Maryland Law Review

Volume 77 | Issue 1 Article 2

Resurrecting Labor

Rick Bales

Articles

RESURRECTING LABOR

RICK BALES*

ABSTRACT

Participation in American labor unions has changed radically, albeit incrementally, over the last fifty years. Private-sector union density has declined five-fold, whereas public-sector density has increased almost as significantly. Today, unions rarely strike, and in much of the country, they are politically impotent. As traditional manufacturing declines and is replaced by on-demand work, unions risk becoming a historical footnote.

This Article ties the decline in union density and power to macroeconomic trends that are highly troubling in an advanced democracy, such as rising income inequality and the failure of wage growth to keep pace with gross domestic product ("GDP") growth. It next reviews the traditional prescriptions that labor scholars have advocated to reverse labor's decline. Finally, it proposes three new radical fixes: authorizing criminal prosecution for willful violations of labor law, expanding labor protections to on-demand workers, and reversing the legal presumption that workers are not represented by a union unless they affirmatively opt in.

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* Ohio Northern University, Pettit College of Law. Many thanks to participants at faculty workshops at the 2016 Colloquium on Scholarship in Labor and Employment Law at University of Washington School of Law and Seattle University School of Law, the University of San Francisco School of Law Faculty Workshop Series, and The Labor Law Group 2016 meeting at UCLA. Special thanks to Catherine Fisk, Dennis Nolan, Jake Rosenfeld, Don Carroll, Matthew Dimick, Barry Hirsch, Jeff Hirsch, Barbara J. DeAngelis, Dustin Green, and Daniel Kimmons, for going above and beyond to help me in one way or another with this project.

I. INTRODUCTION

American incomes and wealth are far less equal today than they were fifty years ago, and the inequality is growing.[1] Though productivity and gross domestic product have risen, wages have not kept pace,[2] meaning that

1. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 520–21, 573 (2016).

2. *See infra* Part III.B.

workers are not sharing in the economic gains to which they contribute. Social mobility has fallen commensurately,[3] with significant political consequences.[4]

Over those same fifty years, unions have been in a deep decline.[5] This decline has faced ambivalence from much of America's heartland and joy from the business community,[6] but its effects are deeply troubling. Nonunion jobs pay less than union jobs and thus contribute to rising inequality.[7] Much less acknowledged, and only now becoming better understood, is that high-paying union jobs help increase wages, even the wages of nonunion workers,[8] and when the union jobs vanish, so does the wage premium for all workers. This Article ties, for the first time in the legal literature of which the author is aware, the precipitously increasing wage inequality that the United States has seen over the past two decades to the decline in union density.

The decline in union density has been long noted by American legal and industrial relations scholars,[9] who have equally long advocated changes to the National Labor Relations Act ("NLRA")[10] to make it easier for workers to organize.[11] This Article agrees that such changes are necessary, but it advances a reform agenda far beyond these traditional fixes.

This Article argues that nothing short of a major overhaul of the NLRA will suffice to give workers the bargaining power to reverse the powerful headwinds of income inequality they now face and to restore the promise of the statute[12] to give workers the ability to negotiate the terms and conditions of their employment.[13] Part II describes the trends afflicting unions today: the decline in private-sector union density, the inability of unions to use strikes as an effective economic weapon, labor's diminishing political power, the spread of right-to-work laws, the decline in manufacturing work, and the rise in contingent and on-demand work.

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3. Michael D. Carr & Emily E. Wiemers, *The Decline in Lifetime Earnings Mobility in the U.S.: Evidence from Survey-Linked Administrative Data* 15–20 (Wash. Ctr. for Equitable Growth, Working Paper No. 2016-05, 2016), http://equitablegrowth.org/equitablog/the-decline-in-lifetime-earnings-mobility-in-the-u-s-evidence-from-survey-linked-administrative-data/.

4. MARK ROBERT RANK ET AL., CHASING THE AMERICAN DREAM: UNDERSTANDING WHAT SHAPES OUR FORTUNES 6 (2014).

5. *See infra* Part II.A.

6. *See* Marc Dixon, *Limiting Labor: Business Political Mobilization and Union Setback in the States*, 19 J. POL'Y HIST. 313, 336–38 (2007); *see also* Part II.A (discussing union decline).

7. *See infra* Part III.C.

8. *See infra* Part III.D.

9. *See* William J. Moore & Robert J. Newman, *A Cross-Section Analysis of the Postwar Decline in American Trade Union Membership*, 9 J. LAB. RES. 111, 123 (1988).

10. 29 U.S.C. §§ 151–69 (2012).

11. *See infra* Part IV.A.

12. 29 U.S.C. § 151 (2012).

13. *See infra* Part IV.B.

Part III ties union decline to income inequality. It first describes the rise in income inequality and the divergence of wage growth from productivity growth. It then links these with declining unions by showing how the union wage premium has fallen and how union inability to "take wages out of competition" drops the wages of nonunion workers.[14]

Part IV is an agenda for reform. It begins by reviewing the traditional prescriptions for reforming labor law: modifying various election rules to make it easier for workers to organize, restricting employers' ability to hire replacement employees when unions strike, and reversing restrictions on union security clauses. It then makes three more far-reaching proposals. First, it builds on the longstanding understanding that the NLRA's civil remedies are grossly inadequate and proposes criminal penalties for willful violations—much as the Mine Safety Act now permits criminal penalties for willful violations that result in worker deaths.[15] Second, it urges expanding NLRA protections to on-demand, gig-economy workers—much as a 2016 Seattle municipal ordinance has.[16] Third, it argues that the default on union representation should be changed from opt-out to opt-in—much like Congress changed the rules for 401(k)s to dramatically increase participation rates.[17]

These prescriptions are sketched rather than described in exhaustive detail. Any one of them would justify a full-length article. The purpose here is to lay out a reform agenda that others can augment and add to and that can be implemented as soon as it becomes politically possible to do so.

II. UNION TRENDS

American unions have weakened considerably over the last fifty years. Part II.A describes the decline in private-sector union density. This decline in union density has led to the inability of unions to use strikes as an effective economic weapon, as described in Part II.B, and to labor's diminishing political power, as described in Part II.C. Labor's diminishing political power is a cause or effect or both of the spread of right-to-work laws, described in Part II.D. Contributors to union decline have been the decline in manufacturing work, described in Part II.E, and the rise in contingent and on-demand work, described in Part II.F.

14. Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679, 700 (2014).

15. *See* 30 U.S.C. § 820(d) (2012) (penalizing violations of health and safety standards by fines or imprisonment).

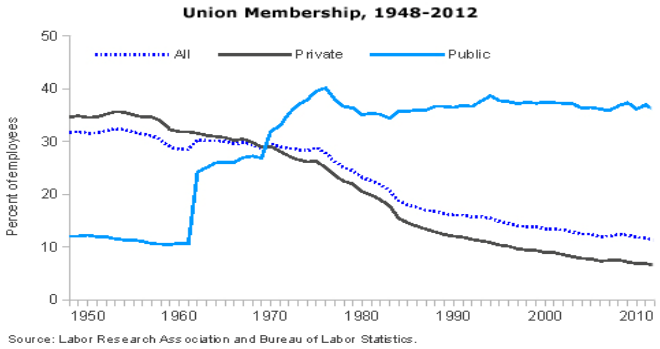
16. *See infra* Part IV.B.2.

17. *See infra* Part IV.B.3.

A. Decline in Union Density

Union membership peaked in the 1950s and has been declining ever since.[18] As the chart below makes clear, private-sector union density halved between the late 1970s and early 1980s, and again between 1990 and 2009, falling to the single digits where it has remained for the last eight years.[19]

Figure 1[20]



Although public-sector union density increased significantly in the 1960s and early 1970s, and now far exceeds private-sector density, the public-sector workforce is much smaller than the private-sector workforce,[21] so union density overall is still in a steep net decline. But even if unions could organize public-sector workers in sufficient numbers to offset private-sector losses, there still would be a significant overall net loss to worker bargaining power for four reasons.

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18. John Schmitt, *Union Membership Trends, 1948–2012*, NO APPARENT MOTIVE (Jan. 25, 2013, 10:13 AM), http://noapparentmotive.org/blog/2013/01/25/union-membership-trends-1948-2012/.

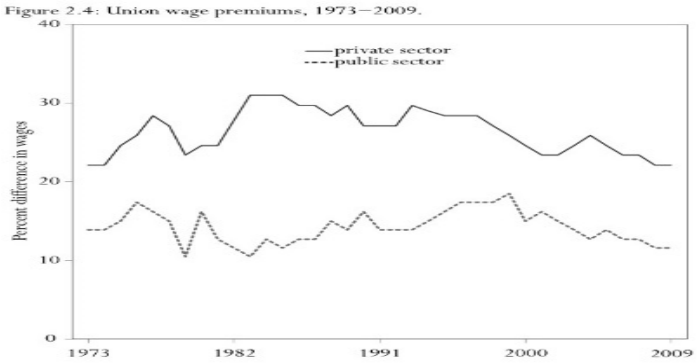
19. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1 (2014); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, DATA TOOLS, https://www.bls.gov/data/ (last visited Sept. 9, 2017); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ECONOMIC NEWS RELEASE: UNION MEMBERSHIP (2017), http://www.bls.gov/news.release/union2.toc.htm [hereinafter ECONOMIC NEWS RELEASE].

20. Schmitt, *supra* note 18. For data that can be analyzed, sliced, and diced every which way, see ECONOMIC NEWS RELEASE *supra* note19; BARRY HIRSCH & DAVID MACPHERSON, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS, www.unionstats.com (last visited Sept. 9, 2017).

21. *See, e.g.*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT EMPLOYMENT STATISTICS, https://www.bls.gov/ces/ (last visited July 3, 2017) [hereinafter CURRENT EMPLOYMENT STATISTICS]. Though roughly half of all union members are public, public employment is roughly one-sixth of all wage and salary employment. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (Jan. 26, 2017), https://www.bls.gov/news.release/union2.nr0.htm [hereinafter UNION MEMBERS SUMMARY].

First, the laws of many states impede the ability of public-sector workers to organize and forbid such workers from engaging in collective bargaining.[22] Second, the percentage of American workers employed in the public sector has stayed largely constant—between 15–20%—since 1960; there are not enough public-sector workers to make up for the decline in private-sector union density.[23] Thus, the total union density rate fell further in 2016 when private-sector union density declined to 10.7%, down 0.4% from 2015.[24] Third, the union wage premium—the degree to which union wages exceed nonunion-member wages—is significantly lower in the public sector than it is in the private sector, as the chart below illustrates.[25] Wages for public-sector workers, for example, often are set by legislators, not by collective bargaining.[26] Fourth, the law often curtails the ability of public-sector workers to use economic weapons—such as the strike—to a much larger degree than their private-sector counterparts do.[27]

Figure 2[28]



Source: Author's compilations. Data for 1973 - 1981 come from the CPS-May files; data for 1983 - 2009 come from the CPS-MORG files.
Note: Sample restricted to employed workers, ages 16 to 64 with positive wages.

22. ROSENFELD, *supra* note 19, at 34–35.

23. CURRENT EMPLOYMENT STATISTICS, *supra* note 21.

24. UNION MEMBERS SUMMARY, *supra* note 21.

25. ROSENFELD, *supra* note 19, at 44–54.

26. *See* MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 619–734 (3d ed. 2016) (describing the wide variation among the states on the scope of permissible collective bargaining by public-sector workers).

27. *Id.* at 735–98 (describing how, in the public sector, strikes are primarily a *political* rather than economic weapon, and often either are prohibited or are highly restricted and regulated).

28. ROSENFELD, *supra* note 19, at 46.

B. Disappearance of Strikes as an Economic Weapon

As the chart below demonstrates, work stoppages have plummeted. The solid line represents data from the Bureau of Labor Statistics ("BLS") on work stoppages (both strikes and lockouts) involving 1,000 or more workers.[29] Such stoppages peaked in the early 1950s, when 400–500 such stoppages occurred per year.[30] They dropped in the early 1960s, rose again in the mid-1960s, and then began a sustained decline beginning in the early 1980s that culminated in a nadir of five stoppages in 2009.[31] The dotted line represents data from the Federal Mediation and Conciliation Service on private-sector, non-airline work stoppages and is not restricted to large work stoppages.[32] It reflects a similar pattern for the limited number of years for which data are available.[33] Note that these are absolute numbers—not percentages of the total workforce. Thus, even as the American workforce has nearly tripled in size since 1950,[34] the number of work stoppages has fallen drastically.

Figure 3[35]

Source: For large strikes, data provided by Bureau of Labor Statistics (BLS) historical Work Stoppages file. For all strikes, data provided by the Federal Mediation and Conciliation Service (FMCS).
Note: Series do not distinguish between strikes and lockouts. The BLS series includes public sector stoppages; the FMCS series is restricted to private sector stoppages.

29. *Id.* at 89 fig.4.1.
30. *Id.* at 89.
31. *Id.* at 89 fig.4.1.
32. *Id.* at 88–89.
33. *Id.* at 89 fig.4.1.
34. *See* Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 16 tbl.1 (noting that the size of the labor force was 62,208 people in 1950 and 140,863 in 2000).
35. ROSENFELD, *supra* note 19, at 89 fig.4.1.

Historically, a decline in work stoppages was not necessarily a sign of union decline.[36] Work stoppages in the 1950s and 1960s were counter-cyclical—workers struck in good economic times when economic growth was increasing, unemployment was falling, and wages were slow to respond to these economic pressures.[37] As the chart above demonstrates, however, the current forty-year decline in work stoppages is constant—notwithstanding fluctuations in the business cycle. Instead, the decline in work stoppages seems strongly tied to the decline in union leverage.[38]

C. Labor's Diminishing Political Power

Unions traditionally have influenced politics in two ways: by delivering votes and by spending money on political campaigns. Both sources of influence have diminished significantly in the last several decades.

In the middle part of the twentieth century, organized labor served as a political counterweight to the political power of big money and big business.[39] Although voter participation correlates strongly with socio-economic status ("SES") (lower-SES status correlates with lower voter participation), unions historically cut across that grain by delivering the vote of a relatively high proportion of low-SES workers who, as a group, supported pro-labor policies that were economically progressive.[40]

The ability of organized labor to deliver votes obviously diminishes commensurately with union density. But even more than that, as Jake Rosenfeld has recently demonstrated, the union vote premium—i.e., the participation rate above what demographics otherwise would suggest[41]—has fallen significantly in recent years as the face of unions has changed.[42] For example, as described above, union workers today are much more likely to be employed in the public sector than they were forty years ago.[43] Public-sector workers—regardless of whether they are in a union—vote more often than private-sector workers.[44] This leaves relatively little room for unions to create a union vote premium by increasing their voter participation. Rosenfeld estimates that in the 2008 election, the private-sector union vote premium

36. *Id.* at 90.
37. *Id.*
38. *Id.* at 92.
39. *Id.* at 159.
40. *Id.* at 163.
41. Richard B. Freeman, *What Do Unions Do . . . to Voting?* 16 (Nat'l Bureau of Econ. Research, Working Paper No. 9992, 2003).
42. ROSENFELD, *supra* note 19, at 166–73.
43. *Id.* at 44–45.
44. *Id.* at 167.

was 5.1%, the public-sector vote premium was 0%, and the total union vote premium was 3.3%.[45]

The second way that unions can influence politics is by donating money (and to some extent, their members' volunteer time) to political campaigns.[46] However, unions' ability to influence elections this way has been constrained significantly over the last several decades by two developments. The first is restrictions the Supreme Court has placed on the ability of public-sector unions to use union dues to fund political campaigns. In *Abood v. Detroit Board of Education*,[47] the Supreme Court held that a public-sector union, while permitted to bill non-members for chargeable expenses, may not require non-members to fund its political and ideological projects.[48] In *Chicago Teachers Union, Local No. 1 v. Hudson*,[49] the Court imposed procedural requirements that a union must meet to collect fees from non-members.[50] Such procedures include a "Hudson notice" that the union must send every year to inform covered employees what that year's agency fee will be and to notify them of the thirty-day period in which they can object to payment of the portion that is not for chargeable collective bargaining purposes.[51] In *Knox v. Service Employees Int'l Union, Local 1000*,[52] the Court held, "when a public-sector union imposes a special assessment or dues increase, the union must provide [employees] a fresh *Hudson* notice and may not [collect] funds from non-members [until receiving] their affirmative consent."[53] Finally, in *Friedrichs v. California Teachers Association*,[54] the Court granted certiorari on two issues:

> [1] Whether *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment[, and (2)] [w]hether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.[55]

45. *Id.* at 180 fig.7.8.
46. *Id.* at 159.
47. 431 U.S. 209 (1977).
48. *Id.* at 235–36.
49. 475 U.S. 292 (1986).
50. *Id.* at 310.
51. *Id.* at 307 n.18.
52. 567 U.S. 298 (2012).
53. *Id.* at 322.
54. 136 S. Ct. 1083 (2016).
55. Petition for a Writ of Certiorari at i, Friedrichs v. Cal. Teachers Ass'n., 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 393856; Friedrichs v. Cal. Teachers Ass'n., No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015) .

However, Justice Antonin Scalia died shortly after the case was argued in front of the Supreme Court, leaving only eight members to decide the case. The result was a non-precedential *per curiam* opinion affirming the lower-court decision (in favor of the union) by an equally divided Supreme Court[56]—a result that likely will change with the appointment of Justice Gorsuch by a Republican president and a Republican-controlled Senate.[57]

The second major recent constraint on unions' ability to influence elections is *Citizens United v. Federal Election Commission*.[58] In that case, the Supreme Court held (5-4) that the First Amendment's freedom of speech protection prohibits the government from restricting independent political expenditures by a nonprofit corporation.[59] The statute the Court struck down similarly restricted political expenditures by unions.[60]

There is a false equivalence, however, in the assumption that the effect of *Citizens United* is non-political because its principles apply to both companies and unions. Unions—especially given membership declines both in absolute terms and as a proportion of the population—cannot hope to match the campaign expenditures of companies.[61] For example, in the 2000 election cycle (before *Citizens United*), business-related interests outspent unions by a ratio of fourteen to one.[62] Unions historically might have countered being outspent by organizing their members to volunteer their time to political organizing, but diminished union numbers (and revenues from dues, which helps fund organizing of new members as well as political contributions) have removed whatever counter-balance they might once have provided. Even worse from unions' perspective, the votes they managed to deliver in the 2016 election often went to a presidential candidate who has already taken steps to gut wage-and-hour laws, scrap Obama-era executive orders favoring labor, appoint to the National Labor Relations Board ("NLRB" or "the Board") and to the Supreme Court candidates hostile to labor, and support a national right-to-work law.[63]

56. Friedrichs, 136 S. Ct. at 1083.

57. Matt Ford, *What's Next for Justice Gorsuch?*, ATLANTIC (Apr. 10, 2017), https://www.theatlantic.com/politics/archive/2017/04/justice-gorsuch-cases/522513/; Harold Meyerson, *Donald Trump Can Kill the American Union*, WASH. POST (Nov. 23, 2016), www.washingtonpost.com/posteverything/wp/2016/11/23/donald-trump-could-kill-the-american-union/?utm_term=.7c1b8a471d0c.

58. 558 U.S. 310 (2010).

59. *Id.* at 365.

60. *Id*.

61. ROSENFELD, *supra* note 19, at 181.

62. Marick F. Masters, *Unions in the 2000 Election: A Strategic Choice Perspective*, 25 J. LAB. RES. 139, 167 tbl.12 (2004).

63. *See, e.g.,* Brief for Appellants, Nevada v. United States Dep't of Labor, No. 16-41606 (5th Cir. June 30, 2017) (stating the DOL dropped its defense of the Obama Administration's Fair Labor Standards Act overtime rule); Jeff Hirsch, *Kaplan Confirmed to NLRB; Emanuel Vote Pushed Back*,

D. Right-to-Work Laws: A Demonstration of Union Political Futility

Union shops and agency shops are union security clauses,[64] negotiated by an employer and union as part of a collective bargaining agreement, that function as critical organizing and funding tools for unions. A closed shop requires membership in the union as a condition for being hired and continuing employment. A union shop allows an employer to hire a nonunion worker but requires that the worker must join the union within a specified amount of time as a condition of continued employment. An agency shop does not require the worker to join the union, but instead, requires the worker to pay a fee to the union to cover collective bargaining costs.

Union security clauses are important to unions for two reasons. First, there is bargaining strength in numbers. Justice Holmes articulated this argument in *Vegelahn v. Gunter*.[65] "Combination on the one side is patent and powerful," he wrote, referring to the right of employers to organize in corporate and other combinations.[66] "Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."[67]

The second reason union security clauses are important to unions is because they prevent "free-riders." The federal labor law principle of exclusive representation[68] requires unions to represent all members of a bargaining unit—in both contract negotiation[69] and in grievance resolution[70]—regardless of whether the bargaining-unit member is a member of the union or pays union dues. A union that fails in this "duty of fair representation" to a member of the bargaining unit is subject to being civilly sued by the bargaining-unit member,[71] and may be liable for part of the member's damages that were caused by the employer's violation of the collective bargaining agreement.[72]

WORKPLACE PROF BLOG (Aug. 2, 2017), http://lawprofessors.typepad.com/laborprof_blog/2017/08/kaplan-confirmed-to-nlrb-emanuel-vote-pushed-back.html (noting steps taken to ensure Republican majority on NLRB); *see also* Steven Greenhouse, *What Unions Got Wrong About Trump*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/26/opinion/sunday/what-unions-got-wrong-about-trump.html?_r=0 (noting that in the 2016 presidential election, (1) Trump won three critical rust-belt states: Michigan, Pennsylvania, and Wisconsin, (2) Clinton's national share of the union vote was only 51%, and (3) in Ohio, Clinton lost among union households 49% to 44%).

64. For a general definition and discussion of each type of union security clause, see TIMOTHY J. HEINSZ ET AL., LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 893 (6th ed. 2009).

65. 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

66. *Id.*

67. *Id.*

68. J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

69. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991).

70. Vaca v. Sipes, 386 U.S. 171, 186 (1967).

71. *Id.* at 179–80.

72. Bowen v. USPS, 459 U.S. 212, 222 (1983).

Thus, without a union-security clause, unions are forced to bargain for, and to represent in costly grievance proceedings, bargaining-unit members who are not members of the union and who do not financially support it. Such "free-riding" workers get all the benefits of union representation without shouldering any of the cost; rational economic theory would predict that given this option, most workers would opt out of the union.[73]

Before 1935, nearly all attempts by unions to negotiate union security clauses were declared illegal by the courts.[74] The original Wagner Act permitted all forms of union-security clauses.[75] In 1947, the Taft-Hartley Act[76] chose a more middle course—it outlawed closed shops but allowed union and agency shops, thus forbidding unions from requiring employers to only hire union workers.[77]

The Taft-Hartley Act further limited union security clauses by allowing individual states (but not local governments, such as cities or counties) to outlaw the union shop and agency shop for employees working in their jurisdictions.[78] "About 22 states, largely in the South, the Great Plains, and the West, adopted [such] 'Right to Work' laws" by the early 1950s.[79] From then until the 2000s, there was almost no change in the list of right-to-work states, though demographic migration from Rust Belt to Sun Belt states[80] during that time significantly increased the proportion of workers affected by right-to-work laws.[81]

In recent years, however, and as Figure 4 illustrates, the right-to-work landscape has changed dramatically. From 2012–2015, three key Rust Belt states (Indiana, Michigan, and Wisconsin) became right-to-work states, and West Virginia followed in 2016.[82] State-level Republican gains in the 2016 election in Missouri and Kentucky turned those states right-to-work in

73. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 88 (1971) (arguing that a rational worker would not voluntarily contribute to a union).

74. *See, e.g.*, Plant v. Woods, 57 N.E. 1011, 1015 (1900) (issuing an injunction against union members for seeking to compel membership).

75. *See* HEINSZ ET AL., *supra* note 64, at 893 (listing the forms of union security that were legal under the Wagner Act).

76. 29 U.S.C. §§ 401–531 (2012).

77. *See* Local 357, Int'l Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 673 & n.7 (1961) (explaining that the Act outlaws closed shops except within specific circumstances).

78. 29 U.S.C. § 164(b) (2012) (codifying Section 14(b)).

79. HEINSZ ET AL., *supra* note 64, at 893.

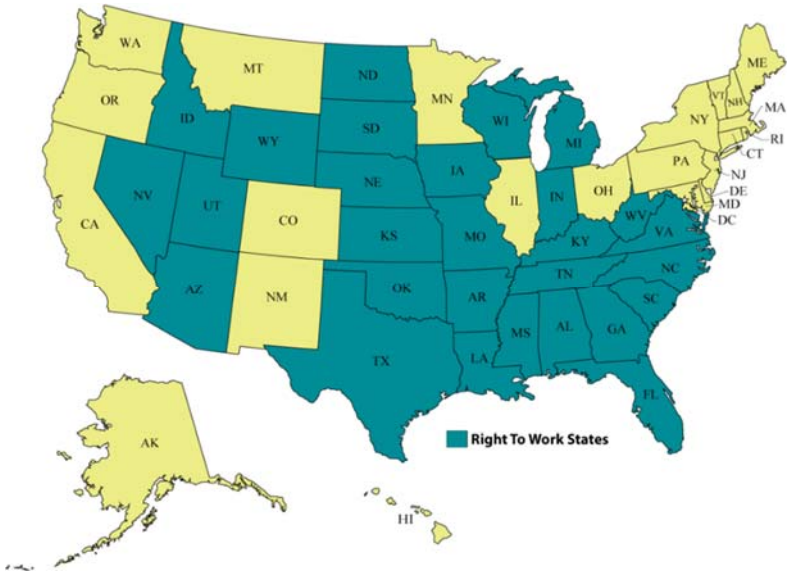
80. That is, from areas in the Upper Midwest (Western Pennsylvania, Western New York, Ohio, Michigan, Northern Indiana, and Northern Illinois) to areas in the South and Southwest (Southern California, Arizona, New Mexico, Texas, Louisiana, Alabama, Mississippi, Georgia, Florida, and South Carolina).

81. HEINSZ ET AL., *supra* note 64, at 893.

82. *Id.* (providing the dates of enactment for state right to work laws).

2017.[83] At the national level, congressional Republicans are likely to take up right-to-work legislation that would completely eliminate the ability of unions to negotiate union-security clauses in their collective bargaining agreements.[84] The *Washington Post* has gone so far as to call Donald Trump's 2016 election "an extinction-level event for American labor."[85]

Figure 4[86]



E. Decline in Manufacturing Work

Manufacturing is a critical part of the U.S. economy—and a source of life support for unions that, as described above, otherwise are in deep trouble. Manufacturing industries generated $2.1 trillion in U.S. gross domestic product (12.5% of total) in 2013.[87] However, this significantly understates the

83. *Id.*; Greenhouse, *supra* note 63.

84. Greenhouse, *supra* note 63; *see also* NAT'L RIGHT TO WORK COMM., NATIONAL RIGHT TO WORK ACT: NATIONAL RIGHT TO WORK FACT SHEET, https://nrtwc.org/facts-issues/national-right-to-work-act/ (last visited July 3, 2017) (arguing in favor of congressional right to work legislation).

85. Meyerson, *supra* note 57.

86. NAT'L RIGHT TO WORK COMM., RIGHT TO WORK STATES TIMELINE, https://nrtwc.org/facts-issues/state-right-to-work-timeline-2016/ (last visited Sept. 13, 2017).

87. ROBERT E. SCOTT, ECON. POLICY INST., BRIEFING PAPER NO. 388, THE MANUFACTURING FOOTPRINT AND THE IMPORTANCE OF U.S. MANUFACTURING JOBS 6 (2015), http://www.epi.org/publication/the-manufacturing-footprint-and-the-importance-of-u-s-manufacturing-jobs/ [hereinafter BRIEFING PAPER NO. 388].

role of manufacturing in the economy. Manufacturing provides a significant source of demand for goods (for example, energy to power a factory, construction to build it, and natural resources to serve as raw materials) and services (for example, engineering, accounting, and legal work) in other sectors of the economy, and these "intermediate inputs" are not captured in measures of manufacturing sector GDP.[88] They are counted in the broader measure of its gross output.[89] Manufacturing is similarly critical to U.S. employment. The manufacturing sector in 2013 was responsible, directly or indirectly, for 29.1 million U.S. jobs, or more than one-fifth (21.3%) of total U.S. employment.[90]

Manufacturing is a particularly important provider of jobs with good wages for workers without a college degree.[91] Much like unions create a union wage premium,[92] manufacturing provides a manufacturing wage premium—the dollar amount by which the average manufacturing worker wage exceeds the wage of an otherwise comparable non-manufacturing worker.[93] "The average wage premium for U.S. manufacturing workers without a college degree was $1.78 per hour (or 10.9%) in 2012–2013 . . . ."[94] Union density in manufacturing is considerably higher than in the private sector as a whole (9.4% v. 6.7% in 2015),[95] but it is falling.[96]

Unfortunately, both manufacturing output and the absolute number (not just the proportional number) of jobs in manufacturing are on a steady decline. Figure 5 below demonstrates both manufacturing's large footprint on the American economy and the relatively consistent decline of manufacturing as a share of national GDP from 1997–2013.[97] Over that time period, the United States lost 5.7 million manufacturing jobs.[98] The primary reason for declines in manufacturing are globalization and trade.[99]

88. *Id.* at 7

89. *Id.*

90. *Id.*

91. ROBERT E. SCOTT, ECON. POL'Y INST., BRIEFING PAPER NO. 367, TRADING AWAY THE MANUFACTURING ADVANTAGE: CHINA TRADE DRIVES DOWN U.S. WAGES AND BENEFITS AND ELIMINATES GOOD JOBS FOR U.S. WORKERS 6 & tbl.1 (2013).

92. *See infra* notes 143–149 and accompanying text (describing the decrease in the union wage premium as union density decreases).

93. BRIEFING PAPER NO. 388, *supra* note 87, at 8–9.

94. *Id.* at 8.

95. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS—2015, USDL-16-0158 at 1, 7 tbl.3 (2016), https://www.bls.gov/news.release/archives/union2_01282016.pdf.

96. *Cf.* BRIEFING PAPER NO. 388, *supra* note 87, at 9 (noting that in 2013, the union density rate in manufacturing was 10.1%).

97. *Id.* at 7.

98. *Id.* at 9.

99. *Id.*

Figure 5[100]

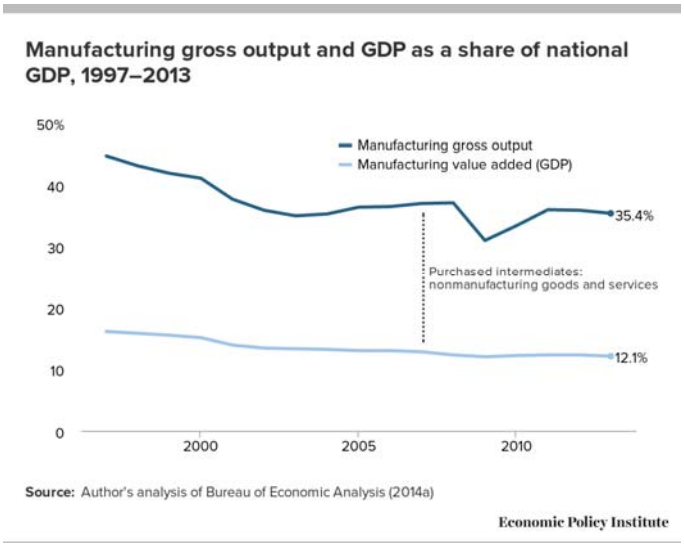
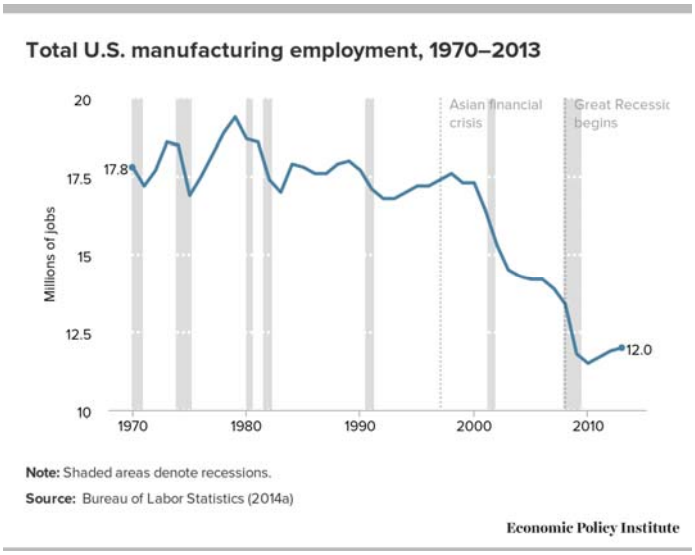


Figure 6 below demonstrates the commensurate decline in manufacturing employment from 1970–2013.[101]

Figure 6[102]

100. *Id.* at 8 fig.A.
101. *Id.*
102. *Id.* at 10 fig.B.



The decline of manufacturing work in the United States hurts unions in at least four ways. First, as described above, workers in manufacturing are more likely to be organized, so declining manufacturing jobs means declining union rosters. Second, workers in manufacturing jobs tend to think of themselves as workers rather than small-business entrepreneurs, as many workers in the gig economy do.[103] Strict divisions between workers and their managers reinforce a sense of commonality among the workers, making them more amenable to union-organizing efforts.

Third, factories are ideal places to organize. Workers arrive and leave at uniform times on uniform shifts, making it relatively easy and efficient for unions to identify and reach out to them. In a factory, the cost of labor is low relative to other costs of production such as the cost of the factory, machinery, and raw materials. This means that marginal increases in labor costs have relatively little effect on profits or product costs, giving management less incentive to resist organization than in the service or gig economy where labor costs represent a much higher percentage of the cost of production.

Fourth, and related, high capital costs (i.e., the cost of the factory, machinery, and raw materials) make factories more vulnerable to strikes than employers in the service or gig economy, making employers more willing to negotiate at the bargaining table and in turn making the union more attractive to workers. Unlike in many parts of the service and gig economy, workers are not fungible and easily replaced, because manufacturing jobs often are skilled—even specialized—jobs.

103. *See infra* text accompanying note 129 (noting the differences in identities between gig workers and employees).

F. Rise in Contingent and On-Demand Work

Existing labor and employment laws are predicated on the assumption of long-term, stable employment relationships.[104] This assumption, however, has been eroding consistently for at least the last couple of decades. It started with the transition from long-term employment relationships to contingent work—work expressly designed to be short-term, including independent contractors (also called freelancers or consultants), on-call workers, and workers provided by temporary help agencies.[105] That erosion has accelerated into a landslide over the last two to three years with the explosion of the on-demand or "gig" economy.[106]

There is no set definition of gig work.[107] It typically involves a single task or project and often is on-demand.[108] The gig could last for weeks or months (in which case it resembles a short-term job) or for only a few minutes.[109] A gig worker may take one gig at a time or juggle several at once.[110] The recent explosion in the quantity of gig work is largely attributable to the rise of companies (such as Uber[111]) connecting workers with gigs through websites or mobile applications (more commonly known as "apps").

The BLS stopped counting "contingent workplace" arrangements after 2005,[112] though it will start counting such arrangements again as part of the

104. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE ix (2004); Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 249–50 (2017), (noting that a traditional employment relationship is "the conventional legal form for engaging labor," against which "nontraditional" work is described, and which is both constituted and assumed by our current framework of labor regulation, originating in the New Deal).

105. STONE, *supra* note 104, at ix. The Government Accountability Office estimates that approximately forty percent of American workers are contingent. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015) (noting that under a broad definition of contingent work, 40.4% of the workforce were contingent workers in 2010).

106. *See infra* notes 118–121 and accompanying text (providing statistics on the growth of the gig economy).

107. Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LABOR STATISTICS: CAREER OUTLOOK (May 2016), http://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See, e.g.*, Richard A. Bales & Christopher Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 466–67 (2017) (describing how the internet allowed companies, including Uber, to expand the sharing economy).

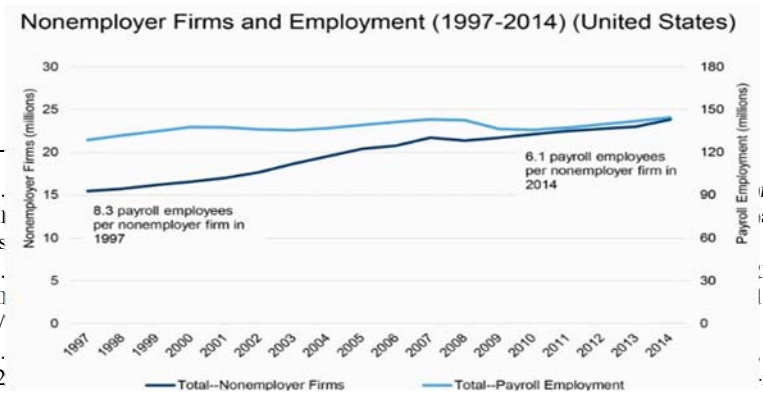
112. Ian Hathaway & Mark Muro, *Tracking the Gig Economy: New Numbers*, BROOKINGS (Oct. 13, 2016), https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers/ (Brookings analysis of data from U.S. Census Bureau and Moody's).

May 2017 Current Population Survey.[113] As of 2005, the BLS estimated that contingent work accounted for 1.8%–4.1% of total employment, and that independent contractors constituted an additional 7.4% of total employment.[114]

The void left by the BLS's hiatus in counting contingent workers has led to widespread speculation about the size and growth of the gig economy.[115] For now, the best estimate of the number of workers in the gig economy comes from a Census Bureau dataset of "nonemployer firms," which count "'businesses' that earn at least $1,000 per year in gross revenues (or $1 in construction) but employ no workers."[116] Approximately 86% of these "firms" are "self-employed, unincorporated sole-proprietors . . . . In the rides and rooms industries, some 93 percent of the 'firms' are freelancers or contractors. These are exactly the types of workers who seek part-time work in the gig economy."[117] Thus, this dataset provides the best snapshot currently available of American workers in the gig economy.

In the entire economy, these nonemployer firms grew from 15 million in 1997 to 22 million in 2007 to 24 million in 2014.[118] Figure 7 below demonstrates the growth of these nonemployer firms as compared to payroll employment.

Figure 7[119]



113. *nd Jobs*, THE H artment-revives

114. ELEASE: CONTI (2005), https://

115. , FORBES (Feb. 2 -reasons-half-of-you-will-be-freelancers-in-2020/#31d7ddb66d39; Jeremy Neuner, *40% of America's Workforce Will Be Freelancers by 2020*, QUARTZ (Mar. 20, 2013), https://qz.com/65279/40-of-americas-workforce-will-be-freelancers-by-2020/ (noting a study that estimates 60 million people will be contingent workers by 2020); Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/ (estimating that at least 14 million people currently work in the gig economy); *see generally* Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017) (advocating for systematic reforms in light of the growing gig economy).

116. Hathaway & Muro, *supra* note 112.

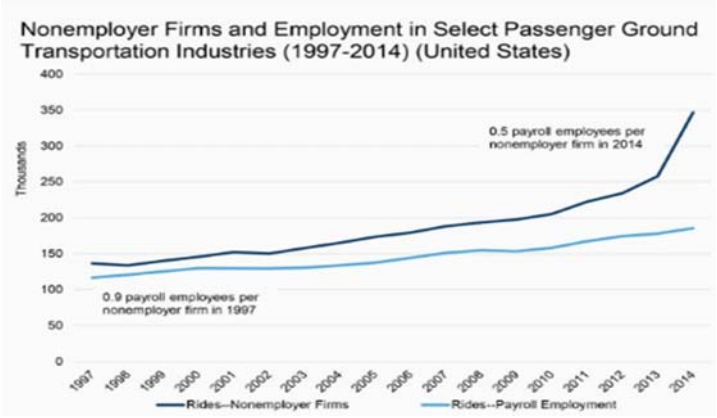
117. *Id.* at n.5.

118. Hathaway & Muro, *supra* note 112. Total U.S. payroll employment was 129 million in 1997 and 145 million in 2014. *Id.*

119. *Id.*

The rise of the gig economy is even more dramatic when limited to the ground transportation industry. Figure 8 below demonstrates that the number of nonemployer firms in the ground transportation industry rose sharply in 2010, the same year Uber launched in San Francisco. It then exploded in 2014—a trend that likely continues to the present.[120] Ian Hathaway and Mark Muro explain: "In [2014] the nonemployer firm growth rate in ride-sharing was 34 percent, compared with 4 percent for payroll employment in the industry. Between 2010 and 2014, nonemployer firms in ride-sharing grew by 69 percent while payroll employment grew by just 17 percent."[121]

Figure 8[122]



The consequence of the rise in the gig economy, especially if it occurs at the expense of traditional employment relationships, is that gig workers are much more difficult to organize into unions. This is so for two reasons. First, they may be "independent contractors" instead of "employees." Independent contractors are specifically excluded from protection by the

120. *Id.*
121. *Id.*
122. *Id.*

NLRA,[123] and attempts by independent contractors to organize and bargain collectively may violate antitrust laws.[124] The status of gig economy workers as employees versus independent contractors has been widely litigated[125] and theorized,[126] but almost exclusively in the context of wage, hour, and benefit disputes,[127] not in the context of whether the workers can organize into unions.[128]

Second, workers in the gig economy may think of themselves as individual entrepreneurs and not as workers with a collective interest.[129] Uber drivers, for example, set their own schedules, work alone, and drive their own cars.[130] However, as Catherine Fisk has shown, Hollywood writers have bargained collectively for eighty years despite working in a gig (albeit non-web-based platform) economy.[131] Independent, entrepreneurial, short-term workers can organize and bargain collectively if given the opportunity, motive, and legal protection to do so.[132]

123. National Labor Relations Act, 29 U.S.C. § 152(3) (2012); *see also* NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968) (applying general agency law principles to determine whether insurance agents were employees or independent contractors under the NLRA).

124. *See* Catherine Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. (forthcoming 2017) (manuscript at 15–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858572 (analyzing historical precedent on whether independent contractors violate antitrust laws by acting in concert); Paul, *supra* note 104, at 11 (describing the legal theory under which Uber workers would violate antitrust laws by engaging in collective bargaining); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977 (2016) (discussing the status of independent contractors under antitrust laws); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 169–70 (2005) (describing the Supreme Court's treatment of independent contractors under the Sherman Act).

125. *See* Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, (St. Louis Univ. Legal Studies Research Paper No. 2016-9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776213 (listing cases where gig economy workers sought the benefits associated with employment).

126. *See, e.g.*, Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 39 COMP. LAB. L. & POL'Y J. (forthcoming 2017), ssrn.com/abstract=2734288 (discussing litigation surrounding gig economy workers' status and analyzing how the gig economy is transforming work); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673 (2016) (advocating for a new approach to delineating employment); Bales & Woo, *supra* note 111 (arguing that current legal tests do not provide clear answers as to whether Uber drivers are employees or independent contractors).

127. Cherry, *supra* note 125.

128. *Cf.* Fisk, *supra* note 124 (using Hollywood writers as a case study in whether gig-like workers can, both legally and practically, organize into a union).

129. V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 104–20 (2017); Fisk, *supra* note 124, at 1.

130. Bales & Woo, *supra* note 111, at 6.

131. Fisk, *supra* note 124, at 2.

132. *See generally id.* (discussing why and how Hollywood, a gig economy, decided to unionize).

III. CORRELATES AND CONSEQUENCES OF UNION DECLINE

By just about any conceivable measure, the economic picture of wages over the last several decades is bleak. Wages have stagnated, have become significantly less equal, and have failed to keep pace with GDP.[133] Correlation, of course, is not necessarily causation; factors contributing to this picture may include globalization, technological change, education levels, and the mobility of capital relative to labor. However, a growing body of research suggests strongly that the decline of unions is responsible for a significant measure of wage stagnation and inequality.

A. Rising Income Inequality

As demonstrated below in Figure 9, from 1979–2007 the average income of the top 1% rose dramatically, the average income of the top 20% rose less robustly, and the average income of everyone else rose marginally at best. For uneducated men, the trend is particularly brutal—nonunion men in the private sector with a high school education or less experienced a real-wage loss of 13% from 1979–2013.[134] Real wages for all nonunion men during that time frame were relatively flat.[135] Real wages for nonunion women with a high school education or less declined slightly, while the one bright spot was that wages for all women rose 27%.[136] Educated women did relatively well over this time period; everyone else flat-lined or back-tracked.[137]

Figure 9[138]

133. *See infra* Parts III.A–III.B.

134. JAKE ROSENFELD ET AL., ECONOMIC POLICY INSTITUTE, UNION DECLINE LOWERS WAGES OF NONUNION WORKERS 3 (2016), http://www.epi.org/publication/union-decline-lowers-wages-of-nonunion-workers-the-overlooked-reason-why-wages-are-stuck-and-inequality-is-growing/.

135. *Id.*

136. *Id.* at 3, 4 fig.A.

137. *Id*. at 3.

138. CTR. ON BUDGET & POLICY PRIORITIES, INCOME GAINS AT THE TOP DWARF THOSE OF LOW- AND MIDDLE-INCOME HOUSEHOLDS, https://www.cbpp.org/income-gains-at-the-top-dwarf-those-of-low-and-middle-income-households-3 (last visited Oct. 3, 2017).

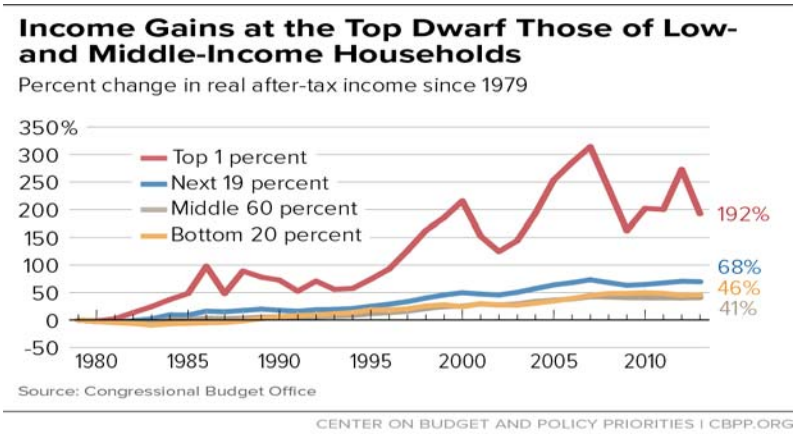
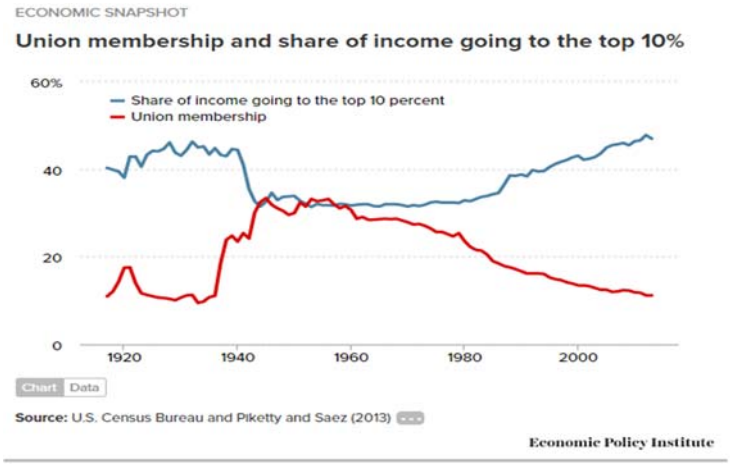


Figure 10 below juxtaposes the share of income going to the top 10% with the union density rate.[139] It illustrates graphically the strong positive correlation of union density and wage equality over nearly the entire last century.

139. *Id.*

Figure 10[140]



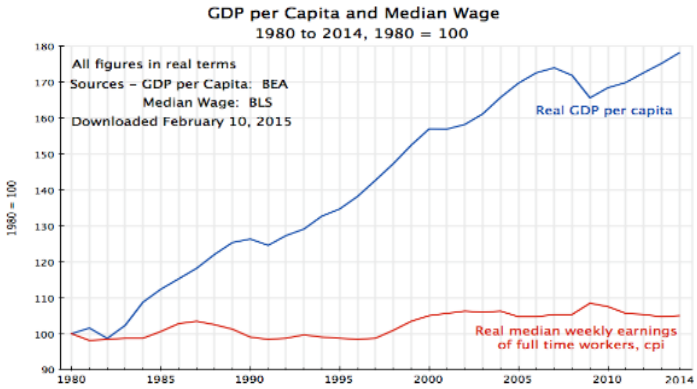
B. Divergence of Wage Growth from GDP Growth

A second disturbing trend, illustrated by Figure 11 below, is that since 1980, wage growth for most workers has failed to keep pace with GDP growth.[141] Workers are not sharing in the prosperity they are creating. Though this trend correlates with declining union density, correlation is not, of course, causation. Nonetheless, it is probably reasonable to assume that if unions were stronger, they would be demanding (and getting) a bigger piece of the pie created by productivity gains.

140. Will Kimball & Lawrence Mishel, *Unions' Decline and the Rise of the Top 10 Percent's Share of Income*, ECON. POLICY INST. (Feb. 3, 2015), http://www.epi.org/publication/unions-decline-and-the-rise-of-the-top-10-percents-share-of-income/.

141. *See* David Autor et al., *Concentrating on the Fall of the Labor Share* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 23108, 2017), www.nber.org/papers/w23108 (noting that "there is consensus that there has been a decline in the U.S. labor share since the 1980s particularly in the 2000s").

Figure 11[142]



C. Declining Union Wage Premium

Unions walk a fine line in attempting to raise wages. Raise them too high, and the firm or industry becomes less competitive, and union members lose jobs. Fail to raise them high enough, and worker interest in joining and supporting a union wanes.

Thus, one of the key goals of any labor organization is to "take wages out of competition."[143] Taking wages out of competition in a particular industry means establishing a wage floor so that rival companies will not compete by a race-to-the-bottom on wages[144]—they instead will compete on innovation and efficiency and other non-wage factors. Achieving this, however, requires unions to achieve sufficient union density in the industry such that nonunion firms cannot attract qualified labor without paying the union wage rate or something close to it.

As described above in Part II.A, however, union density rates have been falling, especially in the private sector. Public-sector density rates have risen, though not nearly enough to offset private-sector losses. As Figure 2[145] illustrates, the union wage premium in the public sector is smaller than in the

142. Frank J. Lysy, *Why Wages Have Stagnated While GDP Has Grown: The Proximate Factors*, AN ECONOMIC SENSE BLOG, (Feb. 13, 2015, 6:45 PM), https://aneconomicsense.org/2015/02/13/why-wages-have-stagnated-while-gdp-has-grown-the-proximate-factors/.

143. Dimick, *supra* note 14, at 700; *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940) ("[E]limination of price competition based on differences in labor standards is the objective of any national labor organization.").

144. *See* Dimick, *supra* note 14, at 700–01 (describing the rationale behind coordinating wages across a market).

145. *See supra* Part II.A.

private sector, so it should not be surprising that the overall union wage premium likewise is falling.[146]

Figure 2 also illustrates, however, that even in the private sector, the union wage premium is falling, though not precipitously. Figure 2 obscures, however, the divergence over the last 30 years of the union wage premium earned by men versus women. In 1974, the private-sector union wage premium for both sexes was about 21%.[147] By 2009, however, the wage premium for men had risen to about 26% while the premium for women had dropped to about 17%.[148] Factors that likely explain this disparity include the higher proportion of men working in manufacturing, construction, and transportation—which still command significant union wage premiums—and the higher proportion of women working in the service industry and education—which do not.[149]

D. Disassociation of Nonunion Wages from Union Wages

Some forty years ago, nonunion companies often looked to their union counterparts as a benchmark for wages and benefits.[150] They did so for three reasons. One was union-avoidance. Nonunion companies feared that going union would mean ceding workplace control, inviting the possibility of a disruptive strike, and paying union-scale wages, so they voluntarily offered near-union-scale wages[151] on the theory that "two out of three ain't bad."[152] The second reason was to attract qualified workers—if unions had succeeded in taking wages out of competition, all the good workers would work for union shops, and a company offering wages well below the norm would be unable to attract qualified workers.[153] The third reason was that unions served as a cultural force pushing—sometimes politically, sometimes socially—for workers to receive a "fairer share."[154] Unions even helped lift the pay of the low- and mid-level managers on the management rungs above them because

146. ROSENFELD, *supra* note 19, at 71.

147. *Id.* at 73.

148. *Id.* at 72 fig.3.1.

149. *Id.* at 73.

150. FRED K. FOULKES, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES 153–54 (1980).

151. *Id.* at 154.

152. MEATLOAF, *Two Out of Three Ain't Bad*, *on* BAT OUT OF HELL (Epic Records 1977).

153. FOULKES, *supra* note 150, at 156.

154. ROSENFELD ET AL., *supra* note 134, at 6; *see also* LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL'Y INST., BRIEFING PAPER NO. 143, HOW UNIONS HELP ALL WORKERS 8 (2003), http://www.epi.org/publication/briefingpapers_bp143/.

companies were loath to pay supervisors less than the workers they supervised.[155] Consequently, as Fred Foulkes noted in 1980, "the activities of many unions in the United States are benefitting many nonmembers; in other words, unions are doing much good for many people who do not pay them any dues."[156]

Today, however, the situation is often reversed. Many union companies look to their nonunion competitors as a benchmark on wages and benefits.[157] With unions becoming a diminished threat to organize[158] and a nearly nonexistent threat to strike, the nonunion company "today has little incentive to match union wage[s]."[159] Moreover, even if the union wage premium retains some of its former vitality, its influence on the larger labor market has diminished significantly with the decline in union density. "After all," writes Jake Rosenfeld, "a large union wage premium means little if only a tiny fraction of the population receives it."[160] Private-sector union decline since the 1970s has contributed to substantial wage losses among workers who do not belong to a union.[161] Union decline can explain about one-third of the growth in wage inequality among men, and about one-fifth of the growth of wage inequality among women—from 1973–2007.[162] Union decline contributed substantially more to wage loss from 1979–2013[163] than increased trade with low-wage nations.[164] The 2016 presidential candidates missed the boat: instead of targeting free trade as a cure for job loss, they should have been targeting the decimation of American unions.

155. Jake Rosenfeld, *Widening the Gap: The Effect of Declining Unionization on Managerial and Worker Pay, 1983–2000*, 24 RES. IN SOC. STRATIFICATION & MOBILITY 223, 235 (2006).

156. FOULKES, *supra* note 150, at 154.

157. ROSENFELD, *supra* note 19, at 70.

158. *Declining Employee Loyalty a Casualty of the New Workplace*, KNOWLEDGE@WHARTON (May 9, 2012), http://knowledge.wharton.upenn.edu/article/declining-employee-loyalty-a-casualty-of-the-new-workplace/ ("Unions are on the decline. It's easy to quash them if they try to organize.").

159. ROSENFELD, *supra* note 19, at 78. For a comprehensive examination of the union wage gaps and how they have changed over time, see BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK: COMPILATIONS FROM THE CURRENT POPULATION SURVEY tbls.2a–2c (BNA 2016).

160. ROSENFELD, *supra* note 19, at 76.

161. ROSENFELD ET AL., *supra* note 134, at 1.

162. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011).

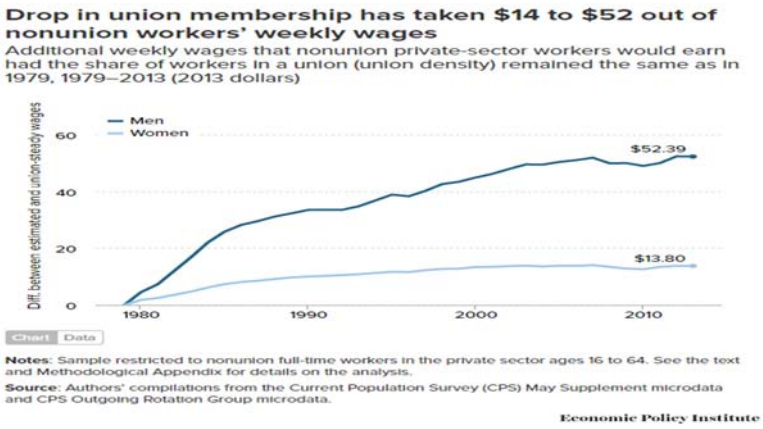
163. ROSENFELD ET AL., *supra* note 134, at 1.

164. *See* JOSH BIVENS, ECON. POLICY INST., BRIEFING PAPER NO. 354, USING STANDARD MODELS TO BENCHMARK THE COSTS OF GLOBALIZATION FOR AMERICAN WORKERS WITHOUT A COLLEGE DEGREE 2 (2013), http://www.epi.org/publication/standard-models-benchmark-costs-globalization/ ("[G]rowing trade with less-developed countries lowered wages in 2011 by 5.5 percent . . . .").

The direct causal effect of union decline on wage rates and inequality is described in detail in the 2016 Economic Policy Institute report Union Decline Lowers Wages of Nonunion Workers,[165] and I will only summarize the findings here. For nonunion, private-sector men, weekly wages would be 5% higher in 2013 if union density had remained at its 1979 level.[166] Non-college-graduate men would have earned 8% more, and men with a high school diploma or less would have earned 9% more.[167] The effect on women would not have been as substantial because women were not as organized as men in 1979, but even so they still would have earned 2–3% more.[168]

The loss in weekly wages is illustrated below by Figure 12, and the union density effect on nonunion wages by Figure 13. The numbers may not seem huge at first glance, but the aggregate annual loss in nonunion wages from union decline is approximately $133 billion.[169] This does not include the annual loss in union wages caused by the dramatic decline in union density over this time period.[170]

Figure 12[171]



165. ROSENFELD ET AL., *supra* note 134, at 1. Calculations from Jake Rosenfeld and the Economic Policy Institute basically ask the following: Let's assume both that union coverage and their effects on wages seen in the past held constant over time. *Id.* If so, what level of union density and earnings would we have now? *Id.* That is an interesting question to ask and the results are informative. But it does not follow that there existed any policies (politically feasible or not) that might have produced constant union density and wage effects. This is particularly so if technological change and globalization are principal reasons for changes over time.

166. *Id.*

167. *Id.* at 2.

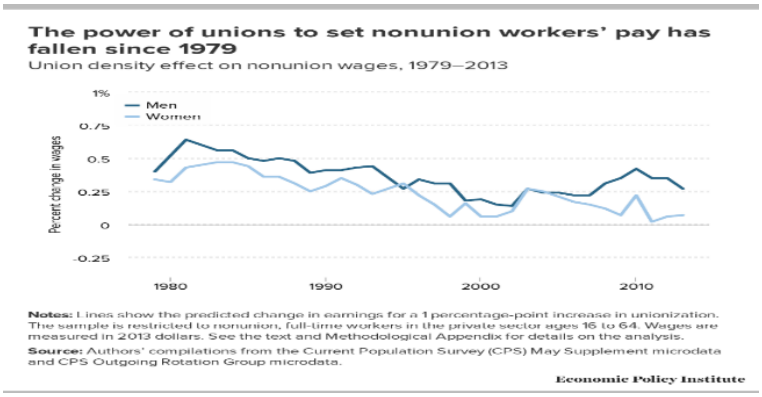
168. *Id.*

169. *Id.* at 1–2 (describing loss for men is $109 billion and loss for women is $24 billion).

170. *Id.* at 3 ("[F]or all of our analyses, we exclude the wages of union workers, as this report's focus is on trends in nonunion pay in the private sector.").

171. *Id.* at 13 fig.C.

Figure 13[172]



IV. PRESCRIPTIONS FOR CHANGE

The figures and numbers in Parts II and III are deeply disturbing, and reversing them will require strong medicine. Part IV begins by reviewing the traditional prescriptions for reforming labor law: modifying various election rules to make it easier for workers to organize, restricting employers' ability to hire replacement employees when unions strike, and reversing restrictions on union security clauses. It then makes three more far-reaching proposals. First, it builds on the longstanding understanding that the NLRA's civil remedies are grossly inadequate and proposes criminal penalties for willful violations—much as the Mine Safety Act now permits criminal penalties for willful violations that result in worker deaths. Second, it urges expanding NLRA protections to on-demand, gig-economy workers—much as a 2016 Seattle municipal ordinance has. Third, it argues that the default on union representation should be changed from opt-out to opt-in—much like the rules for 401(k)s were changed to dramatically increase participation rates.

A. The Traditional Prescriptions

The decline of American unions is no secret, and academics and union advocates have offered plenty of prescriptions over the last several decades. This section discusses those prescriptions. They include easing union election rules, for example, by giving unions accurate and useful information (e.g., cell numbers and email addresses) of workers in the proposed bargaining unit, giving unions meaningful pre-election access to workers, giving unions equal speech rights in election campaigning, and allowing workers to form a union based on anonymously signed cards rather than having to endure an election. Other traditional prescriptions include restricting the ability

172. *Id.* at 22 fig.I.

of employers to hire replacement workers during strike, which in turn would decrease the ability of employers to break strikes and increase unions' bargaining power; and either reversing restrictions on union security clauses, or reducing the burden on unions to represent non-members.

1. Ease the Election Rules

A fundamental premise of federal labor law since the 1920s is that "public policy favors the right of workers to form [labor] organizations of their own choosing, to" bargain for and represent them in the workplace.[173] This premise is built on two goals: (1) equalizing workers' bargaining power with companies and enabling them to negotiate better wages and working conditions than they would otherwise, and (2) providing an administrative (and arbitral) process for resolving conflicts between workers and companies to reduce the number and destructiveness of industrial conflict.[174] The goals cannot be realized, however, if workers are unable to organize effectively.

The NLRA requires that a union have "majority"[175] support before it can represent a given set of workers, and gives the Board the authority to determine, through secret ballot elections, when a union has obtained such support.[176] Before seeking an election, a union must obtain signed authorization cards from at least thirty percent of the workers.[177] A union obtaining a large majority can request immediate recognition from the employer,[178] but the employer does not have to give it,[179] and seldom does.[180]

The union then petitions the Board for an election.[181] Within seven days of ordering an election, the company must file with the NLRB Director a list of employees eligible to vote in the election, together with their addresses and phone numbers (this is known as an "Excelsior list" after the name of the

173. Samuel Estreicher, *"Easy In, Easy Out": A Future for U.S. Workplace Representation*, 98 MINN. L. REV. 1615, 1617 (2014).

174. *Id.*

175. National Labor Relations Act, 29 U.S.C. § 159(a) (2012).

176. *Id.* § 159.

177. *Id.* The statute says a "substantial number," but the Board has consistently interpreted the threshold as 30%, consistent with the 30% threshold in the statute for triggering a decertification election. *Id.* §§ 159(c)(1)(A), 159(e); *see* NLRB, What We Do / Conduct Elections, https://www.nlrb.gov/what-we-do/conduct-elections (last visited Sept. 14, 2017) ("To start the election process, a petition and associated documents must be filed, preferably electronically, with the nearest NLRB Regional Office showing support for the petition from at least 30% of employees.").

178. *See, e.g.*, Harry C. Katz et al., *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. REL. REV. 573, 578–79 (2003) (noting the Communication Workers of America's ("CWA") practice of receiving union recognition without NLRB elections).

179. NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

180. JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS 15 (2016); Estreicher, *supra* note 173, at 1627.

181. 29 U.S.C. § 159(c).

Board case establishing the rule[182]).[183] In the weeks leading up to the election, both the union and the company conduct rival, often bitter,[184] campaigns to persuade workers to vote either for or against the union.

These elections are grossly one-sided and are permeated by employer conduct that is formally illegal but continues nonetheless. A study by Kate Bronfenbrenner, for the Economic Policy Institute, catalogs the malfeasance that occurs regularly in union elections:

> In the NLRB election process[,] it is standard practice for workers to be subjected to threats, interrogation, harassment, surveillance, and retaliation for union activity. . . . [E]mployers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections. Workers were forced to attend anti-union one-on-one sessions with a supervisor at least weekly in two-thirds of elections. In 63% of elections employers used supervisor one-on-one meetings to interrogate workers about who they or other workers supported, and in 54% used such sessions to threaten workers.[185]

Such tactics are possible because the election rules governing union campaigns significantly favor employers, and remedies for illegal employer conduct are exceptionally weak. To resurrect labor, the rules should be rewritten to achieve at least neutrality, and ideally to favor workers.

a. Give Unions an Excelsior List for the Twenty-First Century

In the 1966 *Excelsior Underwear* decision, the Board ruled that "within 7 days after . . . the Board has directed an election . . . the employer must file with the Regional Director an election eligibility list," which would then be turned over to the union.[186] In *NLRB v. Wyman-Gordon Co.*,[187] the Supreme Court upheld the Board's authority to require Excelsior lists, noting that the "disclosure requirement . . . encourag[es] an informed employee electorate and [allows] unions the right of access to employees that management already possesses."[188]

Employer compliance with this requirement is regular, but perfunctory and incomplete. The lists provided to the Director (and thence to the union)

182. Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1239 (1966).

183. 29 U.S.C. § 159(c).

184. Estreicher, *supra* note 173, at 1627.

185. KATE BRONFENBRENNER, ECON. POL'Y INST., BRIEFING PAPER NO. 235, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 1–2 (2009), http://www.epi.org/publication/bp235/.

186. *Excelsior*, 156 N.L.R.B. at 1239.

187. 394 U.S. 759 (1969).

188. *Id.* at 767.

"are never totally accurate and are often filled with wrong names and old addresses."[189] In a digital era, where having accurate employee information is critical, not only for internal reasons but also for tax and all kinds of other regulatory compliance purposes, submitting bad data is inexcusable. The current iteration of the Excelsior rule is also woefully out-of-date, as the Excelsior expectations were set (apparently in stone) before cell phones, email addresses, and social media.

The Excelsior disclosure requirements should be expanded to include, at a minimum, cell phone numbers and email addresses.[190] Additionally, to ensure meaningful compliance, and in recognition of the relative ease of the employer (compared to the union) of obtaining this data, any eligible voter not listed, or listed with incorrect contact information, should be counted as "yes" votes for the Union unless that voter individually and specifically indicates otherwise on an authorization card or at the ballot box, and an employer's failure to provide correct information that the employer in fact has should be an unfair labor practice.

Accurate phone numbers and email addresses are far from sufficient, however, to guarantee free and fair union elections. Face-to-face contact between union organizers and workers is imperative, because employees often decide whether to vote for the union based on their assessment of the union organizer.[191] For this reason, it is also important to give unions meaningful pre-election access to workers at their place of employment.

b. Give Unions Meaningful Pre-Election Access to Workers

The right of employees to self-organize, guaranteed by the NLRA, depends to a large degree on the ability of workers to learn about the advantages of organization from union representatives.[192] However, the Supreme Court

189. GETMAN, *supra* note 180, at 19.

190. The new election rules partially address this by requiring a personal email and phone number if the employer has it. *See* 79 Fed. Reg. 74,308, 74,310 (Dec. 15, 2014) (providing a list of the 2014 amendments to the election rules). For a description of these rules (including a section on *Excelsior* and a short plea for even more electronic addresses), see Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L. REV. 1647, 1654–57 (2015). Employer privacy concerns could be alleviated by allowing employees to affirmatively tell the employer that they do not wish for their personal contact information to be provided as part of the Excelsior list. For a general argument that employees should be able to opt in and out of electioneering processes, see Michael M. Oswalt, The Content of Coercion (unpublished manuscript) (on file with author).

191. GETMAN, *supra* note 180, at 22.

192. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

has held that employer property rights[193] are more important than worker associational rights.[194] As a consequence, during a union representation election, the company enjoys nearly unlimited access to employee voters, whereas the union's access is severely restricted at best.

The first major decision favoring property rights over associational rights occurred in the 1956 case of *NLRB v. Babcock & Wilcox*.[195] In that case, the Supreme Court reversed a Board decision requiring the company to give union organizers access to its parking lot.[196] The Board had concluded that, without such access, the union would be at a serious disadvantage in getting its message to the workers.[197] The Court, without addressing the union's disadvantage, nonetheless held that the Board had erred by giving the union organizers access to the company's property as if they had been employees.[198]

The second major decision was *Lechmere, Inc. v. NLRB*,[199] in which the Court again reversed a Board decision ordering a company to allow union organizers access to the company's parking lot.[200] The Court held that the Board's decision "erod[ed] *Babcock's* general rule that 'an employer may validly post his property against nonemployee distribution of union literature.'"[201] To get access to employees on company property, the Court said, a union must show that "'no other reasonable means of communicating its organizational message to the employees exists,'" such as mailings, phone calls, home visits, or displaying signs across the street from the company's parking lot.[202]

The result of these decisions is that union election campaigns are extraordinarily one-sided. Companies have instant and unfettered access to workers and nearly always exploit this opportunity to drive home the anti-union message. As Julius Getman explains,

> [An] antiunion employer can announce to employees when they are hired that the company is nonunion, and wants to stay that way. It can show antiunion films or CDs at various times throughout the

193. For an excellent discussion of the Supreme Court's focus on employer property rights, and the contrasting focus of Canadian courts on workers' rights, see Martin H. Malin, *Extending Mike Zimmer's Cross-Border Comparative Work: The Role of Property Rights in U.S. and Canadian Labo(u)r Law*, 20 EMP. RTS. & EMP. POL'Y J. 417 (2016).

194. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112.

195. *Id.*

196. *Id.* at 106, 114.

197. *Id.* at 107.

198. *Id.* at 112.

199. 502 U.S. 527 (1992).

200. *Id.* at 530, 541.

201. *Id.* at 538 (quoting *NLRB v. Babcock & Wilcox*, 351 U.S. at 112).

202. *Id.* at 535, 540 (quoting Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 205 (1978)).

> workplace. It can have its supervisors engage in discussions with the employees, and it can fill its message boards with antiunion arguments and slogans.[203]

The structure of the NLRA is predicated on the notion that workplaces are best structured as mini-democracies, with workers voting for representation in free and fair elections.[204] However, thanks to the Supreme Court's favoring of company property rights over worker associational rights, elections for union representation are anything but free and fair. Instead, they are more akin to the "elections" held in many developing countries in which a longstanding dictator owns or controls all media outlets, exiles political opponents, and punishes critics with impunity.[205]

Unions should be given fair access to workers in representation elections so they can make a free and informed choice about union representation. This necessarily means giving union representatives access to workers on company property to permit face-to-face communication,[206] and if an employer uses company time to speak with workers (individually or collectively) to oppose the union, the union should be provided a commensurate opportunity to respond. If the Supreme Court continues to insist that employer property and speech rights forbid this and trump worker associational rights, then the NLRA election rules should be redrafted to provide for snap elections (i.e., ten to fifteen days compared to the current process of about thirty days) before the company can gear up for an anti-union campaign. Better to have minimal campaigning on both sides than to have campaigning that is grossly lopsided.

c. Give Unions Equal Speech Rights in Union Campaigns

A "captive audience speech," in the union-organizing context, is an anti-union speech by an employer to its workers, during work time, that workers are required to attend on pain of discipline or discharge.[207] The workers rarely have an opportunity to question the presenter. The "speech" today often is a multi-media presentation crafted and perhaps delivered by a professional union-busting company, and there often are multiple such speeches

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203. GETMAN, *supra* note 180, at 22.

204. CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 42–43 (1942); Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 276 (1948).

205. *See* BRONFENBRENNER, *supra* note 185, at 25 ("This combination of threats, interrogation, surveillance, and harassment has ensured that there is no such thing as a democratic 'secret ballot' in the NLRB certification election process.").

206. *See* Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 15–16 (2009) (arguing that the Board could require employers to provide unions with some access to company premises).

207. Litton Sys. Inc., 173 N.L.R.B. 1024, 1030 (1968)

throughout a union organizing campaign. Most critically, existing law permits the employer to prevent the union from coming to the workplace to present opposing views.[208]

Captive audience speeches originally were not permitted under the NLRA. In 1946, the Board ruled that they were a *per se* violation of workers' Section 7 right to organize, because they were "calculated to, and do[], interfere with the selection of a representative of the *employees*' choice."[209] However, the Taft-Hartley Act[210] of 1947 amended Section 8(c) of the statute, which now provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[211]

As a result of this language, the Board reversed course and held, in *In re Babcock & Wilcox Co.*, that captive audience speeches do not violate Section 8(a)(1).[212] For two years, the Board required companies to allow unions to make similar speeches in reply,[213] but the Board reversed this equal-access rule in 1953.[214]

One might think that the final provison of Section 8(c), permitting campaigning that "contains no threat of reprisal or force or promise of benefit," would provide employees some measure of protection, but it does not.[215] As discussed above, a union election without an employer threat is the exception rather than the rule, and these threats are not idle—companies fire workers for participating in union organizing campaigns more than one-third of the time.[216]

Paul Secunda has long argued that captive audience meetings amount to coercive conduct against workers in derogation of their Section 7 right to

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208. NLRB v. United Steel Workers of Am., 357 U.S. 357, 363 (1958); NLRB v. Prescott Indus. Prods. Co., 500 F.2d 6, 8, 10–11 (8th Cir. 1974); Hicks Ponder Co., 168 N.L.R.B. 806, 811–12, 815 (1967).

209. *In re* Clark Brothers Co., 70 N.L.R.B. 802, 805 (1946).

210. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–144, 167, 172–187 (2012).

211. *Id.* § 158(c).

212. 77 N.L.R.B. 577, 578 (1948).

213. *See* Bonwit Teller, Inc., 96 N.L.R.B. 608, 611 (1951) (finding that an employer violated Section 8(a)(1) by refusing to allow a union to address the employees under similar conditions to the employer's speech).

214. Livingston Shirt Corp., 107 N.L.R.B. 400, 406–09 (1953).

215. 29 U.S.C. § 158(c).

216. *See supra* note 185 and accompanying text (providing statistics for the frequency of employer threats to employees during union elections); *see also infra* Part IV.B.1 (discussing inadequacy of remedies for unfair labor practices).

organize.[217] Consistent with this, the NLRA should be amended to outlaw the captive audience speech or at least to entitle unions to equal access.

d. Allow Card-Check Certification

The original Section 9(c) of the NLRA allowed the Board to "'take a secret ballot election or utilize any other suitable method'"[218] to determine whether a union had majority support and should be certified as the workers' bargaining representative.[219] Until the 1939 *Cudahy Packing Co.*[220] decision ended the practice, the Board used card checks—certification without an election, upon the Union's demonstration that it had received signed authorization cards from more than half of the workers—as its primary "other suitable method."[221] In 1947, Congress formally stripped out the "other suitable method" language from Section 9(c) with the Taft-Hartley amendments.[222]

Section 9(c) should be re-written to permit certification upon a union's showing of majority support through authorization cards. This would maintain the principle of majority rule, but would permit workers to organize free of the intimidation, coercion, and misinformation emanating from employers and the anti-union firms they hire typical of many contested elections. This system is used in several Canadian provinces[223] and in the United Kingdom,[224] and has been advocated by several American labor law scholars.[225]

217. *See, e.g.*, Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT'L U. L. REV. 385, 388 (2010); Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123, 130 (2012).

218. *Recognition and Withdrawal of Recognition Without an Election*, *in* 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 678, 682 (Patrick Hardin et al. eds., 4th ed. 2001).

219. James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IND. L.J. 147, 154 (2012).

220. *In re* Cudahy Packing Co., 13 N.L.R.B. 526 (1939).

221. *Recognition and Withdrawal of Recognition Without an Election*, *supra* note 218, at 680–81.

222. *Id.* at 681 n.7.

223. Roy L. Heenan, *Canada*, *in* 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 21-1, 21-26 to 21-27 (2d ed. 2003).

224. Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States?*, 25 COMP. LAB. L. & POL'Y J. 227, 233–34 (2004).

225. *See, e.g.*, Stephen L. Befort, *The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform*, FLA. L. REV. (forthcoming 2017) (manuscript at 49), https://papers.ssrn.com/abstract_id=2844463; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 883 (2005); Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 FORDHAM URB. L.J. 247, 271–72 (2008).

2. Restrict Use of Replacement Employees

Section 7 of the NLRA gives workers the right "to engage in . . . concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection,"[226] and Section 13 specifically states, "[n]othing in this subchapter . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."[227] Notwithstanding these statutory "guarantees," dicta from a 1938 Supreme Court decision, which sprung entirely from the Court's policy preferences,[228] has largely eviscerated the strike as an effective weapon in unions' arsenals.

The case is *NLRB v. Mackay Radio*,[229] and the Court's formal holding upheld the Board's finding that an employer's refusal to reinstate union leaders who had led an unsuccessful strike unlawfully discriminated against them because of their union activity[230] in violation of Section 8(a)(3).[231] In dicta, the Court made clear that the company's sin was not in failing to reinstate striking workers generally, but in distinguishing among the strikers on the basis of union activity.[232] The company was permitted, the Court stated, to hire replacement workers during a strike, to promise them "permanent" employment, and at the end of the strike to refuse reinstatement to striking workers in favor of the replacement (presumably anti-, or at least non-union) workers.[233]

This "Mackay doctrine" has been much and long-criticized,[234] but never reversed. The strike threat—the threat to withhold labor—is by far a union's most potent economic weapon. The Court, by giving companies the right to permanently replace strikers, has significantly weakened the ability of unions to negotiate favorable terms at the bargaining table. An under-appreciated effect of the doctrine, however, is its effect on union organizing. Julius Getman illustrates this effect by describing how companies use the doctrine in organizing campaigns by making some version of the following argument:

> If the union wins the election I am required to bargain with it, which I will do. But I am not required to accept unreasonable proposals, which this union regularly makes. I will bargain hard and refuse to compromise. The only way the union can attempt to

226. 29 U.S.C. § 157 (2012).
227. *Id.* § 163.
228. GETMAN, *supra* note 180, at 53–55.
229. 304 U.S. 333 (1938).
230. *Id.* at 347.
231. 29 U.S.C. § 158(a)(3).
232. *Mackay Radio*, 304 U.S. at 345–46.
233. *Id.*
234. *See*, *e.g.*, GETMAN, *supra* note 180, at 52–68; Julius G. Getman & Thomas C. Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.*: The High Cost of Solidarity*, *in* LABOR LAW STORIES 13 (Laura C. Cooper & Catherine L. Fisk, eds., 2005).

> change my mind is by dragging you out on strike. If the union strikes, I have the right to permanently replace all the strikers. And in a strike situation I will exercise my rights.[235]

Section 8(a)(3) should be re-written to make explicit what should have been obvious back in 1938—that when a company, after a strike, refuses to reinstate returning strikers in favor of replacement workers, the employer "discriminates" against the returning strikers on the basis of union activity that is protected by Section 13.

3. Reverse Restrictions on Union Security Clauses, or Reduce the Burden on Unions of Representing Non-Members

As described in Part II.D,[236] unions are required to represent all members of a bargaining unit—in both contract negotiation and in grievance resolution—regardless of whether the bargaining-unit member is a member of the union or pays union dues. This encourages free-riding, because a worker who refuses to join the union representing her bargaining unit gets all the benefits of union representation without shouldering any of the cost. The result is bad policy at multiple levels—it is unfair to unions who must represent workers who do not financially support it, it is unfair to workers who are union members because they must pay higher dues to offset the free-riders, and it undermines the original policy of the NLRA of encouraging union membership.

The NLRA should be amended to eliminate the free-rider problem. This could be accomplished in either of several ways. First, and ideally, the statute could be amended to require all members of the bargaining unit to contribute union dues as if they were full union members—akin to the "closed shop" discussed above in Part I.D. Doubtless some members of the bargaining unit will be unhappy because they disagree with the union's politics or bargaining positions. However, this is a problem in any majority-representation system, including political election to Congress. Moreover, requiring dues payments is not forced speech because workers are free at any time to express whatever views they have on the union's political or bargaining subjects.[237]

Second, the statute could be amended to require all members of a bargaining unit to contribute at least minimal financial support to the union that represents them. Third, the statute could be amended to allow unions that

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235. GETMAN, *supra* note 180, at 68.

236. *See supra* notes 68–72 and accompanying text.

237. *See* Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 60 (2006). *See generally* Catherine Fisk & Erwin Chemerinsky, *Unequal Treatment? The Speech and Association Rights of Employees: Implications of* Knox *and* Harris, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, Issue Brief (Feb. 2014), https://www.acslaw.org/sites/default/files/Fisk_and_Chemerinsky_-_Speech_and_Association_Rights_of_Employees.pdf.

represent state employees to bargain for security clauses that require all members of a bargaining unit to contribute at least minimal support to the union. A fourth alternative would be to relax the exclusivity principle so that unions are not required to represent nonmembers in bargaining and grievances.

B. New Medicine

The prescriptions described in Part IV.A all are variations on themes earlier advocated by others. Part IV.B argues for new medicine to re-invigorate labor, including enhancing remedies for labor law violations to include criminal law sanctions, expanding labor protections to workers in the on-demand economy, and changing the default on union representation from opt-in so that instead of assuming that workers are unorganized until they vote for union representation, they are in unless and until they opt out.

1. Enhance Remedies to Include Criminal Law Sanctions

Remedies for company violations of the rules governing union elections are notoriously impotent. Such remedies come in three flavors: *Gissel* bargaining orders, reinstatement of discriminated-against employees with back pay, and cease-and-desist/notice orders.

The Supreme Court in *NLRB v. Gissel Packing Co.*[238] seemed to raise the possibility that companies committing egregiously unfair labor practices in union elections could be ordered to bargain with a union regardless of the election results in two different situations: (1) when the employer's unfair labor practices were so outrageous and pervasive that they prevented the union from ever getting a majority, and (2) when the union had a previous majority but the company used unfair labor practices to destroy that majority.[239] However, the Board has only issued two orders in the first situation,[240] and now maintains it lacks authority to do so.[241] Bargaining orders in the second situation are almost as rare[242] and, even when ordered, ineffective at creating stable bargaining relationships between companies and unions.[243]

The second type of remedy is reinstatement with back pay for workers fired during an organizing drive for participating in the union campaign. Fines, consequential damages, and punitive damages are not permitted, and

238. 395 U.S. 575 (1969).

239. *Id.* at 613–14; *see* Terry A. Bethel & Catherine Melfi, *The Failure of* Gissel *Bargaining Orders*, 14 HOFSTRA LAB. L.J. 423, 433 (1997) (analyzing the holding of *Gissel*).

240. Bethel & Melfi, *supra* note 239.

241. Gourmet Foods, Inc., 270 N.L.R.B. 578, 583 (1984).

242. BRONFENBRENNER, *supra* note 185, at 25 (noting that bargaining orders "are all too often recommended by the ALJ and the General Counsel only to be reversed by the full NLRB").

243. Bethel & Melfi, *supra* note 239, at 452 (concluding that "*Gissel* bargaining orders are ineffective").

wages earned elsewhere are deducted.[244] But reinstatement is a woefully inadequate remedy for three reasons: (1) it only comes three to five years after the election is over[245]—so during the election, employees witness not the power of labor law to correct employer misconduct, but instead the employer's violation of that law with apparent impunity;[246] (2) fired employees offered reinstatement often do not accept it, either because they rationally fear employer retaliation or because they have found new jobs;[247] and (3) nearly eighty percent of "reinstated" workers are gone permanently within a year or two, often because the employer has found another excuse for discharge.[248] Nor is back pay an effective deterrent, because the cost to a company of back pay is usually far less than the cost of losing an organizing drive.[249]

The third remedy is the cease-and-desist/notice order. A cease-and-desist order tells the company to go-and-sin-no-more. A notice order requires the company to post, for sixty days, a notice informing workers of the substantive obligations of the order and promising not to engage in future unlawful activity.[250] Both are toothless. One commentator explains:

> [These orders] acknowledge[] that an employee's rights have been violated, but then offer[] a solution so inconsequential to both the employer and the employee as to be insulting to the employee and merely inconvenient to the employer. The entire notion that a "notice" is capable of making the aggrieved employee whole or deterring a willfully violative employer from committing future offenses is at best comical. Further, calling this remedy a "significant sanction" dilutes the promises of the NLRA by paying them only pacifying lip service.[251]

In the election context, the remedy might include rerunning the election. But that just means more delay, which usually benefits the employer because it provides more time to mount an anti-union campaign as described above.

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244. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940) (forbidding the Board from issuing penalties or fines); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197–98 (1941) (requiring the Board to deduct mitigating earnings).

245. BRONFENBRENNER, *supra* note 185, at 3.

246. HEINSZ ET AL., *supra* note 64, at 414.

247. *Id.*

248. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1792 (1983).

249. HEINSZ ET AL., *supra* note 64, at 415; Joseph E. Slater, *The "American Rule" that Swallows the Exception*, 11 EMP. RTS. & EMP. POL'Y J. 53, 81–82 (2007).

250. Robert M. Worster, III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1078 (2004).

251. *Id.* at 1079 (footnote omitted).

Thus, for more than thirty years now companies have been violating labor laws with impunity.[252] Worse, the violations have become so deeply ingrained that illegal behavior is now accepted as the norm; "workers have become resigned to the fact that no branch of government [i]s going to listen to their pleas that the system [i]s not just broken, but that it [i]s operating in direct violation of the law."[253]

A strong dose of new medicine is needed and should come in the form of criminal sanctions for willful employer violations of the NLRA. Criminal sanctions are rare in labor and employment cases, but not unprecedented. For example, Section 17(e) of the Occupational Safety and Health Act provides:

> Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.[254]

Similarly, Section 820(d) of the Mine Safety Act makes it a crime to willfully violate a mine health or safety standard and imposes a sentence of up to one year in jail for a first offense and up to five years for subsequent offenses.[255]

In April 2016, Donald Blankenship, C.E.O. of Massey Energy and one of the wealthiest people in Appalachia, was sentenced by a federal court to a year in prison for willfully violating mine safety regulations, resulting in the death of twenty-nine West Virginian miners.[256] The conviction and sentencing made national headlines,[257] and signaled that mine safety laws are important.

The laws that ostensibly protect workers trying to organize a union are important also. It is doubtful that many executives will need to be imprisoned

252. Most scholars date the flagrant disregard of labor law to President Reagan's discharge of striking PATCO workers. *See* Joseph A. McCartin, *The Strike That Busted Unions*, N.Y. TIMES (Aug. 2, 2011), http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html ("More than any other labor dispute of the past three decades, Reagan's confrontation with the Professional Air Traffic Controllers Organization, or Patco, undermined the bargaining power of American workers and their labor unions.").

253. BRONFENBRENNER, *supra* note 185, at 25.

254. 29 U.S.C. § 666(e) (2012).

255. 30 U.S.C. § 820(d) (2012).

256. Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES (Apr. 6, 2016), http://www.nytimes.com/2016/04/07/us/donald-blankenship-sentenced-to-a-year-in-prison-in-mine-safety-case.html.

257. *Id.*

for workers' rights to become more respected. After all, "it was not necessary to hang many gentlemen of quality before the understanding became general that dueling was not required by the code of honour."[258]

2. Expand NLRA Protection to On-Demand Workers

As described in Part II.F above, there is substantial current litigation over whether gig workers are "independent contractors" instead of "employees."[259] Nearly all of this litigation has occurred in the context of wage, hour, and benefit disputes,[260] not in the context of whether the workers can organize into unions.[261] To ensure that the benefits of collective bargaining are available to workers in the gig economy, the following three things should occur:

First, courts and the NLRB should classify gig-economy workers, such as Uber drivers, as employees under the NLRA as well as under the other employment statutes.[262]

Second, the NLRA should be amended to narrow or remove the Section 2 exclusion of independent contractors,[263] and the federal antitrust laws should be amended to ensure that they are not interpreted as applying to collective bargaining involving such workers.[264] This way, even if gig-economy workers are classified as independent contractors, they will be protected by labor laws. As Catherine Fisk's work with Hollywood writers demonstrates, collective bargaining is entirely appropriate for workers who have many of the characteristics of independent contractors.[265] Alternatively, the NLRA should be rewritten to recognize a new category of "independent workers"[266]

258. SUSAN ESTRICH, REAL RAPE 101–02 (1987) (citing Glanville Williams, *Consent and Public Policy*, CRIM. L. REV., Feb.–Mar. 1962, at 74, 77).

259. *See supra* note 125 and accompanying text.

260. Cherry, *supra* note 125.

261. *See supra* note 128 and accompanying text.

262. *See* Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New "Independent Worker" Category*, ECON. POLICY INST. (Mar. 17, 2016), http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/ (analyzing the implications of creating a third category for "independent workers").

263. National Labor Relations Act, 29 U.S.C. § 152(3) (2012). This may also require replacing the word "employee" throughout the statute with the word "worker."

264. *See generally* Paul, *supra* note 104 (arguing that independent contractors should be permitted to engage in collective action bargaining).

265. Fisk, *supra* note 124.

266. *See* SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE "INDEPENDENT WORKER," 15 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (arguing for legislative creation of a third category for "independent workers").

for workers in the gig economy, and to recognize that these workers are entitled to organize and collectively bargain for the terms and conditions under which they work.[267]

Third, an appropriate bargaining unit for purposes of organizing and bargaining should be interpreted broadly. The NLRA Section 9(b) gives the Board the authority to define an appropriate bargaining unit for a given workplace,[268] and establishes procedures for doing so.[269] The Board should interpret this to include not only physical workplaces but also virtual ones.

An example of how this might work in practice is provided by the recent emergence of a union-like association in Seattle.[270] In December 2015, the City of Seattle enacted an ordinance[271] to permit for-hire drivers to organize and elect representatives to bargain on their behalf with the companies that direct their work for better compensation rates and other contract terms. The goal of the ordinance is "[l]eveling the bargaining power between for-hire drivers and the entities that control many aspects of their working conditions."[272] The City Council specifically found:

> Business models wherein companies control aspects of their drivers' work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements that the City of Seattle has deemed in the interest of public health and welfare, and undermine Seattle's efforts to create opportunities for all workers in Seattle to earn a living wage.[273]

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267. *See also* Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, U. CHI. LEGAL F. (forthcoming 2017) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951967 (arguing that the "outmoded legal definitions of who is an employee and who is an 'independent contractor'" should be abandoned in favor of "broad, perhaps universal, coverage for workers").

268. 29 U.S.C. § 159(b) ("The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .").

269. *Id.*

270. *See generally* Katherine V.W. Stone, *Unions in the Precarious Economy: How Collective Bargaining Can Help Gig and On-Demand Workers*, AM. PROSPECT, Winter 2017, at 97, 99–100 (describing Seattle's bill and subsequent litigation); Paul, *supra* note 104, at 7 (analyzing the legal challenge to Seattle's bill); Press Release, Seattle City Council, Council Unanimously Adopts First-of-its-Kind Legislation to Give Drivers a Voice on the Job (Dec. 14, 2015), https://www.seattle.gov/council/issues/giving-drivers-a-voice (providing the reasons why the Seattle City Council promulgated the ordinance).

271. SEATTLE, WASH., COUNCIL BILL 118499 (adopted Dec. 14, 2015) (amending SEATTLE MUNICIPAL CODE § 6.310.110 and adding new § 6.310.735). For a more detailed description of the ordinance and discussion of the legal issues it raises, see Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle's Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49 (2017).

272. SEATTLE, WASH., COUNCIL BILL 118499 § 1(J).

273. *Id.* § 1(H).

The Seattle ordinance establishes a procedure (1) for organizations to register as qualified driver representatives ("QDR"), and (2) for drivers to select from among those QDRs an exclusive driver representative ("EDR") to be the exclusive representative of for-hire drivers operating in the city for a particular on-demand company.[274] A QDR becomes an EDR by submitting to the Director of the City's Finance and Administrative Services ("Director") "statements of interest" from qualified drivers that "clearly state that the driver wants to be represented by the QDR for the purpose of collective bargaining."[275]

Once an EDR is certified, the EDR and the company must meet and bargain over vehicle standards, safe driving practices, the nature and amount of payments to be made, minimum work hours, and work rules.[276] If the parties reach agreement, the agreement must be reduced to writing[277] and certified by the Director,[278] after which it becomes final and binding on all parties.[279] If the parties fail to agree, the ordinance requires interest arbitration upon either party's request.[280]

In March 2016, the U.S. Chamber of Commerce sued the City of Seattle in federal court to declare the ordinance unlawful and enjoin its enforcement.[281] In its complaint, the Chamber argued that the ordinance violated the Sherman Antitrust Act and was preempted by the NLRA.[282] In August, the court dismissed the lawsuit, finding that because the ordinance had not yet been implemented, the Chamber had not yet been harmed and so lacked standing to sue.[283] The judge left the door open for the chamber to re-file the suit at a later time. In January 2017, the ordinance went into effect, and the Chamber almost immediately filed to reinstate its suit.[284] In April 2017, the judge enjoined the ordinance pending consideration of the legal issues posed

274. *Id.* § 2.

275. *Id.* § 3(F)(1).

276. *Id.* § 3(H).

277. *Id.*

278. *Id.* § 3(H)(2).

279. *Id.* § 3(H)(2)(a).

280. *Id.* § 3(I).

281. Complaint, Chamber of Commerce v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016); Daniel Beekman, *Chamber of Commerce Sues Seattle over Allowing Uber-Driver Unionizing*, SEATTLE TIMES (Mar. 3, 2016, 4:41 PM), http://www.seattletimes.com/seattle-news/politics/chamber-of-commerce-sues-seattle-over-allowing-uber-driver-unionizing/.

282. Complaint at 16, 19, *City of Seattle*, No. C16-0322RSL, 2016 WL 4595981.

283. Daniel Beekman, *Judge Tosses U.S. Chamber's Suit Against Seattle over Uber Union Law, Calling It Premature*, SEATTLE TIMES (Aug. 9, 2016, 7:08 PM), http://www.seattletimes.com/seattle-news/politics/judge-tosses-chambers-suit-against-seattle-over-uber-law/.

284. Complaint, Chamber of Commerce v. City of Seattle, No. C17-0370RSL, 2017 WL 1233181 (W.D. Wash. Apr. 4, 2017).

by the ordinance.[285] In August 2017, the judge denied the Chamber's motion for an injunction pending appeal.[286][We'll want to update this, if appropriate, before the article goes to press.]

The Seattle ordinance illustrates that gig-economy work is compatible with unions and collective bargaining. Ironically, a finding by the NLRB or the courts that gig-economy workers are "employees" covered by the NLRA would probably result in a finding of NLRA preemption. However, preemption of the Seattle ordinance would be a small price to pay for opening the door for gig-economy workers across the country to organize.

3. Presume That Workers Are in a Union Until They Opt Out

The NLRA presumes that workers are not organized in a union until they petition for and win a union election. Workers wishing to form an election must file with the NLRB a petition alleging that a "substantial number"[287] ("interpreted by the Board to be 30%"[288]) of the employees wish to be represented by collective bargaining.[289] The Board then investigates the petition, may hold hearings to determine the appropriate bargaining unit and other issues, and (usually after a vigorous anti-union campaign by the employer[290]) holds an election.[291] The union must win fifty percent of the votes plus one to become certified as the workers' bargaining representative—a tie goes to the employer.[292]

The presumption that employees are nonunion until they affirmatively elect to be in one can and should be reversed.[293] There is no absolute reason for the current presumption. For example, in Continental Europe, statutes provide that workers are represented by (1) "works councils that operate at the firm level" to create an avenue for employer-employee consultation, and (2) "trade unions that operate at the multi-employer level to negotiate wages

285. Greg Bensinger, *Federal Judge Puts Hold on Seattle Ordinance Allowing Uber, Lyft Union Vote*, WALL ST. J. (Apr. 5, 2017, 8:29 AM), https://www.wsj.com/articles/federal-judge-puts-hold-on-seattle-ordinance-allowing-uber-lyft-union-vote-1491336939.

286. Order Denying Motion for Injunction Pending Appeal, Chamber of Commerce v. City of Seattle, No. C17-0370RSL, 2017 WL 3641901 (W.D. Wash. Aug. 24, 2017).

287. 29 U.S.C. § 159(c)(1)(A) (2012).

288. HEINSZ ET AL., *supra* note 64, at 238.

289. 29 U.S.C. § 159(c)(1)(A)(i).

290. *See supra* notes 184–185 and accompanying text (describing the anti-union tactics used by employers).

291. 29 U.S.C. § 159(c)(1)(B).

292. *Id.* § 159(a) (providing for exclusive representation after "the *majority* of employees" in an appropriate bargaining unit have elected representation (emphasis added)); *see* JOHN D. FEERICK ET AL., NLRB REPRESENTATION ELECTIONS: LAW, PRACTICE, & PROCEDURE (1989 Supp.) § 7.8, at 288.

293. Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?,* 34 FLA. ST. U. L. REV. 1133, 1166–68 (2007).

and other economic terms" of employment.[294] If strong public policy favors the right of workers to belong to organizations of their own choosing, to engage in strikes and other concerted activity, and to use their collective economic power to compel employers to bargain meaningfully with them over the terms and conditions of employment, the presumption against union membership should be reversed, and workers should be presumed in until they elect out. [295]

A recent example of how a shift from opt-in to opt-out can have dramatic results is provided by the rules governing 401(k) plans. Employers have shifted their retirement plans from defined benefit (traditional pensions) to defined contribution (retirement savings accounts) plans.[296] Defined contribution plans require employees to set their level of savings and to manage the investments in their retirement plans.[297] However, American workers are notoriously bad at both. Many workers eligible to participate in a 401(k) do not;[298] those who do, save too little[299] and invest it poorly.[300]

Recognizing a looming crisis[301] in American retirement plans, Congress, in the Pension Protection Act of 2006[302] ("PPA"), changed two key default rules for 401(k)s. First, it changed the default rule on whether to

294. Estreicher, *supra* note 173, at 1624–25.

295. This would not, however, obviate the need for an initial election to ascertain *which* union employees would belong to.

296. Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007).

297. *See generally* Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U. L. REV. 733 (2016).

298. Richard Eisenberg, *Is This the Solution to America's Retirement Crisis?*, NEXT AVENUE (July 26, 2012), http://www.nextavenue.org/solution-americas-retirement-crisis/ ("[R]oughly a fifth of people eligible for a 401(k) don't sign up.").

299. Kenneth Glenn Dau-Schmidt, *Promises to Keep: Ensuring the Payment of Americans' Pension Benefits in the Wake of the Great Recession*, 52 WASHBURN L.J. 393, 395 (2013) ("By any objective measure, workers seem very myopic in their decisions as to how much to save for retirement, valuing current consumption and the crush of current needs over saving for retirement."); COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYMENT BENEFITS LAW: POLICY AND PRACTICE 489–90 (3d ed. 2011) (noting that employees deciding how much of their salary to save into a 401(k) plan often will pick a random number, an arbitrary formula, or the default number selected by their employer).

300. MEDILL, *supra* note 299, at 490 (noting that employees deciding how to invest their 401(k) savings often overinvest in company stock or in inappropriately conservative investments, or proportionally allocate their investments among all investment choices).

301. Teresa Ghilarducci, *Retirement Security Worse on ERISA's 40th Anniversary*, 6 DREXEL L. REV. 453, 453 (2014) (nearly half of American workers between ages fifty and sixty-four will be poor when they reach retirement); Shlomo Benartzi & Richard H. Thaler, *Behavioral Economics and the Retirement Savings Crisis*, 339 SCIENCE 1152, 1152 (2013) (noting that the percentage of workers saving inadequately for retirement is increasing).

302. Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of 29 U.S.C.).

participate by creating an "automatic enrollment" feature, under which employees can be made to opt out of a 401(k) plan instead of having to opt in.[303] Participation rates immediately skyrocketed from about 50% to 85%.[304] Second, the PPA permitted qualified default investment alternatives ("QDIAs").[305] QDIAs changed the default rules on how much to save and on investment allocation decisions—through a QDIA, an employer can put a fixed percentage of the employee's salary into an appropriately diversified group of mutual fund investments.[306]

These PPA rules are default rules, so workers can still opt out of participation, drop their savings rate to one percent of their salary, and pile their entire retirement portfolio into company stock. But they don't—they tend to stay in the plan and to stick with the default contribution levels and investment options.[307] Basic principles of behavioral economics explain that cognitive biases such as inertia (a preference for the status quo) often lead people to behave sub-optimally (economically irrationally).[308] Changing default rules changes behavior.[309]

Just as changing the default rules for 401(k)s from opt-in to opt-out increased participation, so too would changing the default rules for worker organization. This would not require a radical redesign of our labor laws—just minor tinkering with NLRA Section 9. It would preserve free choice because workers could always opt out, either by initially electing non-representation or through a decertification election.[310] It would not eliminate the need for elections—where more than one union seeks to represent a set of workers, the workers would need to make a selection—but the Board already has election procedures in place for that.[311] It would almost certainly increase worker participation in unions dramatically.

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303. *Id.*; Paul M. Secunda, *The Behavioral Economic Case for Paternalistic Workplace Retirement Plans*, 91 IND. L.J. 505, 526 (2016).

304. *Id.* (citing MEDILL, *supra* note 299, at 179).

305. 29 C.F.R. § 2550.404c-5 (2017).

306. U.S. DEP'T OF LABOR, REGULATION RELATING TO QUALIFIED DEFAULT INVESTMENT ALTERNATIVES IN PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS 1–2 (2008).

307. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83–89 (2008) (analyzing the behavioral preferences for defaults in a variety of contexts); *see also* Secunda, *supra* note 303.

308. Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 80 (2002).

309. *See generally* Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 12–13 (2013) (analyzing the impact of automatic enrollment plans on behavior); Secunda, *supra* note 303, at 524–30 (discussing current behavioral issues in healthcare and potential solutions).

310. *See* 29 U.S.C. § 159(c)(1)(A) (2012) (describing election decertification procedures).

311. FEERICK ET AL., *supra* note 292, § 7.2, at 224; NAT'L LABOR RELATIONS BD., 2 CASEHANDLING MANUAL § 11,022.3, 11350.1; *see also* NLRB, CONDUCT ELECTIONS, https://www.nlrb.gov/what-we-do/conduct-elections, stating:

V. CONCLUSION

Earnings equality in the United States is and has for some time been going in the wrong direction, with dire economic and political consequences. At least some of the trend can be tied directly to declining unions. Reversing union decline—and therefore income inequality—will require a major overhaul of American labor law. This Article provides both old and new policy prescriptions for doing so.

> When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least 30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters.

Id.