.

213. Note that a series of individual agreements, which in the aggregate restrain trade, do not constitute thereby an antitrust violation. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), a hubble gum manufacturer sued its competitor and the Major League Baseball Players' Association for allegedly violating the Sherman Act in their arrangement for the sale of baseball cards. The key components of the arrangement were Topps's individual licensing agreements with each player, the commercial authorization contract between the association and each player, and the renegotiation of the players' licensing agreements by Topps and the association. In rejecting the antitrust claims on the first prong of the arrangement, the court stated, "Merely because Topps, through individual contracts with every minor league player, managed to obtain license agreements with all major league players, does not make the aggregation of these contracts an unlawful combination in restraint of trade." *Id.* at 149-50. Under the reasoning in *Fleer Corp.* and other cases, e.g., *Lawlor v. National Screen Serv. Corp.*, 270 F.2d 146 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960), franchisees may become susceptible to antitrust actions only when they act as a collective unit, not as independent entities.

214. Under the "rule of reason," conduct violates the antitrust laws only when, on balance, it negatively affects competition. This "reasonableness" standard has continued to evolve since first erected in the seminal case, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The per se standard requires no analysis of competitive impact. Some activities so frequently foster anticompetitive results, they are deemed to be per se antitrust violations. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

activities: (1) persuading a franchisor to terminate the franchise of a particular distributor;²¹⁵ (2) persuading a franchisor to refuse granting a franchise to an applicant;²¹⁶ (3) avoiding all dealings with a certain supplier;²¹⁷ (4) deciding how to allocate territories;²¹⁸ (5) acting in unison to pressure a wholesaler into restoring exclusive sales territories;²¹⁹ (6) boycotting a manufacturer for whom the association members ordinarily would produce goods;²²⁰ and (7) "blacklisting" manufacturers that refused to accept the dealer association's standard contract.²²¹ Because

215. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (affirming jury verdict in favor of plaintiff herbicide distributor who alleged that the manufacturer and other distributors conspired to fix resale prices and terminated plaintiff for price cutting).

216. See *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). In this case, a franchisee who was denied an additional franchise in a new location challenged an arrangement whereby franchisor Holiday Inn let its existing franchisees "veto" franchise applications for their market areas. The court found this practice to be a horizontal restraint and, thus, a per se antitrust violation, because Holiday Inn (which was also a franchisee) and other franchisees were barred from operating any hotels other than Holiday Inns, and because the system allocated the market of Holiday Inns among supposed competitors. *Id.* at 1242, 1246-52.

217. See *Fashion Originators Guild of Am. v. FTC*, 312 U.S. 457 (1941). In *Fashion Originators* a group of textile and garment manufacturers, as well as their affiliates, adopted a scheme whereby members of the group would not use or deal in textiles copied from a member's designs and would sell only to retailers who promised not to use or deal in copied designs. The Supreme Court unanimously held the scheme to violate the antitrust laws, regardless of whether tortious copying thereby was curtailed. *Id.* at 468; see also *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368 (3d Cir. 1979). In *Larry V. Muko* the court overturned a directed verdict for the defendant restaurant chain and labor organizations because the plaintiff presented sufficient evidence for the jury to find that the defendants agreed future restaurants would be built only by unionized contractors. If true, this action would constitute an antitrust violation because there was no applicable labor law exemption. *Id.*

218. *United States v. Topco Assocs.*, 405 U.S. 596 (1972), *aff'd on reh'g*, 414 U.S. 801 (1973). Topco, a buying association for small- to medium-sized regional supermarket chains, allocated exclusive territories to its members, who had a type of veto over admission of new members. The Court held that this practice was a horizontal restraint operating as a per se violation of Sherman Act § 1, although price fixing was not part of the scheme. 405 U.S. at 606-12. *But cf.* *Parsons v. Ford Motor Co.*, 669 F.2d 308 (5th Cir. 1982). Ford attempted to enforce a fleet allocation system with its dealers that was designed to facilitate sales to legitimate end-users, and to bypass so-called "bootleggers" like Parsons who made money by buying vehicles at fleet prices from one dealer, and then reselling them at a higher price to others. Parsons alleged that the Ford system violated antitrust law by "freezing out" bootleggers. The Court granted summary judgment for Ford, however, holding that it was not an antitrust violation or conspiracy to prevent a bootlegger from obtaining vehicles under false pretenses of being an end-user and then reselling them for a profit to another dealer. *Id.*

219. See *United States Audio & Copy Corp. v. Philips Business Sys.*, 1983-1 Trade Cas. (CCH) ¶ 65,364, at 70,169 (N.D. Cal. 1983) (discussed *infra* at text accompanying notes 237-38).

220. See *Hinton v. Columbia River Packers Ass'n*, 131 F.2d 88 (9th Cir. 1942) (affirming an injunction against an independent fishermen's association that boycotted a packing company for the company's failure to assent to a standard form of agreement, including a provision that the company buy fish only from association members).

221. See *National Ass'n of Women's & Children's Apparel Salesmen*, 3 Trade Reg. Rep. (CCH) ¶ 19,538 (FTC 1971) (enforcing FTC cease and desist order against association that blacklisted "uncooperative" manufacturers from trade shows and also excluded manufacturers who failed to hire salesmen according to the standard contract drafted by the association), *enforced sub*

franchisees are at the same level of the production and distribution chain, their association, perhaps for more innocuous purposes than those stated above, may nonetheless risk the finding of horizontal conspiracy—a per se antitrust violation.²²² Indeed, although certain membership rules and self-regulating mechanisms, including trade group codes, may be judged under the rule of reason standard,²²³ courts have found per se violations with respect to other association activities such as price regulation,²²⁴ boycotts and “blackballing” of nonmembers,²²⁵ and collective actions to force franchisor-like parties into changing their policies toward group members.²²⁶

Franchisee associations allegedly may foster trade constraints by seeking to renegotiate franchise royalties, advertising fees, quality controls, or other matters directly within the purview of the franchisor-franchisee relationship. Because franchisees within a franchised system are, at law, independent actors, their joint actions probably would be treated as a horizontal restraint of trade just as if Exxon, Chevron, Mobil, and Texaco jointly agreed upon prices or territories. The same actions taken by the franchisor would be subject only to a rule of reason analysis.²²⁷

Responsibility for antitrust violations, however, can reach beyond the franchisee association and its members. Even when franchisees are

nom. National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

222. See *Topco Assocs.*, 405 U.S. at 596; *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

223. See *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (dealing with codes promulgated by the American Society of Mechanical Engineers); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (holding that trotting-horse association's prohibition against members racing at tracks that refused to join the association was not a per se violation of antitrust laws, and that rule of reason sanctioned the prevention of “free riding” by nonmembers).

224. This regulation has been found to be unlawful price fixing. See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 140 (1966) (holding that auto dealers who, through their trade association, induced suppliers to prevent other dealers from selling to or through discounters had engaged in “a classic conspiracy in restraint of trade”); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *Ohio ex rel. Brown v. Central Ohio Chevrolet Dealers Ass'n*, 1975-2 Trade Cas. (CCH) ¶ 60,437, at 66,924 (Ohio Ct. Com. Pleas 1975) (finding violation under Ohio antitrust law).

225. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914); *Kruezer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984); *National Ass'n of Women's & Children's Apparel Salesmen*, 3 Trade Reg. Rep. (CCH) ¶ 19,538; *Hinton*, 131 F.2d at 88.

226. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *Hinton*, 131 F.2d at 88; *National Ass'n of Women's & Children's Apparel Salesmen*, 3 Trade Reg. Rep. (CCH) ¶ 19,538.

227. The actions would then be vertical restraints. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

the primary force behind certain anticompetitive actions, the potential antitrust liability often extends to the franchisor as well, creating severe consequences for the overall franchised system.²²⁸ Thus, in certain circumstances, even if the franchisor bears no animus toward the association, the franchisor nonetheless may try to dissolve the association or reduce it to just a communications clearinghouse between franchisees and their franchisor, not a collective force for lobbying and negotiating. In short, the franchisor often protects his interests—plays it safe—by ignoring, restricting, undermining, or even destroying the franchisee association.

*Cunningham v. A.S. Abell Co.*²²⁹ aptly demonstrates a franchisor's defensive tactics. In *Cunningham* the A.S. Abell Company, a newspaper publisher, agreed to a form contract for each of its home delivery route owners. The contract had been approved by the Sun Route Owners' Association and was presented to Abell by the Carriers' Council, the Association's elected representative. Abell essentially recognized the Association as a collective bargaining unit, with the Carriers' Council empowered to represent the carriers' best interests in negotiations with the newspaper's management.²³⁰

This arrangement lasted for several decades until Abell, prompted by a Supreme Court antitrust ruling,²³¹ reviewed its relations with the carriers. Advised by counsel that the arrangement was unlawful, Abell terminated the form contract and notified each carrier that new individual agreements would be drafted.²³² Abell subsequently terminated a route owner, who in turn claimed Abell's action to be a breach of contract. Both the trial court and the state supreme court upheld Abell's right and duty under the antitrust laws to take these unilateral actions.²³³

Not surprisingly, there are limits to the antitrust liability of franchisee associations. For example, as long as the franchisee association is petitioning the government—lobbying to enact, broaden, or retain state franchisee protection statutes, or bringing suit to obtain judicial or ad-

228. The franchisor may be held to be a coconspirator or other party to antitrust violations by the franchisees. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). The cases are described briefly *supra* at notes 215-16.

229. 264 Md. 649, 288 A.2d 157, *cert. denied*, 409 U.S. 865 (1972).

230. *Id.* at 651-52, 288 A.2d at 158.

231. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

232. The letter so informing each carrier also stated: "We [Abell] believe that we can legally no longer deal concertedly with all Route Owners together, through the Carriers' Council as their joint representative, or otherwise, but that we must deal with each Route Owner independently." *Cunningham*, 264 Md. at 652-53, 288 A.2d at 159.

233. *Id.* at 653, 288 A.2d at 160.

ministrative remedies against franchisor abuses—the association is immune from antitrust liability.²³⁴ Additionally, as part of its legitimate function, a trade group may gather and share overall industry price statistics or other general information without violating antitrust laws.²³⁵ When franchisees collectively and directly confront the franchisor, however, they run the strong risk of being considered part of a horizontal conspiracy violative of Sherman Act Sections 1 and 2.²³⁶ For instance, in *United States Audio & Copy Corp. v. Philips Business Systems, Inc.*²³⁷ dealers in office dictation equipment joined forces to convince their supplier to restore exclusive territories. They withheld payments, filed lawsuits, interfered with the appointment of new dealers, encouraged dealers to switch to competing products, and pressured the dealer trade association to encourage dealers to use another supplier. The trial court denied the defendant dealers' motion for summary judgment. It found that these activities could establish a horizontal conspiracy to divide markets, an unlawful boycott, a concerted refusal to deal with the supplier, an attempted monopolization, or perhaps even a conspiracy to fix prices.²³⁸

Admittedly, courts sometimes have turned to the rule of reason in cases dealing with trade associations, professional societies, or other group arrangements analogous to collective franchisee activities.²³⁹ In

234. This is the "Noerr-Pennington" doctrine. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976) (holding that activities of a labor union and two associations of restaurant and hotel employers in opposing the grant of building permits for McDonald's restaurants consisted entirely of attempts to lobby and petition the government and, therefore, were immune from antitrust liability), *cert. denied*, 430 U.S. 940 (1977); see also *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 24 (7th Cir. 1971) (stating that because of the first amendment, the FTC "may not prohibit the telling of a true statement even if that representation perpetuates the dominance of a monopolist").

With regard to "sham" suits, see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-80 (1973), and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

235. *Wire Mesh Prods., Inc. v. Wire Belting Ass'n*, 520 F. Supp. 1004, 1008 (E.D. Pa. 1981).

236. Section 1 violations include price fixing, boycotting, and refusing to deal. Section 2 focuses on monopolization or attempted monopolization. Many commentators have noted the ease with which franchisee groups can violate antitrust laws, even for simply organizational and representational activities. See, e.g., Chisum, *supra* note 119, at 371; McGuire, *supra* note 168, at 251 & n.137; Zwisler, *Franchisee Associations: Legal Issues That Will Shape Their Future*, Remarks at the 18th Annual Legal Symposium of the International Franchise Association (IFA) 12-15 (May 6-7, 1985) (transcript available from IFA, Washington, D.C.).

237. 1983-1 Trade Cas. (CCH) ¶ 65,364 (N.D. Cal. 1983).

238. *Id.* ¶¶ 70,169, 70,173; cf. *Monsanto*, 465 U.S. at 752 (acknowledging that a franchisor should listen to franchisee complaints as part of an ordinary course of business approach); *Betaseed, Inc. v. U. & I, Inc.*, 681 F.2d 1203 (9th Cir. 1982) (holding that the formation of a joint committee by a competing grower and the regular grower's farmer-producers to petition the regular grower for changes is not a per se antitrust violation).

239. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (test-

*DeFilippo v. Ford Motor Co.*²⁴⁰ eight Philadelphia-area Ford dealers successfully combined to persuade Ford Motor Company not to give other Ford dealers special terms for a new dealership. In ruling for the dealer group, the Third Circuit looked at the rationale for the combination and concluded that the collective action was not a group boycott constituting a per se unreasonable trade restraint.²⁴¹ Inasmuch as the plaintiffs still were able to become Ford dealers and otherwise conduct business on the same terms as the other dealers, there was no Section 1 violation of the Sherman Act.²⁴²

Still, the antitrust cases generally cannot give comfort to franchisee associations. While individual franchisees often turn to antitrust law²⁴³ for relief from what appears to be an oppressive franchisor,²⁴⁴ franchisees that work together become susceptible to franchisor claims or counterclaims of (1) antitrust violations, such as price fixing, group boycotts, monopolization, illegal combinations, and other restraints of trade or refusals to deal;²⁴⁵ (2) unfair competition and other torts;²⁴⁶ and (3)

ing price fixing by blanket license fee under rule of reason); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (finding that society's ban of competitive bidding was not a per se violation, but was unlawful under the rule of reason). The choice between per se or rule of reason revolves around the type of market behavior at issue. See, e.g., *United States Audio*, 1983-1 Trade Cas. (CCH) ¶ 70,173 (N.D. Cal. 1983) (listing four per se Sherman Act violations). The per se rule still applies to "horizontal" restraints—agreements among competitors at the same market level (e.g., retail distributors). See *Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982).

240. 516 F.2d 1313 (3d Cir. 1975), *cert. denied*, 423 U.S. 912 (1976).

241. *Id.* at 1320.

242. *Id.* at 1320-21.

243. Franchisees also commonly include counts alleging breaches of contract and misrepresentation. For a discussion of problems franchisees might face in raising antitrust claims if the franchisees are deemed to be employees of the franchisor, see *supra* note 204.

244. To forestall or prevent franchise, lease, or sales contract terminations, franchisees have persuaded numerous courts that terminations would further a franchisor's anticompetitive practices. See, e.g., *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 366 (7th Cir. 1971) (and cases cited therein). In *Milsen* a group of franchisees sued the franchisor and obtained a preliminary injunction against franchise terminations. *Id.* at 366-67. Furthermore, when franchisees sue their franchisor and allege that a franchisor-initiated program violates the antitrust laws, the franchisees' participation in that program cannot be used by the franchisor as an *in pari delicto* (of equal fault) defense. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

245. See, e.g., *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (holding that an association may be liable for antitrust violations when its members with real or apparent authority use the association to effectuate anticompetitive practices); *Hinton v. Columbia River Packers Ass'n*, 131 F.2d 88 (9th Cir. 1942); *United States Audio*, 1983-1 Trade Cas. (CCH) ¶ 65,364 (described *supra* notes 237-38 and accompanying text); *National Ass'n of Women's & Children's Apparel Salesmen*, 3 Trade Reg. Rep. (CCH) ¶ 19,538 (FTC 1971) (described *supra* note 221), *enforced sub nom.* *National Ass'n of Women's & Children's Apparel Salesmen v. FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *In re Detroit Autodealers Ass'n*, 5 Trade Reg. Rep. (CCH) ¶ 22,653 (FTC 1989) (stating that agreement among area auto dealers to have all area showrooms closed on Saturdays and three weekday evenings was unlawful restraint of trade; no labor law exemption applicable because agreement was among deal-

even criminal conspiracy.²⁴⁷

VII. CONCLUSIONS AND RECOMMENDATIONS

A. *The Present Situation: A Need for Well-Established and Substantial Rights of Association*

Occasionally franchisees are large and powerful,²⁴⁸ but usually they are not. In most instances, their franchisors have a significant advantage in resources—money, information, political influence, business experience, and access to professional advice.²⁴⁹

Franchisees generally do bear a greater degree of economic risk. According to some commentators, the individual franchisee in most franchised operations is much more likely to fail than the franchisor. This risk differential results partly because the franchisor typically collects substantial franchise fees up front and a percentage of gross sales for the life of the agreement, regardless of whether the franchisee nets any profit.²⁵⁰ Franchisors even have acknowledged the inequities of the relationship.²⁵¹ Indeed, some entire franchised systems are actually experiments in which a franchisor establishes franchises as a means to test the market for a product or service. If the product or service succeeds, the franchisor either will buy out the franchisees or compete with

ers, not really between dealers and their employees); H. BROWN, *supra* note 1, § 11.12, at 11-36 & n.28; BROWN, *supra* note 127, at 775 & n.54, 813-14 & nn.285-90; CHISUM, *supra* note 119, at 371 & n.414.

246. See, e.g., *In re Pontiac Dealers Advertising Ass'n*, 1980-1 Trade Cas. (CCH) ¶ 63,011 (Mass. Super. Ct. 1979); *Ohio ex rel. Brown v. Central Ohio Chevrolet Dealers Ass'n*, 1975-2 Trade Cas. (CCH) ¶ 60,437 (Ohio Ct. Com. Pleas 1975); see also BROWN, *supra* note 50, at 5, col. 2 n.9 (citing *Burch v. Baltimore County Refuse Collectors Ass'n*, Trade Reg. Rep. (CCH) No. 258, Dec. 6, 1976, at 4).

247. BROWN, *supra* note 127, at 813 & n.283.

248. See S. LUXENBERG, *supra* note 4, at 272-73; BRAUN, *Policy Issues of Franchising*, 14 Sw. U.L. REV. 155, 225 n.272 (1984).

249. See, e.g., *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973) (stating that Shell was the dominant party in the relationship and could dictate its terms), *cert. denied*, 415 U.S. 920 (1974); Brief for Petitioner at 20, 27, 30, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172) (discussing the "inherently unequal economic power between the individual franchisee and the monolithic franchisor;" the "traditional economic imbalance" favoring franchisors; and the strong "economic power of the large, monolithic franchisor"—something checked only by franchisees joining together); H. BROWN, *supra* note 1, § 5.01, at 5-2 (stating bluntly, "The franchisor has all of the legal and practical advantages"), § 9.01 (and that there is "a marked, intentional, and constantly emphasized disparity in the parties' positions," greatly favoring the franchisor); BROWN, *supra* note 50, at 5, col. 1.

250. See, e.g., S. LUXENBERG, *supra* note 4, at 61; B. WEBSTER, *supra* note 8, at 11-13.

251. See, e.g., C. VAUGHN, *FRANCHISING TODAY: REPORT ON THE FIFTH INTERNATIONAL MANAGEMENT CONFERENCE ON FRANCHISING 174-75* (1970). Charles Vaughn relates how an officer of a major franchisor stated: "When you sell this gentlemen the license, and he gives you \$10,000, it is like . . . poker [and] he is giving that to the house. Marvelous industry, this franchising! Can you imagine a fellow paying \$10,000 for the right to pay you royalties for the rest of his life!" *Id.*

them; if it fails, the franchisor simply will move on to other projects.²⁵²

It is, thus, myopic to view the current maze of disclosure laws, registration requirements, state franchise and business opportunity practices statutes, and common-law contract principles as adequate protections for franchisees. Although franchisees must abide by the lawful contracts that they freely and knowingly make, for the following reasons franchisees should not be prevented from organizing collectively: (1) their franchising contracts rarely proscribe collective organization; (2) franchisees arguably have a constitutional and statutory right of association; and (3) the risks that franchisees bear do not encompass the impairment of collective rights that they might otherwise possess. It seems incongruous that a franchisor who uses an established franchise operation's systemic advantages as a drawing card to attract new franchisees, and who requires persons to *pay for the privilege* of joining that membership system, would contend that franchisees generally cannot undertake significant joint efforts. Why must each franchisee, then, "go it alone"? Just as the employee needs the right to associate collectively with fellow employees to compensate for individual weaknesses, the franchisee also should have the right not only to associate with other franchisees, but to demand and otherwise take collective action without fear of legal reprisal.

Presently franchisees have limited associational rights and little else. Many states have a statutory right of association.²⁵³ Also, the Constitution may give franchisees a similar right.²⁵⁴ The right, however, simply may mean no more than a prohibition of "yellow dog" contracts in the franchising context.²⁵⁵ As such, right of association protections

252. See, e.g., *Kealey Pharmacy v. Walgreen*, 761 F.2d 345 (7th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984); *Copy-Data Sys. v. Toshiba Am., Inc.*, 663 F.2d 405 (2d Cir. 1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *White Hen Pantry v. Johnson*, 599 F. Supp. 718 (E.D. Wis. 1984); *Picture Lake Campground v. Holiday Inns, Inc.*, 497 F. Supp. 858 (E.D. Va. 1980); *Diehl & Sons, Inc. v. International Harvester, Inc.*, 426 F. Supp. 110 (E.D.N.Y. 1976); see also S. LUXENBERG, *supra* note 4, at 259. Stan Luxenberg states that "many chain builders' franchisees serve as cannon fodder, foot soldiers to be expended in battle. [In testing a market, the franchisor] can find operators . . . If the experiment fails and the franchisees go bankrupt, well, that's too bad." *Id.* Luxenberg notes also that "[i]n 1971 Ralston-Purina decided franchising was not profitable for its Jack-in-the-Box chain. The huge food processor gave thirty days' notice to the owners of six hundred forty-two franchises that their licenses had been terminated." *Id.* at 270.

253. The right is guaranteed, to a limited extent, by many state statutes. See *supra* Part III(C). Some useful purposes for state freedom of franchisee association statutes are stated *infra* at text accompanying notes 298-300.

254. See *supra* Part III(A).

255. "Yellow dog" contracts were employment agreements in which the employee agreed not to join a labor union. In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Supreme Court invalidated a Kansas statute that made it a misdemeanor for an employer to prohibit employees from joining or remaining in a labor union during their term of employment. That decision essentially was over-

may only accomplish for franchisees and their associations what the Norris-LaGuardia Act²⁵⁶ did with respect to employees and unions—declare a right to join. Thereafter, any franchisee rights of association are murky at best.

Labor law simply does not fill the void. As previously discussed,²⁵⁷ federal labor relations law rarely covers franchisees. Indeed, only the protected few actually have been considered employees, and the facts in those cases generally evinced a pattern of strict supervision, little entrepreneurial risk or profit potential, minimal ownership interests, and often even a purposeful conversion to sham franchises just to avoid the labor laws. Absent a dramatic shift in case law interpretation²⁵⁸ or in the statutes themselves, franchisee hopes for developing associational protections within the established field of labor relations law are pointless.

B. Proposal: An Antitrust Exemption, Not Collective Bargaining Requirements

The Author is not convinced that placing franchisees within the NLRA (or creating an NLRA-like construct for franchising) is necessary, let alone wise. While one notable franchise attorney has long argued for franchisee collective bargaining rights comparable to those held by employees,²⁵⁹ one can accept his views about franchisee problems without accepting his conclusion that we must have a franchisee-franchisor relations law providing collective bargaining rights.²⁶⁰ He and other proponents²⁶¹ may be adept at showing *present* problems that might be resolved by mandatory collective bargaining, but one cannot be sure who is blessed with prescience about the broad *future* effects of a franchising NLRA. Requiring franchisors to enter into collective bargaining with franchisee representatives is a huge step that imprudently bypasses other smaller steps which should be tried first.

turned with the passage of the Norris-LaGuardia Act of 1932, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1988)). The provision outlawing "yellow dog" contracts is found at 29 U.S.C. § 103 (1988).

256. See 29 U.S.C. §§ 102-103 (1988).

257. See *supra* Part V.

258. In 1971 Professor Raymond McGuire called in vain for such changes. See *generally* McGuire, *supra* note 168.

259. H. Brown, *supra* note 1, § 10.08 [5][b]; Brown, *supra* note 127, at 815; Brown, *supra* note 50.

260. Harold Brown simply comments that "a constructive method for operational harmony" in franchising "can only be accomplished through some form of collective bargaining." Brown, *supra* note 50, at 5, col. 1. He argues also that collective bargaining is "the only realistic hope for an effective franchising relationship." Brown, *supra* note 127, at 815; see also *infra* note 267. This conclusion is certainly debatable.

261. See, e.g., Note, *supra* note 166, at 1294 (authored by law student Elizabeth Anania).

For example, one smaller step would be the creation of an antitrust exemption for some franchisee group activities. Franchisees thus could organize, exchange information, make recommendations about business policies, request that the franchisor bargain collectively, and perhaps even strike. Of course, certain actions would remain unprotected, such as pricing schemes, boycotts of third parties, and other actions that have a direct impact on parties other than the franchisees and franchisor. The antitrust exemption, consequently, could be crafted to state clearly that, for purposes of dealing with the franchisor, the franchisees' activities fall within the customary protections afforded to labor organizations or agricultural marketing cooperatives.²⁶² In effect, franchisees would be permitted to use their collective economic leverage to balance against their franchisor in the same way that employees use these powers vis-à-vis their employer. Shielded actions by employees with regard to wages, hours, working conditions, and other matters would have protected counterparts in the franchising context covering, *inter alia*, royalties and other fees, hours of operation, advertising,

262. See, e.g., Clayton Act of 1914 § 6, 15 U.S.C. § 17 (1988) (exempting labor organizations and the "legitimate objects thereof" from antitrust laws); Norris-LaGuardia Act of 1932 §§ 4, 5, 13(c), 29 U.S.C. §§ 104, 105, 113(c) (1988) (stating that no federal court shall have jurisdiction to enjoin, as an unlawful combination or conspiracy, various protected actions during a "labor dispute"); Capper-Volstead Act of 1922 § 1, 7 U.S.C. § 291 (1988) (clarifying and extending the Clayton Act exemption to agricultural cooperatives).

As independent contractors who have joined together in marketing associations, farmers' cooperatives may be more analogous to franchisee associations than to labor unions. Numerous decisions have applied the antitrust exemption in favor of such agricultural groups. See, e.g., *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) (holding that three associations were not conspiring but were effectively one association and, thus, were exempt from the Sherman Act); *Holly Sugar Corp. v. Goshen County Co-operative Best Growers Ass'n*, 725 F.2d 564 (10th Cir. 1984) (finding that a farmers' cooperative was not subject to antitrust laws for keeping individual members from contracting directly with the sugar manufacturer); *Waters v. National Farmers Org.*, 328 F. Supp. 1229 (S.D. Ind. 1971) (holding that farmers' group seeking collective bargaining with processors of agricultural products was exempt from antitrust laws). Of course, the exemption is not absolute. See, e.g., *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960) (holding that exemption does not cover Sherman Act § 2 combinations, conspiracies to monopolize, or activities designed to restrain and suppress competition by independent producers); *United States v. Borden Co.*, 308 U.S. 188 (1939) (holding that agreements with nonagricultural groups to limit sales and fix dealers' prices to retailers are not exempt); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980) (and cases cited therein) (stating that the exemption does not protect predatory tactics, such as coerced membership and price discrimination), *cert. denied*, 454 U.S. 818 (1981); *Boise Cascade Int'l, Inc. v. Northern Minn. Pulpwood Producers Ass'n*, 294 F. Supp. 1015 (D. Minn. 1968) (holding that members of pulpwood producers' association cannot boycott or persuade others to boycott when doing so breaches existing contracts).

Note that these cooperatives, unlike labor unions, cannot require collective bargaining. Therefore, they may resemble more closely the position of the franchisee association. See Note, *Anti-trust, Bargaining, and Cooperatives: ABC's of the National Agricultural Marketing and Bargaining Act of 1971*, 9 HARV. J. ON LEGIS. 498 (1972) (discussing a congressional bill, subsequently killed, to give NLRA-like rights to agricultural cooperatives).

quality control, and franchise termination. Outside the realm of franchisee-franchisor relations, antitrust law could be used against franchisees—either individually or as a group—just as antitrust law still controls unions insofar as they run a business or otherwise operate apart from labor-management relations.²⁶³

Absent a special collective bargaining requirement, the franchisor still could ignore the franchisee association. Moreover, it still could try to set up alternative franchisee groups, such as advisory councils.²⁶⁴ The antitrust exemption, however, already would have removed antitrust law as one of the strongest weapons franchisors have for fighting associations.²⁶⁵

Combined with a franchisee right of free association law, the antitrust exemption could bring to some franchisees the prospect of collective bargaining, if that were their desire.²⁶⁶ Much would depend on the reactions of both franchisor and franchisee to a new bargaining power equation—one tilted less in the franchisor's favor.²⁶⁷ In addition, the parties' knowledge that their agreements could be enforced in court might spur a sense of equality and reality.²⁶⁸ In other words, the law should eradicate the notion that a franchisor always can back out of its arrangements with the franchisees; while the decision to deal with the franchisees may be voluntary, once an agreement is reached or the fran-

263. Many articles and other writings have reviewed the application of antitrust laws to labor activities. See, e.g., Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1 (1983); Kaminsky, *The Antitrust Labor Exemption: An Employer Perspective*, 16 SETON HALL L. REV. 4 (1986); King & Smith, *New Antitrust Developments Affecting Labor Law*, 33 SYRACUSE L. REV. 945 (1982). In addition to the statutory exemption, courts have carved out a nonstatutory exemption that provides some protection to employers—not just employees and labor unions—concerning arm's-length collective bargaining on wages, hours, and working conditions. Kaminsky, *supra*, at 32-51. Note, however, that if franchisee associations are given an antitrust exemption, public policy may require a similar exemption for franchisors.

264. This option is available unless the legislature decides that advisory councils present the same problems as company unions did in the 1920s and early 1930s. In that case, the legislature could outlaw or otherwise restrict franchisor involvement in the operation of franchisee groups. The Author believes such action should prove unnecessary. The trend already appears to be that, as franchised systems mature, franchisees gravitate toward an independent group, not one with close ties to the franchisor. Moreover, an antitrust exemption for all franchisee groups likely would give a further boost to independent associations because franchisors would be left with a reduced arsenal for attacking associations. Concerning franchisor use of the antitrust laws against franchisees, see *supra* Part VI.

265. See *supra* Part VI.

266. This may not happen. Because franchisees traditionally see themselves as businesspersons, not unionizers, some franchisees still may prefer to retain individual control.

267. Harold Brown argues that a "special form of collective bargaining should be devised for groups of franchisees" and that "only the collective power of franchisees' group activity can mitigate [though presumably not eliminate] the gross imbalance between the parties." H. BROWN, *supra* note 1, § 10.08[5][b], at 10-102 (emphasis added).

268. Such enforcement actions could be brought under 29 U.S.C. § 185(a) (1988) (discussing suits by and against labor organizations), contract law, or equity.

chisees reasonably rely on the franchisor's recognition of their association, the franchisees ought to have the power to compel the franchisor to honor its commitments.²⁶⁹

Rights of free association, a limited antitrust exemption, and the ability to enforce collective agreements do not impose "collectivism" on unwilling franchisors or disinclined franchisees.²⁷⁰ To push for a franchising relations act that forces franchisors to accept collective bargaining ignores many salient legal, economic, and political concerns about the franchisor-franchisee relationship.

First, most franchisees are not in the same legal or economic position as employees.²⁷¹ At the very least, they must be classified as managers or supervisors, not ordinary employees. Although perhaps not truly independent contractors, franchisees legally still do not fall under a worker category generally protected by labor law. To treat them as so protected would require major reworking of other areas of labor law, both to maintain legal consistency, and to prevent or compensate for economic dislocations that presumably would result from the differences in labor law treatment of franchisees, other independent contractors, and supervisory or managerial employees.

Second, franchisee collective bargaining requires adequate safeguards, such as detailed and explicit legislative pronouncements. Otherwise, such rights — by analogy or other creative legal interpretation—could be used to alter, perhaps without any foresight, the law in many other areas. These areas include: Labor relations for franchisees' employees, the law of vicarious liability and other agency issues within the franchising context, employment law, franchise contract law, franchisor disclosures and other protections for prospective franchisees, and federal preemption of state franchise and business opportunity laws.

Third, there is very little history of franchisee-franchisor collective bargaining. Even when it has occurred informally,²⁷² general conclusions

269. If read broadly, a portion of *Newspaper Drivers & Handlers Local 372 v. NLRB*, 735 F.2d 969, 971 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985), unfortunately may be interpreted as giving the franchisor a ready means of extrication from collective talks or even agreements with the franchisee association. See *supra* note 208 and accompanying text. How far would this franchisor freedom not to recognize a "union" of nonemployees go? Such capricious or otherwise unfair reneging should not be tolerated. Franchisors should understand that their dealings with an association—although voluntary—can produce reciprocal and binding rights and duties.

270. A discussion on binding all franchisees to a collective bargaining agreement is found *infra* at note 296 and accompanying text.

271. See *supra* Part V.

272. The Holiday Inn, Midas, and Pizza Hut systems are notable examples. See, e.g., S. LUXENBERG, *supra* note 4, at 266-69; B. WEBSTER, *supra* note 8, at 195-96; see also *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 473 (1979) (describing how Midas muffler franchisees formed an association whose principal activity was to serve as a bargaining agent for the franchis-

have proved difficult: isolated cases concerning voluntary negotiations between a franchisor and an association are not the equivalent of forced collective bargaining. It clearly would be easier to proceed if more substantial legal and economic reference points existed other than analogies to the NLRA system, which has far different historical, legal, and economic underpinnings.

Fourth, from both the franchisor's and franchisee's viewpoints, the use of franchising stems from legal, economic, and social considerations that run counter to those represented by a collective bargaining approach. Suppliers and others choose to issue franchises for a multitude of reasons, with many important reasons arising from a desire to avoid the employment relationship and corresponding labor law issues.²⁷³ Similarly, franchisees typically were motivated to enter into a franchise relationship by a desire to be more than an employee, to be a capitalist rather than a proletarian. At least initially, it seems that a franchisee is generally oriented not toward status as a member of a class of franchisees, but toward an individual relationship with the franchisor and a role, however small, as an independent businessperson.²⁷⁴

Fifth, collective bargaining may foster or exacerbate an unduly adversarial approach to franchisee-franchisor relations. As labor law grapples with issues of improved productivity and cooperation between labor and management,²⁷⁵ the advent of required franchise collective bargaining could be seen as a move in the wrong direction, toward group confrontation rather than more individualized, constructive communication.

Finally, and perhaps most important, a push for collective bargaining flies in the face of political reality. Franchisors have a very powerful lobbying organization, the International Franchise Association (IFA). Certainly the IFA, which has been instrumental in defeating numerous congressional bills, state legislative drafts, and federal or state rulemaking proposals,²⁷⁶ will battle vigorously the very notion of required collective bargaining,²⁷⁷ an idea with far more serious consequences than

ees in dealing with Midas, how the association persuaded Midas to eliminate a customer service fee requirement, and how it successfully negotiated a new form of franchise agreement).

273. See *supra* note 120 and accompanying text.

274. This is the conclusion of Stan Luxenberg, who states that "many of the franchisees were dedicated capitalists with strong anti-union sentiments." S. LUXENBERG, *supra* note 4, at 266.

275. See, e.g., Smith & Childs, *Imported from America: Cooperative Labor Relations at New United Motor Manufacturing, Inc.*, 9 INDUS. REL. L.J. 70 (1987).

276. See S. LUXENBERG, *supra* note 4, at 243-46.

277. See H. BROWN, *supra* note 1, § 5.01 (explaining that "franchisors universally have fought all franchisee efforts to establish collective bargaining, since this would impugn the franchisors' established superiority"); see also *supra* notes 120-25, 143-44 and accompanying text.

much of the law the IFA already has opposed so successfully.²⁷⁸ Franchisee efforts probably would be better served by demanding implementation of a strong, meaningful right of free association and the easing of antitrust constraints on their organizational activities.²⁷⁹ Both of these goals seem more manageable for three reasons: (1) associational rights already are found in the proposed Uniform Act and in many states' general or special-industry franchise laws;²⁸⁰ (2) antitrust law has long been under attack by legal commentators; and (3) easing antitrust enforcement has been, in many respects, a national policy this past decade.²⁸¹

C. *The Rise of Franchisee Associations, Collective Efforts, and Freedom of Association Statutes*

Compared to prior decades, franchising has matured.²⁸² The predominant issues for the 1990s are not flagrant abuses as in earlier years, but the long-term problem of defining standards of conduct for the continuing relationship between franchisors and franchisees.²⁸³

The rise of franchisee associations is part of this trend. They not only serve the interests of comparatively weak, often inexperienced franchisees,²⁸⁴ but they also counterbalance franchisors' well-en-

278. Franchisees might establish a better case for collective bargaining if there were more statutes like New Hampshire's and Vermont's and if those statutes were reinforced by some collective bargaining history or administrative or court decisions.

This situation is similar to that of job applicants who cannot find jobs because they have no work experience, and thus, ironically, never get the work experience they need. Until there are more states with franchising collective bargaining laws, some will argue that the almost complete absence of these laws shows that there is no need for them or that one should wait until there is more meaningful legislative guidance. If all legislatures have that attitude, new laws might never develop in this field. As discussed briefly *supra* at text accompanying notes 259-61, the Author is not arguing for more required collective bargaining laws. What is needed, simply, is more franchisor-franchisee experience with collective bargaining, whether mandated or voluntary. See *supra* text accompanying notes 259-69.

279. One assumes also that there would be no cramped interpretation as to the enforceability of franchisor-franchisee collective agreements (*i.e.*, not permitting franchisees to back out whenever they desire). See *supra* notes 208, 268-69 and accompanying text.

280. See *supra* Parts III(B) & (C).

281. See Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321 (1987); *Private Antitrust Enforcement: Preparing and Prosecuting Actions in a New Antitrust Era*, 58 ANTITRUST L.J. 267 (1989). Public enforcement resources have fallen drastically since 1980, from 429 professional staff at the Antitrust Division of the Justice Department to 236 by 1988. *Hearings Before Senate Judiciary Committee*, 100th Cong., 1st Sess. 150-53 (1988). Studies likewise have shown a decline in private antitrust cases starting in the early- to mid-1970s. See Brodley, *Critical Factual Assumptions Underlying Public Policy*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 252-67 (L. White ed. 1988).

282. Garner, *Editor's Column*, 8 FRANCHISE L.J., Spring 1989, at 2, 16.

283. *Id.*

284. Most franchisors actually may want inexperienced franchisees. A study, including a poll of franchisors, reached that conclusion nearly 20 years ago. U. OZANNE & S. HUNT, *supra* note 9, at

trenched economic and political positions²⁸⁵ and, therefore, serve a legitimate public interest.²⁸⁶ Franchisees' weaker individual powers may result in a skewing of capital investment,²⁸⁷ labor resources allocation,²⁸⁸ site selection,²⁸⁹ and other decisions, producing results that are in no one's long-term interest except perhaps the franchisor's.²⁹⁰ A franchisee association, however, that tends to equalize the balance of power between franchisor and franchisee could eliminate or diminish the number and severity of these one-sided decisions. The franchised system would serve better the franchisee's profit motive and thus better align it with other forms of business and with rational economic decision making.²⁹¹

While not necessarily constituting franchisee unions, the associa-

125.

285. See Reply Brief for Petitioner at 8, *National Muffler Dealers Ass'n. v. United States*, 440 U.S. 472 (1979) (No. 77-1172); *supra* notes 130, 249, 277, 282 and accompanying text; *cf. supra* notes 159-61 and accompanying text (regarding franchisor uses for an advisory council).

286. See, e.g., Brief for Petitioner at 28, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172); see also *supra* Part V(A).

287. This may occur when franchisees pay high franchise fees and royalties instead of seeking other, perhaps better, uses of capital. Thus, a misuse of individual and societal resources arises with the entry-level decision to franchise. See generally S. LUXENBERG, *supra* note 4, at 284-88 (contending that franchising often has resulted in a lessening of national prosperity and productivity, unacceptable risks and losses to numerous franchisees, and damage to the economy and social fabric of individual communities); Rubin, *supra* note 9, at 224 (noting that persons take much greater financial risks by becoming franchisees than, for example, investing in a diversified stock portfolio). For individual franchisees this unwise allocation of resources may continue throughout the term of the franchise, perhaps even upon the demand of the franchisor. See, e.g., B. WEBSTER, *supra* note 8, at 107 (stating that franchise contracts sometimes require franchisees to remove their existing equipment every few years and replace that equipment with more expensive, new items, regardless of how well the older equipment was functioning and how much longer it was expected to last). Economists have analyzed the high levels of sunk costs borne by franchisees and the resulting problem of franchisors' "opportunism": the ability to extract (via increased fees, higher rents, etc.) all that a franchisee has invested without risking the franchisees' departure from the franchised system. See Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979).

288. E.g., franchisees and their employees spend a great deal of time and effort on futile, franchisor-imposed initiatives. S. LUXENBERG, *supra* note 4, at 55-56 (noting that franchisees "may be used to pioneer untested areas where sales are uncertain," with franchisees often providing "cheap labor" for the franchisor); *id.* at 286 (concluding that thousands of franchisees invest months or years in unsuccessful projects and "emerge from the experience devastated"); *supra* notes 250-52 and accompanying text; see also B. WEBSTER, *supra* note 8, at 17 (stating that a franchisee is "subjected to time-consuming, often annoying, reporting and supervisory requirements").

289. See S. LUXENBERG, *supra* note 4, at 55.

290. See *id.* at 288-89.

291. This should be preferable to having franchisees primarily serve a sales-boosting function (both sales of franchises to new franchisees and, at existing franchises, sales of services or goods to franchise customers), regardless of net profits. See *supra* note 84. Without franchisee association protections, the franchisees merely may be "cannon fodder": the true risk-bearers for ideas dictated from franchisor headquarters. See *supra* notes 250-52 and accompanying text.

tions can trace their origins to a need for dealing with a sometimes insensitive, common superior, who has substantially greater powers than the individual franchisee.²⁹² In the future, franchisee associations could be at the vanguard of an attempt to transfer franchise conflict resolution from the courtrooms and legislative halls to the participants themselves. Just as courts have come to recognize a national labor policy favoring private dispute resolution,²⁹³ franchising law may hold a similar preference for private resolution of conflicts. Progress toward that end could occur through franchisees' increasing use of associations, coupled with franchisors' positive acceptance of associations.

Collective bargaining may be a necessary component of a private resolution approach that attempts system-wide prevention or settling of franchisee-franchisor conflicts.²⁹⁴ Thus, despite the various problems with requiring collective bargaining,²⁹⁵ it ultimately may be necessary. Perhaps it would be necessary also to go beyond requiring collective bargaining and make a "majority rule" for representation of franchises like that in labor law for nonunion or dissident employees. This would bind some franchisees to collective choices even though they would rather contract individually with franchisors.²⁹⁶

A more modest step, however, would be to remove some of the antitrust fetters from franchisee associations. As amply demonstrated in the literature and in case law, franchisors still would have plenty of methods for dealing with unlawful or inappropriate activities by one or more franchisees.²⁹⁷

292. See, e.g., Brief for Petitioner at 8, 28, 30, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) (No. 77-1172).

293. See *Clayton v. United Automobile Workers*, 451 U.S. 679, 689 (1981) (discussing collective bargaining disputes); *Majewski v. B'nai B'rith Int'l*, 721 F.2d 823, 826 (D.C. Cir. 1983) (discussing bargaining agreements between an employer and its supervisory-managerial employees' association).

294. See *supra* notes 259-61 & 267.

295. See *supra* Part VII(B).

296. There could be many problems with such an approach. If franchise collective bargaining became an accepted practice, the franchising community and ultimately legislatures and courts would have to decide such issues. For fundamental NLRA law on this point, see *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). All three decisions give the collective interests represented by a certified bargaining unit (a union) priority over those interests espoused by dissident employees. See also *supra* note 123 and accompanying text (noting "the independent contractor nature" of franchisees, the separate and sometimes different contract each franchisee has with the franchisor, and the franchisor's need to preserve communication with every franchisee, not just those belonging to an association); *supra* note 136 (noting the distinct nature of individual gasoline dealers' contracts with their supplier).

297. Obviously, franchisors do not have to turn to antitrust claims when opposing franchisee associations or their individual members, whether with good or improper motives. See, e.g., *Jay Edwards, Inc. v. New England Toyota Distrib., Inc.*, 708 F.2d 814 (1st Cir.) (discussing a distributor who tried to terminate and otherwise take private action against dealers who had formed a

Franchisee freedom of association statutes perhaps cover little, if any, ground not already covered affirmatively by the first amendment or negatively through limits in antitrust and unfair competition law. One wonders: Is there really any room between these two parameters for an association statute to be effective? Nonetheless, even assuming that the general groundwork already has been provided for and occupied by other laws, a freedom of association statute still may serve fundamental purposes.

For instance, an association statute could give specific notice to franchisors about the state of the law.²⁹⁸ While notice is not generally a requirement for imposing liability,²⁹⁹ it certainly could remove obstacles to substantial punishment for offending franchisors, such as ignorance of the law. More importantly, a clear statute better enunciates public policy and removes doubt from the law. Additionally, a statute on associational rights could develop what currently amounts to vague constitutional principles, case law dicta, and antitrust notions into a full statement on franchisees' rights of association. If this area of franchising law, like much of the law on franchising, is based on the broad and simple concept of fairness, the law certainly should be spelled out more clearly.

With a right of association statute in place, specific remedies for violations could be codified or else promulgated through regulations. Criminal and civil enforcement measures thus would become part of the overall statutory or regulatory framework, which would help define franchisor-franchisee expectations. Absent a statute and formal enforcement provisions, a right of association may be available only against some parties—such as the government—and not franchisors.³⁰⁰

“dealer alliance” for bargaining with the distributor, and ruling against the distributor for violation of New Hampshire’s automobile dealership statute), *cert. denied*, 464 U.S. 894 (1983); Brown, *supra* note 127, at 775. Brown discusses a franchisees’ association that, after 10 months of unsuccessful bargaining with a franchisor, notified its members of the need to litigate and requested their participation and financial support. Upon disclosure of these facts at a preliminary hearing in *Halverson v. Convenience Food Mart*, No. 70C-499 (N.D. Ill. filed Mar. 3, 1970), the district court dismissed the suit on the merits and even lodged a complaint with the Illinois Bar Association against the association’s attorney for his participation in alleged solicitation. *See also* *Schupack v. McDonald’s Sys.*, 200 Neb. 485, 264 N.W.2d 827 (1978). In *Schupack* the Nebraska Supreme Court overturned a judgment in favor of alleged transferees of a right of first refusal concerning new franchises. The court, in finding for McDonald’s, devoted a substantial portion of its opinion to the seemingly unreliable testimony of the plaintiff’s chief witness, the president of “an association of dissident McDonald’s franchisees.” *Id.* at 489, 264 N.W.2d at 829.

298. This would be no mean task considering the quagmire of existing statutes, rules, and case law. *See supra* Part II(B).

299. Certainly, more “basic,” less specific laws such as antitrust statutes, the Constitution, and resulting case law can be crucial in their effect on franchisee association formation and subsequent activities. *See supra* Part III(A) & Part VI.

300. For example, the first amendment to the Constitution involves rights against govern-

Furthermore, without statutory enforcement provisions, it may be only a public right, with solely the government entitled to bring an action.

D. *Final Thoughts*

The franchisees' rights of association to this point have been a mere "will-o'-the-wisp," luring those who expected much more to the ultimate realization that little exists in the case law, and what does exist is nearly lost among major areas of franchise, antitrust, and labor law. Given the growth of franchisee associations, however, the maturing of franchising both as a concept and as applied in particular industries and individual chains, and the continuing disparity of power between franchisor and franchisee, there is a need for legislative and judicial recognition of the franchisees' right and need to join together. Moreover, franchisees can be afforded a realistic opportunity to deal effectively with the franchisor only by taking external pressures off the franchisees' collective efforts. To reduce these legal, economic, and political pressures, the most practical approach may be to restrict the use of antitrust laws in stifling franchisees' organizational efforts and other franchisee union-like activities.

Presently, the law considers the individual franchisee an independent contractor unentitled to collective bargaining rights and probably unsuited for those rights anyway. The franchisee is in a subordinate legal and economic position, which renders him too dependent for effective bargaining on his own.³⁰¹

A limited antitrust exemption would be no panacea, but franchisors who resist *any* change ultimately may confront their worst fears—a collective bargaining requirement springing to life in various states, and perhaps even federal law, well beyond the gasoline dealership requirements in New Hampshire and Vermont. This may never happen, but it would be less likely to occur if some weight were given to freedom of association provisions and if the antitrust laws were not permitted to render those statutes a virtual nullity. As bargaining and other franchisor-franchisee relationships develop in response to an exemption, and as further cases arise under right of association provisions, one may see then that a franchise NLRA is not really needed. At the very least, if further action is required, legislatures and courts may proceed more adroitly, building upon lessons that the antitrust exemption and statutory franchisee association rights have taught us.

mental interference, not purely private wrongs.

301. Put simply, the typical franchisee is too "independent" from other franchisees to bargain collectively, but too dependent on the franchisor to bargain alone.

STATE FRANCHISE AND BUSINESS OPPORTUNITIES STATUTES
(AS OF JANUARY 1990)

- | | |
|---|--|
| <p>1. <i>Disclosure Only</i> (20 states)*
Alabama*^A New Hampshire
Alaska New Mexico
Arizona Ohio
Colorado Oklahoma
Idaho Oregon
Kansas Pennsylvania
Louisiana*^L Texas*^T
Massachusetts Vermont
Montana West Virginia
Nevada Wyoming</p> | <p>4. <i>Prohibitions*^P and Disclosure*</i> (7 states,
D.C., P.R. & V.I.)
Arkansas Nebraska
Delaware New Jersey
District of Puerto Rico
Columbia Tennessee
Mississippi*^M Virgin Islands
Missouri*^M</p> |
| <p>2. <i>Registration (with Exemptions)**
and Disclosure</i> (8 states)
Florida*^F Maine
Georgia North Carolina
Kentucky South Carolina
Iowa Utah</p> | <p>5. <i>Prohibitions*^P Registration (with
Exemptions),** and Disclosure</i> (1 state)
Connecticut</p> |
| <p>3. <i>Registration*** and Disclosure</i> (4
states)
Maryland North Dakota
New York Rhode Island</p> | <p>6. <i>Prohibitions*^P Registration,*** and
Disclosure</i> (10 states)
California Minnesota
Hawaii South Dakota
Illinois Virginia
Indiana Washington
Michigan Wisconsin</p> |

* These states require no registration at all: none of their state franchise statutes requires it, and even if the state has a "business opportunities" law providing for registration, that particular law does not require any significant franchise registrations.

*^A Alabama has no franchise statute. The Alabama business opportunities law simply prohibits misrepresentation. ALA. CODE § 8-19-5(20) (1984).

*^F Florida law proscribes misrepresentation, FLA. STAT. § 817.416 (1976), but specifies no other prohibited practices.

*^L Louisiana has no franchise statute. Some prohibitions, however, may be found in the business opportunities act, LA. REV. STAT. ANN. § 51-1823 (West 1987 & Supp. 1989), but there is a very broad exemption for the licensing of a registered trademark, which is a commonplace arrangement in franchising. *See id.* § 51-1823(3).

*^M Prohibitions or restrictions are a (a) statutory limitation of events that can result immediately in a franchise termination, or (b) required notice at least 90 days before other, nonautomatic terminations or nonrenewals. MISS. CODE ANN. § 75-24-53 (Supp. 1989); MO. REV. STAT. § 407.405 (1990). Neither state has a registration or disclosure requirement.

*^P The term "prohibitions" includes restrictions on practices. For explanations and examples of prohibitions or restrictions, see *supra* notes 27-28 and accompanying text.

*^T If franchisor complies with the FTC disclosure rule, it need only file a notice to the state, with the form merely including the franchisor's actual name, "doing business" name, and address.

** Registration of franchises in these states takes place solely via business opportunities legislation, not franchising laws specifically. Many or most franchisors qualify for exemptions from registration.

*** This category includes some states that do not require large, experienced, financially sound franchisors to register. *See supra* note 25. This exemption is not treated as applying to "many or most franchises" (categories 2 & 5).

