NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

VOLUME 79
ISSUE 2

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City

New York University Annual Survey of American Law
is in its seventy-sixth year of publication.

L.C. Cat. Card No.: 46-30523
ISSN 0066-4413
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New York University Annual Survey of American Law is published biannually at 110 West 3rd Street, New York, New York 10012. Subscription price: $30.00 per year (plus $4.00 for foreign mailing). Single issues are available at $16.00 per issue (plus $1.00 for foreign mailing). For regular subscriptions or single issues, contact the *Annual Survey* editorial office. Back issues may be ordered directly from William S. Hein & Co., Inc., by mail (2350 North Forest Rd., Getzville, NY 14068), phone (800-828-7571), fax (716-883-8100), or email (order@wshein.com). Back issues are also available in PDF format through HeinOnline (http://heinonline.org).

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Or land or life, if freedom fail?
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LABOR RELATIONS AT THE WOKE CORPORATION

*MATTHEW T. BODIE**

Almost ten years ago, Whole Foods Market founder and then-CEO John Mackey published a book with economics professor Raj Sisodia entitled *Conscious Capitalism: Liberating the Heroic Spirit of Business*.[1] The idea behind conscious capitalism was the melding of the traditional profit motive with more human notions of serving the greater good. Writing the introduction individually, Mackey explained that the primary purpose of the book was to inspire the creation of "more conscious businesses: businesses galvanized by higher purposes that serve and align the interests of all their major stakeholders; businesses with conscious leaders who exist in service to the company's purpose, the people it touches, and the planet; and businesses with resilient, caring cultures that make working there a source of great joy and fulfillment."[2] Rather than trying to maximize shareholder wealth, conscious capitalism companies were those that instead followed a higher purpose, integrated their stakeholders, and fostered a more conscious culture with more conscious leaders.[3] Companies that the authors describe as following the conscious capitalism blueprint included Medtronic, Southwest Airlines, Starbucks, and of course Whole Foods Market.[4] The book claimed that a "great transition" was underway, and that a more benevolent, caring capitalism was the mode of the future.[5]

Conscious capitalism is only one example from a collection of business theories and practices that have moved away from the prin-

* Robins Kaplan Professor of Law, University of Minnesota Law School. My thanks to the N.Y.U. Annual Survey of American Law, particularly Lucretia (Loulie) Bunzel and Alex Sim, for including me in this symposium on "The Future of Workers' Rights." Many thanks to co-panelists Veena Dubal and Orly Lobel, as well as our moderator Cynthia Estlund. I am grateful for comments from Marion Crain, Miguel Padro, Noam Scheiber, and Alan Palmiter.

1. JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS (2014).

2. *Id.* at 8–9.

3. *Id.* at 33 (describing the four tenets of conscious capitalism). Such businesses are "suffused with higher purpose, leavened with authentic caring, influential and inspirational, egalitarian and committed to excellence, trustworthy and transparent, admired and emulated, loved and respected . . . ." *Id.* at 32.

4. *Id.* at 32, 36 & 287–88.

5. *Id.* at 264–65.

ciple of shareholder wealth maximization to the idea that a corporate leader should serve all of the firm's participants, rather than just shareholders. These alternative approaches are sometimes lumped under the umbrella terms of "stakeholderism" and "stakeholder theory."[6] Stakeholderism has become increasingly popular in both boardrooms and academic circles in the wake of the societal upheavals of the 2008 Financial Crisis, the continuing racial reckoning engendered by killings of Black citizens at the hands of police, the pandemic, and the presidency of Donald Trump.[7] But there is more going on than simple stakeholderism. It has become increasingly popular to talk of a higher "purpose" of the corporation, and to frame that purpose around lofty societal and ethical goals.[8] Along with conscious capitalism, we also have such terms as firms of endearment, the purpose economy, evolutionary capitalism, and the broader ideas of environmental, social and governance (ESG) investing as well as corporate social responsibility (CSR).[9] And as the corporate world has taken a more progressive approach to the political and cultural controversies of our time, there has been a backlash as well: derisive mocking and anger directed at "woke" corporations for taking more overtly ideological stances.[10]

These new, enlightened approaches to capitalism seem to feature workers prominently. Employees are one of the core sets of a

6. *See* RAJ SISODIA, JAG SHETH & DAVID B. WOLFE, FIRMS OF ENDEARMENT: HOW WORLD CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 1–2, 34–36 (2014) (discussing stakeholder relationship management and its intellectual origins).

7. Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1181 (2022) ("[I]t is clear that the concept of stakeholderism has captured the attention of the business community, perhaps because they are being embraced by members of the business community who have heretofore been closely aligned with shareholder primacy.").

8. For just a small sampling, see AARON HURST, THE PURPOSE ECONOMY 21 (2014) ("The emergence of purpose as the new organizing principle in our economy is a product of our current moment in time."); MACKEY & SISODIA, *supra* note 1, at 48 ("A higher purpose gives great energy and relevance to a company and its brand."); BRIAN J. ROBERTSON, HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD 166 (2015) (making the point that the role of the board of directors under holacracy is "expressing the organization's purpose"); ROY M. SPENCE JR., IT'S NOT WHAT YOU SELL, IT'S WHAT YOU STAND FOR: WHY EVERY EXTRAORDINARY BUSINESS IS DRIVEN BY PURPOSE (2011).

9. *See, e.g.*, HURST, *supra* note 8; FREDERIC LALOUX, REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS 43 (2014) (using terms such as "self-actualizing," "evolutionary," "integral," and "teal"); SISODIA ET AL., *supra* note 6.

10. *See* VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM 4 (2021) ("Wokeness has remade American capitalism in its own image.").

corporation's stakeholders, and employees are included within the "social" aspect of ESG.[11] The Business Roundtable's 2019 statement on corporate purpose committed to "[i]nvesting in our employees" by "compensating them fairly and providing important benefits," as well as "supporting them through training and education that help develop new skills for a rapidly changing world."[12] Conscious capitalism seeks to turn workers into "passionate, inspired team members" and bemoans the failure of most companies to "create purposeful workplaces in which people are given the opportunity to find meaning, purpose, and happiness in their own lives."[13] Employees represent one of the bright stars in this new corporate constellation of stakeholders.

Mostly missing from this renaissance in corporate theory, however, are employees' collective representatives: organized labor. Accounts of this new wave of enlightened enterprises generally do not include unions within the set of important stakeholders. With only around six percent of the private-sector workforce having collective representation, it's no surprise that even these "woke" companies are not meeting unions at the bargaining table.[14] But lurking within many of these progressive companies—and the management theories that inspire them—is a hostility towards organized labor. Looking to conscious capitalism as one example, Makey and Sisodia try to have it both ways. While they counsel company leaders to work with unions if necessary, the authors suggest that it's better to treat your workers so well that they don't even consider unionizing.[15] Happy workers obviate concerns about collective bargaining.

But what if the workers actually want to be represented? The real-life response of CEO Mackey is instructive. In 2002, workers in

11. *See* Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1903, 1903 n.59 (2021) (noting that the "S" stands for "social," which includes labor issues and other societal concerns); *ESG Investing: Discover Funds that Reflect What Matters Most to You*, VANGUARD, https://investor.vanguard.com/investing/esg [https://perma.cc/V9MT-JC44] ("Social [includes] [r]elationships with employees, suppliers, clients & communities."). *But see* Strine, Smith & Steel, *supra*, at 1903 (arguing that under ESG, the interests of employees into the ESG framework are "bur[ied] in the S").

12. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://system.businessroundtable.org/app/uploads/sites/5/2023/02/WSJ_BRT_POC_Ad.pdf [https://perma.cc/RGG9-HJSU].

13. MACKEY & SISODIA, *supra* note 1, at 54.

14. News Release, U.S. Dep't of Lab., Union Members – 2022 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/C8UP-V6F3].

15. MACKEY & SISODIA, *supra* note 1, at 157–59.

the Madison, Wisconsin Whole Foods did in fact vote to join a union.[16] Seeing the vote as "a huge wake-up call for me personally," Mackey undertook a national listening campaign to find out why workers at stores across the country were unhappy.[17] The company ended up improving its wages and benefits in the other stores, particularly its health insurance coverage.[18] At the Madison location, however, the company refused to come to an agreement with the union.[19] As Mackey and Sisodia relate, "There was actually never a union contract signed for Madison or for any other Whole Foods Market store."[20]

This failure to include organized workers within the new socially conscious landscape is discordant with the growing support for labor unions, particularly among younger workers. Surveys show that unions are at their most popular in over fifty years, with Gen Z leading the way in approval rates.[21] As corporations shift their approaches to other political issues in keeping with generational preferences, the continuing hostility towards collective bargaining stands out. The new corporate "wokeness" does not include labor unions.

This symposium contribution will consider the role of labor relations within the so-called "woke" corporation. Part I will explore the turn in corporate behavior and corporate law theory towards an attention to stakeholders and a larger corporate purpose. Part II examines how this shift in corporate sentiment has not changed the traditional hostility towards the choice of a company's own workers to unionize. Part III considers how to address this disjunction, both through pressure from the workers themselves and through

16. *Whole Foods Store Votes to Join Union*, PROGRESSIVE GROCER (July 16, 2002), https://progressivegrocer.com/whole-foods-store-votes-join-union [https://perma.cc/9SFF-TDAP].

17. MACKEY & SISODIA, *supra* note 1, at 160.

18. *Id.*

19. *Id.*

20. *Id.* at 161.

21. *See, e.g.*, Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/47QW-RLW9] (finding seventy-one percent approval of unions); Aurelia Glass, *The Closing Gender, Education, and Ideological Divides Behind Gen Z's Union Movement*, CTR. FOR AM. PROGRESS (Oct. 5, 2022), https://www.americanprogress.org/article/the-closing-gender-education-and-ideological-divides-behind-gen-zs-union-movement/ [https://perma.cc/3YQ3-2JXJ] ("Gen Zers are the most supportive of unions, with a mean approval rating of 64.3 compared with 60.5 for Millennials, 57.8 for Gen Xers, and 57.2 for Baby Boomers.").

changes in corporate law, corporate theory, and labor and employment law.

I.
THE NEW CORPORATE SOCIAL CONSCIOUSNESS

In 2019, the Business Roundtable issued an extraordinary statement. After many years in which the corporate commitment to maximize shareholder value was taken for granted, the Roundtable provided a "Statement on the Purpose of a Corporation." In explaining its new approach to corporate purpose, the Roundtable offered that the statement "supersedes previous Business Roundtable statements and more accurately reflects our commitment to a free market economy that serves all Americans."[22] It was signed by the CEOs of 181 influential American companies—Alphabet, Amazon, Apple, Citibank, Comcast, JP Morgan, Microsoft, Salesforce, Starbucks, and many more.[23] Essentially a rejection of the shareholder primacy norm, the statement recited the importance of all of a company's stakeholders: customers, employees, suppliers, communities, and shareholders (listed last).[24] The statement concluded: "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[25]

The 2019 statement was in some ways a culmination, and in some senses a prelude. The financial crisis of 2008 had dealt a significant blow to the foundations of shareholder capitalism from which it had never quite recovered.[26] Although the stock market reached record highs and unemployment reached record lows,[27]

22. BUS. ROUNDTABLE, *supra* note 12.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See, e.g.*, Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), https://www.nytimes.com/2008/10/24/business/economy/24panel.html [https://perma.cc/KX9M-Q7JR].

27. *See, e.g.*, Matthew Fox, *Here's How the Stock Market Performed Under President Donald Trump, and How It Compares to Previous Administrations*, BUS. INSIDER (Jan. 20, 2021, 3:00 PM), https://markets.businessinsider.com/news/stocks/stock-market-performance-under-president-donald-trump-dow-jones-sp500-2021-1-1029987163 [https://perma.cc/U9N3-WVRK] ("During Trump's presidency, the Dow [Jones Industrial Average] made 126 new all-time highs . . . ."); *What Happened to the Economy Under Trump Before Covid and After,* WALL ST. J. NOTED (Oct. 14, 2020, 6:04 PM), https://www.wsj.com/articles/what-happened-to-the-economy-under-trump-before-covid-and-after-11602713077 [https://perma.cc/F6QL-KP25] (noting the lowest unemployment rate in 50 years).

overall wages had remained stagnant.[28] Donald Trump's surprise presidential victory in 2016 had awakened a vigorous opposition movement, upping the stakes for political contests.[29]

In 2018, one CEO wrote a letter to his fellow CEOs that was deemed "likely to cause a firestorm in the corner offices of companies everywhere."[30] That year's annual letter from BlackRock's Larry Fink was notable for many reasons. His company had more of an interest in these other companies' financial success, and shareholder wealth maximization more generally, than almost anyone else; at that time BlackRock managed more than $6 trillion in investments, making it the largest investor in the world.[31] Nevertheless, in his annual letter to CEOs, he argued: "To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[32] Directing companies to "publicly articulate [their] strategic framework for long-term value creation," he posed the following questions:

> Companies must ask themselves: What role do we play in the community? How are we managing our impact on the environ-

28. Elise Gould, *State of Working America Wages 2019: A Story of Slow, Uneven, and Unequal Wage Growth over the Last 40 Years*, ECON. POL'Y INST. (Feb. 20, 2020), https://www.epi.org/publication/swa-wages-2019/ [https://perma.cc/2WXM-PM5U].

29. *See generally* THE RESISTANCE: THE DAWN OF THE ANTI-TRUMP OPPOSITION MOVEMENT (David S. Meyer & Sidney Tarrow eds., 2018); Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html [https://perma.cc/KGN4-YG73]; Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 371 (2019) ("More specifically, social media has served as a central forum for this unprecedented global conversation, where previously silenced voices have been amplified, supporters around the world have been united, and resistance has gained steam."); Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1081 (2019) (noting that "#MeToo largely emanates from the abuse of gendered power in government and business firms").

30. Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html [https://perma.cc/SW3C-2LVB].

31. *Id.*

32. Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/ [https://perma.cc/6JH9-SPZF].

> ment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioral finance and other tools to prepare workers for retirement, so that they invest in a way that that will help them achieve their goals?[33]

The letter in many ways set the table for the Business Roundtable's subsequent statement.

Following the Roundtable's statement, however, the forces driving political polarization and generational revolt have only compounded. The novel coronavirus pandemic led to illness, death, and mass unemployment, buffered by the largest federal relief package ever.[34] Companies got caught in the politicization of the pandemic, where medically recommended efforts to curb the tide of infection were met with resistance.[35] The murder of George Floyd sparked an outpouring of outrage and an urgency for reform and real racial justice.[36] In the aftermath of the presidential election, anger over the supposedly stolen election boiled over into the January 6 insurrection, in which the U.S. Capitol was stormed and elected leaders threatened with kidnapping or death.[37]

This turmoil has forced U.S. corporations to navigate a changed and complicated world in which customers, employees, and investors are expecting more corporate commitment on political and cultural issues. In 2018, Starbucks employees called the police when two Black men asked to use the restroom and then refused to leave when denied.[38] After a video of the incident was released on social media, the resulting furor led to an apology from

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33. *Id.*

34. *See* Catie Edmondson, *5 Key Things in the $2 Trillion Coronavirus Stimulus Package*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/us/politics/whats-in-coronavirus-stimulus-bill.html [https://perma.cc/6ZCH-7ZVU].

35. *See* Robert Gatter & Seema Mohapatra, *Covid-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 18–20 (2020) (noting the political controversy surrounding masking requirements).

36. *See* Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 817–18 (2021) (discussing the trauma inflicted by the killing and the cross-racial nature of the protests).

37. *See, e.g.*, Aaron C. Davis, *Red Flags*, WASH. POST (Oct. 31, 2021), https://www.washingtonpost.com/politics/interactive/2021/warnings-jan-6-insurrection/ [https://perma.cc/59CR-WHN6].

38. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html [https://perma.cc/N2JR-R9SK].

the CEO, who called it "a disheartening situation . . . that led to a reprehensible outcome."[39] That May, the company closed all of its stores to conduct racial bias education for 175,000 employees.[40] The following year Starbucks hired Covington & Burling LLP to conduct annual civil rights assessments in order to "1) provide[ ] a factual and honest review of [the company's] journey in inclusion, diversity and equity, and 2) help[ ] [Starbucks] track progress over time to drive truly lasting change."[41]

A commitment to racial equity is only one of the ways in which Starbucks is striving to be a more socially conscious company. In 2021, Starbucks committed to coffee-specific sustainability goals for 2030 that include halving their carbon footprint, reaching carbon neutral green coffee, and conserving water usage in green coffee processing by fifty percent.[42] The company has been known for offering meaningful employee benefits, such as health insurance, tuition stipends, and free online offerings.[43] It was cited numerous times in *Conscious Capitalism* as an example of conscious capitalism at work, with then-CEO Howard Schultz praised as a "good example of high-SQ [spiritual intelligence] leadership" for his work "recommit[ing] Starbucks to its core purpose and its sense of authenticity."[44]

On many of the core issues confronting American politics and society, big brands like Starbucks have taken a more committed stand to support causes that their customers, employees, and inves-

39. *Starbucks CEO: Reprehensible Outcome in Philadelphia Incident*, STARBUCKS STORIES & NEWS (Apr. 14, 2018), https://stories.starbucks.com/press/2018/starbucks-ceo-reprehensible-outcome-in-philadelphia-incident/ [https://perma.cc/ERG6-FPV5].

40. *See* Anna Orso, *One Year Later: A Timeline of Controversy and Progress Since the Starbucks Arrests Seen 'Round the World'*, PHILA. INQUIRER (Apr. 12, 2019), https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html [https://perma.cc/5PEV-UD6Q].

41. *Starbucks Civil Rights Assessments,* STARBUCKS STORIES & NEWS, https://stories.starbucks.com/stories/civil-rights-assessments/ [https://perma.cc/GUW5-LG7N].

42. *Starbucks Announces Coffee-Specific Environmental Goals*, STARBUCKS STORIES & NEWS (Mar. 22, 2021), https://stories.starbucks.com/stories/2021/starbucks-announces-coffee-specific-environmental-goals/ [https://perma.cc/2V23-LGBJ].

43. MACKEY & SISODIA, *supra* note 1, at 287; Dee-Ann Durbin & Anne D'Innocenzio, *Companies Like Starbucks and Chipotle Are Paying Hourly Employees' College Tuition. One Graduate Keeps Asking, 'Is This Real?'*, FORTUNE (Oct. 23, 2022), https://fortune.com/2022/10/23/starbucks-chipotle-free-tuition-employees-benefits-education/ [https://perma.cc/X9YL-RUKD].

44. MACKEY & SISODIA, *supra* note 1, at 32, 185–86.

tors want them to support.[45] The examples are legion and across all types of industries. Large-scale, seemingly apolitical companies such as AT&T, Comcast, and Blue Cross Blue Shield pledged to withhold all political spending from politicians who claimed that the 2020 presidential election was not legitimate.[46] Delta and Coca-Cola came out strongly against a restricted voting access bill in their home state of Georgia.[47] At the 2020 World Economic Forum, Goldman Sachs pledged to only take companies public if they had at least one diverse member of the board.[48] BlackRock set a goal of having zero carbon emissions for all assets under management by 2050.[49] In the wake of *Dobbs v. Jackson Women's Health Organization*,[50] many companies changed their benefit plans to include reimbursement for travel to a state where abortion was still legal.[51]

And when companies have failed to respond to the new corporate environment, they have often been pressured to change course. In early 2022, the Florida legislature was considering the "Parental Rights in Education" bill, labeled the "Don't Say Gay" law by opponents.[52] The bill stated that "[c]lassroom instruction by school personnel or third parties on sexual orientation or gender

45. *See* Fairfax, *supra* note 7, at 1165 ("One of the most significant recent phenomena in corporate governance is the outspoken embrace of the view that corporations should operate in a manner that benefits society and all of the corporations' stakeholders.").

46. Alex Isenstadt et al., *Business Titans Pull Back from GOP After Capitol Insurrection*, POLITICO (Jan. 11, 2021, 8:28 PM), https://www.politico.com/news/2021/01/11/business-titans-gop-capitol-insurrection-457901 [https://perma.cc/L35C-C7XK].

47. David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. TIMES (Mar. 31, 2021), https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html [https://perma.cc/C6LR-FENW].

48. RAMASWAMY, *supra* note 10, at 14.

49. Andrew Ross Sorkin, *BlackRock Chief Pushes a Big New Climate Goal for the Corporate World*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/26/business/dealbook/larry-fink-letter-blackrock-climate.html [https://perma.cc/RZ2T-ESAT].

50. 142 S. Ct. 2228 (2022).

51. *See, e.g.*, Alex Millson & Ella Ceron, *How US Companies Are Supporting Workers on Abortion*, BLOOMBERG (May 3, 2022), https://www.bloomberg.com/news/articles/2022-05-03/how-u-s-companies-are-supporting-workers-on-abortion [https://perma.cc/2GH7-RVYD].

52. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022) https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis [https://perma.cc/C7FN-RKV3]. The bill was eventually passed and became state law. Florida Parental Rights in Education Act, H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (codified at FLA. STAT. § 1001.42(8)(c)(1) (2022)).

identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."[53] Critics of the bill argue that it is meant to penalize teachers for talking about LGBTQ+ perspectives and for acknowledging the existence of alternative lifestyles.[54] Bob Chapek, just two years into serving as CEO at the Walt Disney Company, wrote a memo to employees outlining the company's desire to avoid taking a stand on the bill.[55] Arguing against public opposition, Chapek wrote: "[C]orporate statements do very little to change outcomes or minds. Instead, they are often weaponized by one side or the other to further divide and inflame."[56] Chapek said that the company should avoid enmeshing itself in the controversy and should instead create "a more inclusive world . . . through the inspiring content we produce."[57] But many employees were upset with the silence and challenged Chapek through letters, protests, and statements to the media.[58] Ultimately, Disney leadership had to change course and come out publicly against the legislation.[59] Chapek even admitted that "I missed the mark in this case but am an ally you can count on," noting "we need to use our influence to promote that good by telling inclusive stories, but also by standing up for the rights of all."[60] The company pledged to curb donations to the bill's supporters.[61] Disney's public opposition to the bill, which was passed and signed into law, led to a

53. *See* Diaz, *supra* note 52.

54. *Id.*

55. Ethan Shanfeld, *After 'Don't Say Gay' Bill Backlash, Disney CEO Expresses 'Unwavering Support' for LGBTQ Community*, VARIETY (Mar. 7, 2022), https://variety.com/2022/film/news/disney-ceo-bob-chapek-support-lgbtq-1235197938/ [https://perma.cc/3T3C-K2DR].

56. *Id.*

57. Jennifer Maas, *Disney CEO Received Letter From LGBTQ Staff Pleading for Support Before 'Don't Say Gay' Bill Passed Florida Senate*, VARIETY (Mar. 10, 2022), https://variety.com/2022/tv/news/disney-lgbtq-staff-letter-dont-say-gay-bill-bob-chapek-1235200825/ [https://perma.cc/US2L-JC5X].

58. *Id.*; Gene Maddaus & Pat Saperstein, *Disney Employees Rally to Protest Fallout from 'Don't Say Gay' Bill: 'It's Been Really Painful and Soul-Crushing'*, VARIETY (Mar. 10, 2022), https://variety.com/2022/film/news/disney-lgbtq-employees-walkouts-dont-say-gay-1235211082/ [https://perma.cc/RC97-5N2N].

59. Brooks Barnes, *Disney C.E.O. Says Company Is 'Opposed' to Florida's 'Don't Say Gay' Bill*, N.Y. TIMES (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/business/disney-ceo-florida-lgbtq-bill.html [https://perma.cc/H5CF-6T6U].

60. Andrew Atterbury, *Disney Pledges to Stop Florida Campaign Donations Over 'Don't Say Gay' Bill*, POLITICO (Mar. 11, 2022), https://www.politico.com/news/2022/03/11/disney-pledges-to-stop-florida-campaign-donations-dont-say-gay-0001 6705 [https://perma.cc/HH3Q-2AUZ].

61. *Id.*

backlash from conservatives. Calling Disney a "woke" corporation, Governor Ron DeSantis accused Disney of attacking "the parents of my state,"[62] and the Florida legislature quickly changed the law to allow the governor to end Disney World's special taxing district.[63]

As corporations have moved to embrace a new degree of social consciousness, corporate law theory has also shifted away from the pure, distilled focus on shareholder wealth maximization that has characterized the field since the 1980s. Certainly stakeholderism (a.k.a. stakeholder theory) has been around for a long time, with Professor Merrick Dodd arguing (against Adolph Berle) that the corporation must serve its stakeholders across the board, rather than simply shareholders.[64] But after the advent of the law and economics movement within corporate law, stakeholderism had been at most a consistent but low thrum of dissent.[65] Now, however, there are clear signs that legal academia is willing to question the consensus on shareholder primacy. The current draft of the American Law Institute's *Restatement of the Law: Corporate Governance* has a convoluted and uncertain definition of corporate purpose, attempting to maintain shareholder primacy while opening itself up to stakeholder possibilities.[66] The European Corporate Governance

62. Andrew Atterbury, *DeSantis Revokes Disney's Special Status After 'Don't Say Gay' Opposition*, POLITICO (Apr. 22, 2022), https://www.politico.com/news/2022/04/22/desantis-disney-special-status-dont-say-gay-00027302 [https://perma.cc/7ERF-JGPY].

63. Lori Rosza, *DeSantis Says Florida May Take Over Disney's Special District*, WASH. POST (May 16, 2022, 6:15 PM), https://www.washingtonpost.com/nation/2022/05/16/desantis-says-florida-may-take-over-disneys-special-district/ [https://perma.cc/W4N2-AJKE] (noting that the takeover of the district has not yet been implemented). In February 2023, the Florida legislature changed course to continue the special tax district but took away Disney's power to appoint members of the tax district's five-member oversight board, giving that power to the governor. Jesus Jiménez & Brooks Barnes, *What We Know About the DeSantis-Disney Dispute*, N.Y. TIMES (May 19, 2023), https://www.nytimes.com/article/disney-florida-desantis.html [https://perma.cc/2PMX-N23T].

64. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

65. For some of the more important entries in the stakeholder canon, see LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1996); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 194–95 (1991).

66. Section 2.01(a) states:

> (a) The objective of a corporation is to enhance the economic value of the corporation, within the boundaries of the law;

Institute, long a stalwart of the shareholder primacy approach, has created a new "Responsible Capitalism Initiative," recognizing that "[t]he issues of sustainability, inequality and exclusion create new challenges for capitalism and corporate governance."[67] And even a former champion of the primacy norm (in his former positions of power) has now come out in full force in favor of stakeholderism.[68] In earlier writings, former Delaware Chancellor and Supreme Court Chief Justice Leo Strine had emphasized that Delaware law enforced shareholder primacy, and it was foolish to spend time thinking otherwise.[69] Writing in 2021, however, Strine said that "the outcomes of a corporate governance system that has increased the power of stockholders, in the form of institutional investors, and decreased the power of workers and other corporate stakeholders are unsustainable, both in terms of their effect on the environment and on the social fabric."[70] As for those still clinging to shareholder wealth maximization, Strine provides this withering assessment:

> It is the elites in business and in law and economics scholarship who are catching up. They are not in the vanguard; they were slow on the uptake, and the questions being asked are more

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(1) in common-law jurisdictions: for the benefit of the corporation's shareholders. In doing so, a corporation may consider:
(a) the interests of the corporation's employees;
(b) the desirability of fostering the corporation's business relationships with suppliers, customers, and others;
(c) the impact of the corporation's operations on the community and the environment; and
(d) ethical considerations related to the responsible conduct of business;
(2) in stakeholder jurisdictions: for the benefit of the corporation's shareholders and/or, to the extent permitted by state law, for the benefit of employees, suppliers, customers, communities, or any other constituencies.

RESTATEMENT OF CORPORATE GOVERNANCE § 2.01(a) (AM. L. INST. Tentative Draft No. 1, April 2022).

67. *ECGI Responsible Capitalism Initiative*, EUROPEAN CORP. GOVERNANCE INST., https://ecgi.global/content/ecgi-responsible-capitalism-initiative [https://perma.cc/QC74-RAKY].

68. *See* Brett McDonnell, *Doctor Leo and Justice Strine*, 24 U. PA. J. BUS. L. 855, 856 (2022) (describing Leo Strine's changing positions on shareholder primacy).

69. Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) ("Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.").

70. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397, 399 (2021).

> fundamental and involve this: Isn't it time for all societally important business entities—not just public companies, but large private companies and money management firms as well—to have to use their power in a socially responsible manner?[71]

Changes in the economy, corporate law theory, and cultural expectations have resulted in a dramatic shift away from the apolitical pursuit of profit to a newly engaged sense of business stewardship. We are entering an age not just of corporate social responsibility, but of corporate social justice.[72] And these moves have not been without controversy—they are often in conflict with a sizeable portion of the American public. But there has been a real and significant change in the attitudes and perspectives on display from many corporate leaders—away from a shareholder primacy approach to a more holistic, stakeholder-friendly mindset.

II.
THE LABOR EXCEPTION

The new landscape of corporate consciousness does not ignore the lot of the workforce. As part of the 2019 Business Roundtable statement, the signatory companies committed to "[i]nvesting in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world."[73] Indeed, many of the signatories are well known for their higher levels of compensation and benefits. Amazon recently increased its average starting wages from $18 to $19 per hour, with warehouse and delivery workers earning between $16 and $26 per hour depending on their position.[74] Amazon also sells employees on the promise of a growing career and expanded opportunity, as its benefits include partnerships with over 180 colleges and universities to provide a cost-free college education to its hourly employees.[75] Many tech companies are known for their unu-

71. *Id.*

72. Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice [https://perma.cc/BT5F-9E6E].

73. BUS. ROUNDTABLE, *supra* note 12.

74. Annie Palmer, *Amazon Hikes Pay for Warehouse and Delivery Workers*, CNBC (Sept. 28, 2022), https://www.cnbc.com/2022/09/28/amazon-hikes-pay-for-warehouse-and-delivery-workers.html [https://perma.cc/B7MW-PX9U].

75. Sydney Lake, *Amazon Workers Can Now Attend These 180 Colleges for Free*, FORTUNE (Mar. 3, 2022), https://fortune.com/education/business/articles/2022/03/03/amazon-workers-can-now-attend-these-180-colleges-for-free/ [https://perma.cc/F222-MQP5].

sual and generous benefits; Apple, for example, provides six to eighteen weeks of paid parental leave, substantial employee discounts, and an annual "beer bash" featuring celebrity appearances and performances.[76] Google has a long history of innovative employee perks and generous employee stock options.[77] Marc Benioff at Salesforce has long been a champion of "Ohana," a traditional Hawaiian family-oriented approach to their workplace community; in the wake of the pandemic, the company has provided its employees significant choice in deciding between remote work and a return to the office.[78] Perhaps the undisputed leader in its care and feeding of retail workers is Patagonia, which has long offered good pay, extraordinary flexibility, and perks like on-site childcare and free organic snacks.[79]

What these companies have not had, however—at least not until recently—were unionized employees. Only a small percentage of private-sector workers in the United States are represented by a union—a figure that has been hovering between six and seven percent for some time.[80] And organizing in the tech industry has been fairly minimal.[81] Silicon Valley has long possessed a strong hostility

76. Aine Cain, *8 of the Flashiest Perks Apple Employees Get, from Discounted iPhones to Maroon 5 Concerts*, BUS. INSIDER (Aug. 2, 2018), https://www.businessinsider.com/perks-apple-employees-benefits-2017-11 [https://perma.cc/3EPP-6VH6]; Mark Gurman, *Apple Ups Benefits for Retail Workers in Tightening Labor Market*, BLOOMBERG (Feb. 8, 2022, 11:52 AM), https://www.bloomberg.com/news/articles/2022-02-08/apple-ups-benefits-for-retail-workers-in-tightening-labor-market [https://perma.cc/Y9XP-NQTZ].

77. *See, e.g.*, LASZLO BOCK, WORK RULES!: INSIGHTS FROM INSIDE GOOGLE THAT WILL TRANSFORM HOW YOU LIVE AND LEAD (2015).

78. Marcel Schwantes, *What Salesforce Does for Its Employees That Makes Other Companies Jealous*, INC. (May 13, 2019), https://www.inc.com/marcel-schwantes/what-salesforce-does-for-their-employees-that-make-other-companies-jealous.html [https://perma.cc/RKH6-3Z2W]; Jane Thier, *Return-to-Office Orders Are 'Never Going to Work,' Rants Salesforce CEO Marc Benioff*, FORTUNE (June 23, 2022, 3:38 PM), https://fortune.com/2022/06/23/salesforce-marc-benioff-slams-return-to-office-mandates/ [https://perma.cc/UM7T-EVHL]. For a discussion of Benioff's approach to business as a tool for social progress, see MARC BENIOFF, TRAILBLAZER: THE POWER OF BUSINESS AS THE GREATEST PLATFORM FOR CHANGE (2019).

79. Brigid Schulte, *A Company That Profits as it Pampers Workers*, WASH. POST (Oct. 25, 2014), https://www.washingtonpost.com/business/a-company-that-profits-as-it-pampers-workers/2014/10/22/d3321b34-4818-11e4-b72e-d60a9229cc10_story.html [https://perma.cc/J7N8-HS48].

80. U.S. Dep't of Lab., *supra* note 14.

81. *See, e.g.*, Mark A. Konkel & Emma C. Kelly, *A Union Strikes a Revolutionary Blow in Tech*, LEXOLOGY (Sept. 30, 2019), https://www.lexology.com/library/detail.aspx?g=29964796-8292-47f7-9072-2ca006fbc39f [https://perma.cc/PR3H-PR65].

towards unions, and labor has not had much purchase there.[82] The same is true for national retail brands. Efforts to unionize Walmart stores began in the 1990s but have foundered.[83] While workers may organize an occasional store or outlet, such successes have been limited and temporary. The 2002 Whole Foods representation campaign in Madison, Wisconsin, illustrates the pattern. As noted earlier, employees did manage to elect a union by a narrow margin at the one store.[84] This act of defiance had huge ramifications for employees across the country, as Mackey admits that the company "significantly transformed" the employee health care plan in response to worker dissatisfaction.[85] But the Madison workers got nothing. Whole Foods did not extend the suite of new benefits, including improved health insurance, to the Madison workers and refused to reach a collective agreement with the union.[86] A year later, after workers circulated a petition, the union was decertified.[87]

Whole Foods may seem like an extreme case of antiunionism; after all, its founder famously compared organized labor to herpes.[88] But the Whole Foods response to its lone unionized store in Madison has become something of a playbook for "conscious" companies that want to avoid these solidarity-transmitted diseases. Companies that were previously thought to be forward-thinking, worker-centered, and socially conscious have displayed traditional

82. *See, e.g.*, Gerrit De Vynck, Nitasha Tiku & Jay Greene, *Six Things to Know About the Latest Efforts to Bring Unions to Big Tech*, WASH. POST (Apr. 30, 2021), https://www.washingtonpost.com/technology/2021/01/26/tech-unions-explainer/ [https://perma.cc/YRS2-M3JW].

83. Rick Wartzman, *A Brief History of the Attempts to Unionize Walmart*, LITERARY HUB (Nov. 16, 2022), https://lithub.com/a-brief-history-of-the-attempts-to-unionize-walmart/ [https://perma.cc/NL49-SURY] ("Despite decades of trying—and the filing of 288 unfair labor practice charges against the company between 1998 and 2003 for purportedly surveilling, interrogating, and firing workers who hoped to organize—neither the UFCW nor any other union was ever able to notch a single victory at a Walmart in the United States. Except for once. In February 2000, butchers at a Walmart Supercenter in Jacksonville, Texas, voted seven to three in favor of being represented by the UFCW.").

84. MACKEY & SISODIA, *supra* note 1, at 160.

85. *Id.*

86. *Id.* at 161.

87. *Id.*

88. Emma G. Keller, *Whole Foods CEO John Mackey Calling Obamacare Fascist Is Tip of the Iceberg*, THE GUARDIAN (Jan. 18, 2013), https://www.theguardian.com/business/us-news-blog/2013/jan/18/whole-foods-john-mackey-fascist [https://perma.cc/B8T6-RNNL] (quoting Mackey as saying, "[t]he union is like having herpes. It doesn't kill you, but it's unpleasant and inconvenient, and it stops a lot of people from becoming your lover").

anti-union techniques in fighting off their own workers' efforts to secure collective representation.

Starbucks is perhaps the quintessential example of this phenomenon. The Seattle-based coffee chain has long appeared on lists of the "best places to work for" and "most-admired employers."[89] Its fringe benefits and corporate culture have been selling points for potential employees. Founder and longtime CEO Howard Schultz was seen as the face of this Starbucks approach, drawing accolades in the business press.[90] But during the pandemic, stories began to appear about worker dissatisfaction with Starbucks' policies. One common refrain was that during the pandemic the company had prioritized customer service over safety and respect for workers.[91] The official company response to these complaints was emblematic:

> Our 200,000 partners across the US are the best people in the business, and their experiences are key to helping us make Starbucks a meaningful and inspiring place to work. We offer a world-class benefits program for all part- and full-time partners and continued support for partners during Covid-19 to care for themselves and their families, and we continue to have an industry-leading retention rate.[92]

When Starbucks Workers United began a representation campaign at stores in Buffalo, New York in 2021, company executives did not embrace this expression of worker sentiment; they instead followed the traditional anti-union playbook. When the union filed representation petitions for three different stores individually, Starbucks insisted that a grouping of all twenty Buffalo stores was

89. *See, e.g.*, Brian Kushida, *Starbucks Ranks High on Fortune's '100 Best Companies to Work For'*, MINN. DAILY (Jan. 24, 2007), https://mndaily.com/208079/news/world/starbucks-ranks-high-fortunes-100-best-companies-work/ [https://perma.cc/N98D-GWWC]; Bonnie Rochman, *What Makes Starbucks One of the World's Top 5 Most Admired Employers? Ask These Partners*, STARBUCKS STORIES & NEWS (Jan. 23, 2018), https://stories.starbucks.com/stories/2018/starbucks-one-of-the-worlds-top-5-most-admired/ [https://perma.cc/2442-7X8Y].

90. *See, e.g.*, Rochman, *supra* note 89.

91. *See, e.g.*, Michael Sainato, *'Coffee-Making Robots': Starbucks Staff Face Intense Work and Customer Abuse*, GUARDIAN (May 26, 2021), https://www.theguardian.com/business/2021/may/26/starbuck-employees-intense-work-customer-abuse-understaffing [https://perma.cc/ET6H-26LZ]; Noam Scheiber, *Starbucks Faces Rare Union Challenge as Buffalo Workers Seek Vote*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2021/08/30/business/starbucks-coffee-buffalo-union.html [https://perma.cc/7UPJ-WD9N].

92. Sainato, *supra* note 91.

necessary.[93] After fighting and losing on that issue at the National Labor Relations Board (NLRB), the company vigorously opposed the union campaigns.[94] Starbucks executives flooded the Buffalo stores, with seven visits alone from Rossann Williams, Starbucks' president of retail for North America.[95] Once the union had secured victories at several stores, Starbucks' tactics became even more hardball. Howard Schultz, returning to his role as CEO, implemented a series of improvements in workers' benefits, but then said that unionized workplaces would not enjoy them.[96] The company has gone on a firing spree, terminating, reassigning, or downgrading employees allegedly because of their union activity.[97] The scope of the alleged unfair labor practices is staggering, with over twenty complaints alleging hundreds of illegal acts filed against Starbucks as of August 2022—less than a year after the first announced union campaign.[98] A June 2023 media report tallied nearly 100 NLRB-issued complaints against Starbucks, with Board administrative law judges finding that the company had violated labor law in sixteen out of seventeen adjudicated cases.[99] To give a

93. Noam Scheiber, *As Starbucks Workers Seek a Union, Company Officials Converge on Stores*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2021/10/18/business/economy/starbucks-union-buffalo.html [https://perma.cc/77QF-CYDW].

94. Mary Meisenzahl, *Starbucks Just Got Closer to Having Its First Unionized Store in the US*, BUS. INSIDER (Oct. 29, 2021, 12:27 AM), https://www.businessinsider.com/starbucks-union-organizers-in-buffalo-just-got-a-boost-from-the-nlrb-2021-10 [https://perma.cc/TH5Y-PPZ4].

95. Scheiber, *supra* note 93.

96. *See, e.g.*, Noam Scheiber, *Starbucks Plans Wage Increases That Won't Apply to Unionized Workers*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/business/economy/starbucks-howard-schultz-union-pay.html [https://perma.cc/6H23-CFPL]; Heather Haddon, *Starbucks Prepares to Expand Worker Benefits That Might Exclude Unionized Staff*, WALL ST. J. (Apr. 13, 2022), https://www.wsj.com/articles/starbucks-prepares-to-expand-benefits-to-workers-but-could-exclude-unionized-ones-11649869570 [https://perma.cc/ZB6B-8VLL].

97. Robert Iafolla & Parker Purifoy, *Starbucks Is Racking Up Labor Law Violations as Rulings Roll in*, BLOOMBERG L. (June 2, 2023, 4:31 AM), https://news.bloomberglaw.com/daily-labor-report/starbucks-is-racking-up-labor-law-violations-as-rulings-roll-in [https://perma.cc/ML39-9DU3]; Kate Rogers, *Starbucks Hit with Sweeping Labor Complaint Including Over 200 Alleged Violations*, CNBC (May 6, 2022, 7:46 PM), https://www.cnbc.com/2022/05/06/starbucks-accused-of-more-than-200-labor-violations-in-nlrb-complaint.html [https://perma.cc/AY65-N6K2].

98. *See, e.g.*, Dee-Ann Durbin, *Labor Board Files Complaint Against Starbucks for Withholding Raises from Unionized Stores*, PBS NEWSHOUR (Aug. 25, 2022, 7:29 PM), https://www.pbs.org/newshour/economy/labor-board-files-complaint-against-starbucks-for-withholding-raises-from-unionized-stores [https://perma.cc/FM9W-6TVV].

99. Iafolla & Purifoy, *supra* note 97.

taste of the organized onslaught against workers: the initial NLRB complaint in the Buffalo regional office accused Starbucks of "firing employees because they supported the union; promising benefits to workers as a way to discourage them from unionizing; intimidating workers who sought to unionize by subjecting them to surveillance; and other illegal behavior."[100] Soon thereafter, the Board amended its complaint to seek to require Starbucks to recognize a union under an imposed bargaining order.[101] The Board has already secured the reinstatement of seven employees in Memphis through an extraordinary injunction and is seeking nation-wide injunctions against the company in a number of cases.[102]

While the breadth and depth of the Starbucks response is extraordinary, it is not alone amongst the more enlightened enterprises in its scorched-earth response to unionization efforts. When workers at Chipotle stores began to organize at stores in Maine and Michigan, the restaurant chain followed the Starbucks playbook, bringing in managers from across the country as well as an anti-union consultant.[103] Soon after the organizing began, Chipotle shut down the Maine location, claiming that the decision was based on staffing issues; the NLRB filed a complaint alleging that the shutdown was retaliatory[104] and eventually reached a $240,000 set-

100. Noam Scheiber, *Labor Board Seeks Unionization at Starbucks Where Union Lost Election*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/20/business/starbucks-union-buffalo.html [https://perma.cc/C2TM-QVGX].

101. *Id.*

102. Press Release, NLRB Off. of Pub. Affs., NLRB Region-15 Wins Injunction Requiring Starbucks to Rehire Seven Unlawfully Fired Workers, Post the Court's Order, and Cease and Desist from Unlawful Activities (Aug. 18, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-region-15-wins-injunction-requiring-starbucks-to-rehire-seven [https://perma.cc/2Z49-ABU3]; Robert Iafolla, *Starbucks Faces Labor Board Bid for Nationwide Court Order*, BLOOMBERG (Nov. 15, 2022), https://news.bloomberglaw.com/daily-labor-report/starbucks-faces-labor-board-request-for-nationwide-court-order [https://perma.cc/EWJ6-VMQV].

103. Lauren Kaori Gurley, *Michigan Chipotle Outlet the Chain's First to Unionize*, WASH. POST (Aug. 25, 2022, 6:57 PM), https://www.washingtonpost.com/business/2022/08/25/chipotle-union-victory-fastfood-michigan/ [https://perma.cc/F58Y-SZ25].

104. Josh Eidelson, *Chipotle Shut Down Maine Restaurant to Defeat Union, Labor Board Alleges*, BLOOMBERG (Nov. 3, 2022, 5:18 PM), https://www.bloomberg.com/news/articles/2022-11-03/chipotle-shut-restaurant-because-workers-organized-nlrb-alleges#xj4y7vzkg [https://perma.cc/UL6A-38Z5]. Pro-union workers from the closed location alleged that they are blacklisted within the company. Meaghan Bellavance, *Chipotle Reportedly Blacklists Augusta Employees Who Filed to Unionize*, NEWS CTR. ME. (Aug. 8, 2022, 6:30 PM), https://www.newscentermaine.com/article/money/business/chipotle-blacklists-augusta-maine-employees-who-filed-for-union-

tlement with the company.[105] Chipotle has a record of violating labor and employment laws; summer 2022 saw the company agree to a settlement with New York City potentially worth more than $20 million for violating the city's worker protection laws.[106]

Apple has long been considered one of the premier retail establishments in the country, with workers at the "Genius Bar" afforded strong benefits and ethereal workplaces.[107] But a shift in corporate culture has allegedly had workers maximizing sales with pressure tactics, leading to an interest in unionization.[108] Two retail stores have voted for union representation, with workers at other stores considering the possibility.[109] Apple has responded with an increase in health and education benefits—but not for the unionized stores.[110] In Atlanta, the Communications Workers of America withdrew its election petition after concluding that "Apple's repeated violations of the National Labor Relations Act have made a free and fair election impossible."[111] The union claims that Apple is

food-business/97-ed587a53-0828-425a-8922-7585a579b341 [https://perma.cc/J6VL-4VAL].

105. Press Release, NLRB Off. of Pub. Affs., NLRB Region 1-Boston Obtains Settlement with Chipotle with $240,000 in Backpay and Front Pay, Preferential Hiring, and Notice Posting in 40 Stores (Apr. 5, 2023), https://www.nlrb.gov/news-outreach/region-01-boston/nlrb-region-1-boston-obtains-settlement-with-chipotle-with-240000-in [https://perma.cc/9VC5-HLL8].

106. The settlement was "the largest settlement of its kind in the city's history." Noam Scheiber, *Chipotle Agrees to Pay Over $20 Million to Settle New York City Workplace Case*, N.Y. Times (Aug. 9, 2022), https://www.nytimes.com/2022/08/09/business/economy/chipotle-labor-nyc.html [https://perma.cc/UN92-VFC6].

107. As Josh Eidelson reported: "Apple Store workers say the jobs were plum by retail standards until this transition, and for many they were dream jobs: getting paid to use their geekery for good. The money was decent (it's now $22 an hour in the US, minimum), the benefits were strong (health insurance, pet-sitting help), and some of the perks matched the ones enjoyed by their white-collar counterparts (discounts on Apple products, occasional trips to the corporate headquarters in Cupertino)." Josh Eidelson, *How Apple Stores Went from Geek Paradise to Union Front Line*, Bloomberg (Nov. 14, 2022, 4:00 AM), https://www.bloomberg.com/news/features/2022-11-14/apple-appl-stores-join-us-retail-union-fight#xj4y7vzkg [https://perma.cc/5P34-ZEPZ].

108. *Id.* ("Increasingly, workers have concluded that the only way to regain the Apple experience they signed up for, and hold the company to the values it preaches, is to unionize.").

109. *Id.*

110. Mitchell Clark, *Apple's First Unionized Workers Say the Company Is Withholding New Benefits*, The Verge (Oct. 28, 2022, 5:51 PM), https://www.theverge.com/2022/10/28/23427577/apple-union-maryland-letter-benefits-contract [https://perma.cc/AB2W-4V6E].

111. Mitchell Clark, *Atlanta Apple Store Workers Say 'Intimidation' Has Made a Fair Union Vote Impossible*, The Verge (May 27, 2022, 6:52 PM), https://

playing out of the same anti-union playbook: hiring anti-union lawyers, circulating anti-union messages, and holding captive-audience meetings.[112] In October 2022, the NLRB filed unfair labor practice charges against Apple, alleging that the employer interrogated workers about their union support and prevented pro-labor flyers from being distributed in a break room.[113] In January 2023, the NLRB issued a statement finding merit to allegations that top executives at Apple had improperly imposed rules on employees restricting their ability to engage in protected concerted activity.[114] Other union charges are still under investigation.[115]

Trader Joe's has cultivated an offbeat, relaxed vibe at its stores, with a focus on stakeholders and a progressive image.[116] However, the company has followed the conventional management path in its approach to unionization—fighting it vigorously.[117] The company has hired the law firm of Littler Mendelson to carry on an anti-union campaign at its stores; like Starbucks and others, it has allegedly changed terms and conditions in the midst of an organizing drive, retaliated against union supporters at its stores, and closed a store to discourage unionization.[118] Two Trader Joe's stores have organized while one has rejected unionization; in the stores that have organized, Trader Joe's United has accused the employer of bad-faith bargaining.[119]

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www.theverge.com/2022/5/27/23145034/apple-atlanta-retail-store-union-election-canceled-intimidation [https://perma.cc/9FZY-EMDZ].

112. *Id.*

113. *See, e.g.*, Tripp Mickle, *N.L.R.B. Issues Complaint Against Apple*, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/business/apple-store-nlrb-ruling.html [https://perma.cc/ZP7G-ZCM9].

114. Josh Eidelson, *Apple Executives Violated Worker Rights, Labor Officials Say*, BLOOMBERG (Jan. 30, 2023, 4:09 PM), https://www.bloomberg.com/news/articles/2023-01-30/apple-executives-violated-worker-rights-us-labor-officials-say [https://perma.cc/73DL-DNB9].

115. *Id.*

116. Jonah Furman, *Trader Joe's Union Campaign Takes Two Steps Forward, One Step Back*, LAB. NOTES (Aug. 25, 2022), https://labornotes.org/2022/08/trader-joes-union-campaign-takes-two-steps-forward-one-step-back [https://perma.cc/534S-Z44J].

117. *Id.* ("It seems that Trader Joe's management is considering becoming the next Starbucks in a different sense: closing stores and harassing workers out of union drives.").

118. *See* Michael Sainato, *Trader Joe's Broke Labor Laws in Effort to Stop Stores Unionizing, Workers Say*, THE GUARDIAN (Sept. 4, 2022), https://www.theguardian.com/us-news/2022/sep/04/trader-joes-union-workers-labor-law [https://perma.cc/QEH2-53L2].

119. *See, e.g.*, Catherine Douglas Moran, *Trader Joe's Accused of Bad Faith Bargaining by Union*, GROCERY DIVE (Nov. 8, 2022), https://www.grocerydive.com/

It's hard to say for sure, of course, but there is a case to be made that no other company has devoted as many resources to anti-unionization as Amazon. Prior to 2022, the company had succeeded in keeping unions out of its workforce.[120] The company's workplace surveillance is notorious amongst its employees, deploying an array of electronic wizardry that some workers compare to prison.[121] The monitoring also discourages concerted activity among employees, as they fear being overheard or even identified as congregating together by the company's tracking systems.[122] The company also held hundreds of meetings with employees to convince them not to join the union; these small-group meetings, sometimes called "training," were hosted by up to twenty-nine employee relations officials and up to nine outside consultants.[123] The union's loss in the 2021 representation election at the Bessemer, Alabama warehouse seemed to foretell continued difficulties for organizing at the company.[124] But the NLRB ordered the election to be held again, as it found that the company had a "flagrant disre-

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news/trader-joes-unfair-labor-practice-charges-union/635972/ [https://perma.cc/DU6D-QFG4]; Noam Scheiber, *Workers at Trader Joe's in Brooklyn Reject Union,* N.Y. TIMES, (Oct. 28, 2022), https://www.nytimes.com/2022/10/28/business/economy/trader-joes-brooklyn-union.html [https://perma.cc/9A4G-UPJ8].

120. Noam Scheiber, *Mandatory Meetings Reveal Amazon's Approach to Resisting Unions*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html [https://perma.cc/MS7A-6XRL].

121. *See, e.g.*, Jay Greene, *Amazon's Employee Surveillance Fuels Unionization Efforts: 'It's Not Prison, It's Work'*, WASH. POST (Dec. 2, 2021, 7:00 AM), https://www.washingtonpost.com/technology/2021/12/02/amazon-workplace-monitoring-unions/ [https://perma.cc/LE8W-CFN8].

122. *See, e.g.*, Annie Palmer, *How Amazon Keeps a Close Eye on Employee Activism to Head Off Unions*, CNBC (Oct. 24, 2020, 10:30 AM), https://www.cnbc.com/2020/10/24/how-amazon-prevents-unions-by-surveilling-employee-activism.html [https://perma.cc/5NC9-VTUV]; Jo Constantz, *Inside the Secretive World of Union Busting: How Employers Use Technology to Defeat Unions*, CAPITAL & MAIN (Dec. 9, 2021), https://capitalandmain.com/inside-the-secretive-world-of-union-busting-how-employers-use-technology-to-defeat-unions [https://perma.cc/UCP8-M4JA]. Internal memos showed that Whole Foods stores were using heat-mapping technology to identify where workers were congregating and assigning each location a score of their likelihood to unionize. Hayley Peterson, *Amazon-Owned Whole Foods Is Quietly Tracking its Employees with a Heat Map Tool That Ranks Which Stores Are Most at Risk of Unionizing*, BUS. INSIDER (Apr. 20, 2020, 10:52 AM), https://www.businessinsider.com/whole-foods-tracks-unionization-risk-with-heat-map-2020-1 [https://perma.cc/5R4D-XT4L].

123. Constantz, *supra* note 122; Scheiber, *supra* note 120.

124. *See, e.g.*, Karen Weise & Michael Corkery, *Amazon Workers Vote Down Union Drive at Alabama Warehouse*, N.Y. TIMES (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/technology/amazon-defeats-union.html [https://perma.cc/ZWM3-F7NF].

gard" for agency election procedures and had "essentially highjacked the process and [given] a strong impression that it controlled the process."[125] A year later, workers at a Staten Island warehouse voted for representation from the Amazon Labor Union (ALU), a stand-alone union newly created to serve Amazon workers.[126] Amazon has since been accused of violating federal labor law in its enforcement rules about non-working areas, and the ALU has lost two subsequent elections at different warehouse locations.[127]

It should be noted that many of the alleged unfair labor practices from the last year are, to date, either from union charges or NLRB complaints, and that the employers have vigorously contested the facts on many of these claims. But some of the facts are undisputed, many have been held to be violations in administrative hearings, and the breadth and depth of the alleged illegality are breathtaking. Moreover, these companies all could have taken a neutral or even welcoming stance towards their employees' decision to unionize.[128] They could have not advocated for a "no" vote on the representation question; they could have refrained from opposition through internal messaging, captive-audience meetings, and public statements; they could have recognized the union voluntarily when the union demonstrated proof of majority support; they could have undertaken bargaining with an eye to resolving differences and reaching a collective agreement. None of this has happened. Instead, these companies have pushed their anti-union positions to the full extent of the law—and well beyond, as seems fairly (if only allegedly) clear at this point.

It is difficult to harmonize these consistently hostile responses to unionization, including widespread alleged illegal activity, with the new corporate culture of social consciousness and responsible stewardship. All of these companies have enjoyed relatively positive

125. Jay Greene, *Labor Board Calls for Revote at Amazon Warehouse in Alabama in Major Victory for Union*, WASH. POST (Nov. 29, 2021, 5:41 PM), https://www.washingtonpost.com/technology/2021/11/29/amazon-warehouse-union-revote/ [https://perma.cc/7W2T-GRJZ] (quoting from the opinion of NLRB Regional Director Lisa Henderson).

126. *See* Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html [https://perma.cc/2J2J-DL28].

127. Karen Weise & Noam Scheiber, *Amazon Labor Union Loses Election at Warehouse Near Albany*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/technology/amazon-labor-union-alb1.html [https://perma.cc/554Q-7S4H].

128. For a discussion of card check and neutrality agreements, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

public images and are seen as employers that offer more generous benefits, more positive working environments, and more accepting corporate cultures. Despite demonstrations through union cards and NLRB elections that their workers want representation, managers have fought tooth-and-nail to prevent their workers from securing collective representation. And in an era where stakeholder theory and ESG investing are asking companies to go beyond the requirements of the law to serve customers, workers, the environment, and communities, these employers are alleged to have repeatedly violated the law in their desperation to stave off collective representation.

Corporate attitudes have changed dramatically over this period of significant social change. Unfortunately, traditional animus towards labor remains firmly locked in place. But it is not too late for that to change. It is time to extend the principles of stakeholderism and socially conscious capitalism to the concept of collective worker power in a way that truly offers meaningful participation to this critical set of stakeholders.

III.
A CREDIBLE COMMITMENT TO WORKERS

In her article *Stakeholderism, Corporate Purpose, and Credible Commitment*, Professor Lisa Fairfax notes that there are reasons to be skeptical about the new corporate commitment to broader interests within society.[129] Stakeholder interests have come to the fore before, and business rhetoric often has not matched the reality.[130] But Fairfax also notes reasons for optimism, citing to new sets of powerful supporting voices, new forms of pressure to apply, and a new public environment demanding greater accountability.[131] To take advantage of the moment, she counsels that companies must "make a credible commitment to ensuring that corporations will focus on other stakeholders" so that the moment "translates into a genuine shift in corporate attitude and behavior, particularly in the medium and long-term."[132]

Corporations across the spectrum are looking to display fidelity to the governing principle of stakeholderism as part of a new approach to corporate purpose and responsibility. It is time for these corporations to make a credible commitment to their workers and

129. Fairfax, *supra* note 7, at 1163–64.
130. *See id.* at 1176–81.
131. *Id.* at 1181–86.
132. *Id.* at 1168.

to the organizations that represent their workers collectively. Any business that embraces stakeholderism—at a minimum, the 181 signatories to the Business Roundtable statement—must change its behavior to comport with those principles. That means new thinking about the company's relationship to labor law, the company's approach to collective worker power, and the company's willingness to give workers the right to participate in company governance.

First, companies must commit to stop violating labor law. The allegations and, in many cases, administrative findings of rampant illegality on display from companies like Starbucks, Amazon, and Chipotle would not be tolerated by investors or activist groups for almost any other type of legal breach. Part of the problem is the lackluster enforcement regime for labor law violations. Remedies for unfair labor practices under the National Labor Relations Act are notoriously weak,[133] and federal officials should be in a better position to enforce labor law through swift actions and meaningful penalties like those proposed in the Protecting the Right to Organize (PRO) Act.[134] But societal acceptance of these gross violations of law is an important factor in their proliferation. Stakeholders must come together to punish companies that fail to abide by the basic assumptions of lawfulness. Investors should refuse to consider labor law violators as worthy of "ESG" or "sustainable" status, no matter their other contributions.[135] Governments should strike

133. *See, e.g.,* Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 110 (2007); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787–91 (1983); 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, 1077–88 (2004).

134. The PRO Act would require the NLRB to pursue preliminary injunctions for certain categories of employer unfair labor practices (including many of those alleged against these companies), as well as civil penalties of $50,000 per violation and up to $100,000 for repeat offenders, along with compensatory damages. *See* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021); Ben Penn et al., *Democrats' Budget Deal Seeks to Penalize Labor Law Violators*, BLOOMBERG L. (July 14, 2021, 5:47 PM), https://news.bloomberglaw.com/daily-labor-report/democrats-budget-deal-seeks-to-penalize-labor-law-violators [https://perma.cc/E68E-AY5J].

135. Legal behavior is often assumed as a threshold requirement for ESG. Mark S. Goldstein & Amanda E. Brown, *How ESG is Changing the Landscape in Labor and Employment Law*, REUTERS (Mar. 3, 2022, 10:46 AM), https://www.reuters.com/legal/legalindustry/how-esg-is-changing-landscape-labor-employment-law-2022-03-03/ [https://perma.cc/WL3E-F79Z] ("With the increased focus on ESG, companies are increasingly seeking to be more than merely legally compliant and are wanting to go further to demonstrate their progressive positions with respect to ESG."). Responses to worker activism are seen as important but are often left unde-

companies from the list of contractors if they have been found to have committed unfair labor practices.[136] And workers across the company—including executives and managers—must not tolerate a culture of lawlessness, even if it doesn't affect them directly.

It is worth noting that notions of labor law "legality" encompass areas where the boundaries may not be crisply drawn. The line between, for example, an illegal threat against union activity and a lawful prediction of unionization consequences can be difficult to discern.[137] The concept of "good-faith bargaining" is notoriously slippery, without clear markers to determine when hard negotiating crosses the line into an unfair labor practice.[138] These uncertainties could seem to excuse some degree of noncompliance. But they could instead counsel companies to steer clear of the line in their behavior. A stakeholder-supporting approach would support a "legality-plus" outlook, where companies give wide berth to questionable actions by adhering to a gold-star standard.[139]

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fined. *Id.* ("For worker activism, companies would be well-served to partner with labor and employment counsel to understand the nuances of how to effectively respond to an organizing campaign and, potentially, even a union election and contract negotiation. The past year has already seen an increase in the number of organizing campaigns, and the Biden administration has indicated its strong support for such efforts. Accordingly, this area should be a key focus for ESG programs.").

136. A recent study found that contractors who violated labor law were more likely to violate other laws and perform poorly. Karla Walter, Divya Vijay & Malkie Wall, *Federal Contractors Are Violating Workers' Rights and Harming the U.S. Government*, CTR. FOR AM. PROGRESS ACTION (Jan. 21, 2022), https://www.americanprogressaction.org/article/federal-contractors-violating-workers-rights-harming-u-s-government/ [https://perma.cc/647U-DTJP].

137. *See* SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 115 (2d ed. 2020) ("A difficult line is maintained between threats, which are prohibited, and predictions of adverse consequences of unionization, which are protected [under labor law] . . . .").

138. *See* NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457, 466 (2d Cir. 1973) ("We recognize of course that a company's 'entire course of conduct' or 'the totality of the circumstances' may show a lack of good faith in violation of § 8(a)(5), although none of its specific acts amounted to proscribed conduct."); Bryan M. O'Keefe, *The Employee Free Choice Act's Interest Arbitration Provision: In Whose Best Interest?*, 115 PENN ST. L. REV. 211, 250 (2010) ("Whether bargaining is in good faith or bad faith is highly subjective.").

139. As one Starbucks employee put it: "Now we want to say to Starbucks: This is not who you are. This is not who we are. Union-busting is not this company. We are this company." Joanna Robin, *The Pandemic Pushed These Amazon and Starbucks Workers to the Brink. Now, They Are Forming Unions and Pushing Back*, ABC NEWS (Dec. 15, 2021, 1:05 AM), https://www.abc.net.au/news/2021-12-13/the-tipping-point-for-amazon-and-starbucks-workers/100648814 [https://perma.cc/658R-NVGR].

Moving up a level of "consciousness," companies could of course give their workers free and unfettered choice in choosing a representative. A company can commit to this course of action through a neutrality agreement, in which the company pledges to remain silent during the representation campaign.[140] A card check agreement binds the employer to recognize the union if a majority of the bargaining unit signs a card or petition agreeing to be represented by the union.[141] Card check and neutrality agreements were popular tools for certain unions in organizing campaigns in the late 1990s and early 2000s.[142] There's nothing to prevent a stakeholder-oriented corporation from signing such an agreement at the beginning of the campaign.[143] In fact, Microsoft recently agreed to a card check and neutrality agreement with the Communications Workers of America as part of its proposed acquisition of Activision.[144] Its decision may have been motivated in part by antitrust concerns, but the company nevertheless came to the table and took a much more open approach to employees' choice of representation.[145] As Microsoft President Brad Smith stated, "We will respect the fact that our employees are capable of making decisions for themselves and they have a right to do that."[146]

The primary legal mechanism for worker participation in the United States is collective bargaining through union representation. But there are other ways for companies to provide workers with participation in the governance of the firm. A constellation of participatory management systems such as holacracy, works councils, and total quality management include employees within the

140. ESTREICHER & BODIE, *supra* note 137, at 125.

141. *Id.*

142. Brudney, *supra* note 128, at 825.

143. Employers may want to require some form of union information disclosure to employees as part of the agreement, in order to ensure that employees are properly informed in their choices, especially if more than one union is involved. *See* Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1135 (2011) ("[L]abor law reforms that diminish coercive election practices while increasing the flow of information and the opportunity for discourse will both enhance individual choice and increase the amount and quality of collective action.").

144. Noam Scheiber & Karen Weise, *Microsoft Pledges Neutrality in Union Campaigns at Activision*, N.Y. TIMES (June 13, 2022), https://www.nytimes.com/2022/06/13/business/economy/microsoft-activision-union.html [https://perma.cc/2BV3-8WCQ].

145. *Id.*

146. *Id.*

firm's internal governance structures.[147] Workers need not bargain with management for their terms and conditions of employment; instead, they can work within the overall governance structure to manage the affairs of the firm. In the United States, these systems are largely a product of private decisions made by company leaders, with little in the way of binding commitment to the system.[148] Some organizational forms, such as the cooperative or the employee stock ownership plan (ESOP), invest employees with actual ownership rights.[149] In many European countries, codetermination provides workers with seats on the company's board of directors—the ultimate position of power within the corporation.[150] These corporate forms vary in the extent to which they offer employees access to control and to financial dividends; ESOPs have been criticized, for example, for divesting employees of much of the governance power and handing it over to a trustee.[151] But they are at least efforts—large and small—to bring employees into governance and establish meaningful power sharing.

It is time to consider meaningful change in corporate governance to establish real power-sharing amongst stakeholders. Stakeholder theorists have—puzzlingly—generally failed to diagram a change in the corporate power structure as part of their reforms, instead remaining content to ask existing boards to contemplate the good of all stakeholders (even though they are elected by shareholders alone).[152] There are many different possibilities for implementing stakeholderism through corporate governance. With respect to employees, it makes sense to move away from share-

147. LALOUX, *supra* note 9; ROBERTSON, *supra* note 8; Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 986–90 (1998) (providing a taxonomy); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993). For a critique of participatory management, *see* Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996).

148. *But see* ROBERTSON, *supra* note 8, at 21 (describing the binding nature of the constitution within holacracy).

149. *See, e.g.*, Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs, and "Ownership Societies"*, 92 CORNELL L. REV. 865 (2007).

150. Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 324 (2021).

151. *See* Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"*, 67 FORDHAM L. REV. 957, 960 (1998) (discussing the power of the trustee within the ESOP).

152. Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2113 (2010).

holder-only governance and consider power-sharing in the form of worker board representation.[153] Legislation to this effect has been proposed in Congress.[154] Worker representation in firm governance offers power and participation without some of the limitations of collective bargaining, such as the inherently limited nature of bargaining as a right.[155] In any event, the point applies more broadly: for stakeholder governance to be real—for companies to make a credible commitment to that effect—stakeholders must have governance power to exercise.

IV.
CONCLUSION

The pandemic brought into sharper relief the disconnect between employer rhetoric and employee reality at the workplace. After the first frantic and terrifying weeks of quarantine and isolation—and for some workers, even during this period—the return to work meant dangerous exposure to the virus, angry customers and coworkers, and a realization that "essential" did not mean essential as to respect and compensation.[156] Many workers have attributed the uptick in unionization to the wave of powerlessness that swept over them as part of the pandemic.[157] To a great extent, their concerns echoed the concerns of workers well before the pan-

153. For an extended discussion, see GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2021).

154. *See, e.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Reward Work Act, H.R. 3355, 116th Cong. (2019); Teamwork for Employees and Managers (TEAM) Act of 2022, S. 3585, 117th Cong. (2022).

155. *See* Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1136 (2019) (noting the inherent weaknesses of collective bargaining).

156. *See, e.g.,* Ruqaiijah Yearby, *Lack of Enforcement, Political Influence, and Meat and Poultry Processing Workers' Disproportionate Rates of Covid-19 Infections and Deaths*, 35 ABA J. LAB. & EMP. L. 41 (2020); Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html [https://perma.cc/X7ZW-HTEN]; Molly Kinder & Laura Stateler, *Frontline Workers Were Excluded from Companies' Pandemic Windfalls. No Wonder So Many Are Forming Unions*, BROOKINGS (May 4, 2022), https://www.brookings.edu/blog/the-avenue/2022/05/04/frontline-workers-were-excluded-from-companies-pandemic-windfalls-no-wonder-so-many-are-forming-unions/ [https://perma.cc/3ZD9-EW7K].

157. *See* Kinder & Stateler, *supra* note 157; Ian Prasad Philbrick, *Why Union Drives Are Succeeding*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/briefing/union-drives-college-graduates.html [https://perma.cc/BG5H-FES8].

demic, going back to the beginning of the Post-Industrial Age.[158] But the threat of death, present in many jobs as never before, highlighted their lack of power over basic workplace decisions, including to what extent workplace dangers would be managed or tolerated.

Corporate leaders like John Mackey and Howard Schultz see themselves as managing their companies in the right way, but they are unwilling to cede any meaningful control over the workplace to their employees and the unions that represent them.[159] The newly conscious corporation needs a sense of self-awareness and deference, and an interest in bringing all stakeholders into the fold. And that includes worker empowerment.

158. For a discussion of employee organizing in tech companies prior to the pandemic, see Kate Conger & Noam Scheiber, *Employee Activism Is Alive in Tech. It Stops Short of Organizing Unions.*, N.Y. TIMES (July 8, 2019), https://www.nytimes.com/2019/07/08/technology/tech-companies-union-organizing.html [https://perma.cc/JG9E-RSZL].

159. *See* Jeff Steen, *In 14 Words, Starbucks CEO Howard Schultz Shows Why So Many Employees Don't Trust Their Leaders,* INC. (Mar. 24, 2022), https://www.inc.com/jeff-steen/in-14-words-starbucks-ceo-howard-schultz-shows-why-so-many-employees-dont-trust-their-leaders.html [https://perma.cc/ZZ5M-JQMD] (citing to Schultz's statement: "If they had faith in me and my motives, they wouldn't need a union").

TECHNOLOGY, EMPLOYEE REPLACEMENT, AND THE FUTURE OF WORK

*CYNTHIA ESTLUND**

I. INTRODUCTION

At least since the invention of the wheel, technology has been a boon to humanity, in large part by complementing and replacing human labor.[1] With the Industrial Revolution and the explosion of productivity it brought about, many late-19th and early-20th century observers foresaw, as Marx had, the emergence of a technologically-advanced economy that could meet the material needs of the citizenry with only a small fraction of the human labor that was then employed.[2] Indeed, if the fruits of a highly automated and productive economy could be fairly distributed, then humanity could transcend the enduring economic problem of scarcity and democratize the pursuit of humanistic and artistic aims that Walt Whitman called "higher progress."[3] In 1930, John Maynard Keynes famously predicted that "our grandchildren" a century hence (that is, in 2030) would need to work no more than *fifteen hours per week* to meet their material needs. Then, "for the first time since his creation man will be faced with his real, his permanent problem—how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well."[4]

That isn't quite how things have turned out, of course. Some visionaries still dream of a more automated future of much less toil and widely distributed abundance, while others fear a future in

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1. *See, e.g.*, BETH KANTER & ALLISON H. FINE, THE SMART NONPROFIT: STAYING HUMAN-CENTERED IN AN AUTOMATED WORLD 10–12 (2022) (describing how automation can free up non-profit staff time for engagement with clients and donors).

2. *See generally* BENJAMIN K. HUNNICUTT, FREE TIME: THE FORGOTTEN AMERICAN DREAM 1–12 (2013) (describing the historical development of the movement for shorter working hours among intellectuals and workers).

3. *Id.* at 48–69; *see also* Robert T. Rhode, *Culture Followed the Plow, However Slowly*, 15 KY. PHILOLOGICAL REV. 49 (2001).

4. JOHN MAYNARD KEYNES, *Possibilities for Our Grandchildren*, *in* ESSAYS IN PERSUASION 321, 328 (Palgrave Macmillan 2010).

which demand for human labor, wages, and wealth are even more unequally distributed than they are now.[5] In the meantime, technology is already taking a toll on work and workers in various ways. "Algorithmic management," including tracking of workers' movements, keystrokes, attentiveness, and emotional states, threatens to render human work itself increasingly robotic while undercutting existing strategies for constraining managerial overreach.[6] Technologies that quantify human performance are changing and sometimes skewing decisions about hiring, promotions, and discipline in ways that anti-discrimination laws might fail to address.[7] Managers also use technology to enhance their power over workers directly and to squelch collective action, with or without improvements in productivity.[8] In a number of ways, workplace technologies exacerbate problems of "subordination and submission" at work,[9] and shift risk from firms to workers.[10]

Here, I want to focus instead on an underappreciated role that technology is playing in the field of work by enhancing employers' arsenal of employee replacement options and consequently depressing workers' bargaining power. That is true most obviously in the case of automation, or replacement of human workers with machines, but it is also true in relation to organizational techniques of "fissuring," or contracting out work to individuals or supplier firms, whether domestic or overseas. Part II of this Article will sketch current debates about workers' relative bargaining power and its determinants. Part III will explore trends in the organization and technology of work that are making it easier for private sector em-

5. I survey the spectrum of views on a future of less work in CYNTHIA ESTLUND, AUTOMATION ANXIETY: WHY AND HOW TO SAVE WORK 36–39 (2021).

6. *See* JEREMIAS PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY 55–58 (2018); Jeremias Adams-Prassl, *What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, 41 COMP. LAB. L. & POL'Y J. 123 (2019).

7. *See* IFEOMA AJUNWA, THE QUANTIFIED WORKER: LAW AND TECHNOLOGY IN THE MODERN WORKPLACE (2023). *But see* ORLY LOBEL, THE EQUALITY MACHINE (2022) (arguing that technology might also facilitate the detection of discrimination and help to counter historical exclusions).

8. *See* BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK (2023); Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531 (2020).

9. *See* Valerio De Stefano, *'Masters and Servants': Collective Labour Rights and Private Government in the Contemporary World of Work*, 36 INT'L J. COMPAR. LAB. L. & INDUS. RELS. 425 (2020).

10. *See* Pegah Moradi & Karen Levy, *The Future of Work in the Age of AI: Displacement or Risk-Shifting?*, *in* OXFORD HANDBOOK OF ETHICS OF AI 270–88 (Markus D. Dubber et al. eds., 2020).

ployers to replace employees, and that are depressing most workers' labor market power.[11] Part IV will suggest some ways in which the law of work could respond to these trends, either by supplementing workers' bargaining power with public regulatory power or by intervening to rebalance bargaining power.

II.
THE RETURN OF "UNEQUAL BARGAINING POWER" IN U.S. LABOR POLICY

After a long period of exile in the intellectual wilderness, the concept of unequal bargaining power is back at the center of scholarly and public discourse about labor law and policy. That is a welcome development to those who believe that U.S. workers have taken an economic beating since the 1970s, and that workers' lives at work and beyond are profoundly affected by their bargaining power. Employees with little bargaining power—or leverage—experience lower wages and benefits, less opportunity for advancement, worse schedules, less job security, less access to paid leaves or vacations, less privacy on and off the job, and greater vulnerability to workplace hazards and abuse. They will often feel compelled to tolerate violations of their legal rights, such as discriminatory harassment or demands for unpaid, off-the-clock work. Many workers, especially those without higher education or advanced skills, find themselves in that position most of the time. This Article explores the role that technology has played in exacerbating asymmetries of labor market power in recent decades, along with some ways in which the law could respond to those asymmetries.

The concept of unequal bargaining power was once-dominant, long-disdained, and now-resurgent within U.S. labor policy. The basic template for that policy was constructed during the New Deal era, when there was a widespread consensus that workers—or at least most workers most of the time—suffered from a deficit of bargaining power. The first pillar of U.S. labor policy, the National Labor Relations Act of 1935 (NLRA), expressly aimed to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association."[12] The law sought to do that by enabling

11. I explore these trends in Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, U. CHI. L. REV. (forthcoming 2023), from which this section borrows.

12. National Labor Relations Act § 1, 29 U.S.C. § 151 (1935) (amended 1947).

workers to aggregate and amplify their own bargaining power through union organizing and collective bargaining. The second founding pillar of U.S. labor and employment law, the Fair Labor Standards Act of 1938 (FLSA),[13] established a national minimum wage and mandatory overtime premium for most of the private sector labor market. The idea behind the FLSA was that, while collective bargaining would enable workers in leading industries to improve their wages and working conditions, many workers outside those industries simply had too little bargaining power for that strategy to succeed; they needed direct government intervention to put a floor on basic terms and conditions of work.[14]

The NLRA has failed to enable workers to organize and bargain collectively (and there is no shortage of analysis of the reasons for that failure). That is seen in the fall of union density to about six percent of the private sector labor force.[15] But the problem is deeper: workers can amplify their bargaining power by aggregating it, but only by so much. If workers have too little individual bargaining power, then aggregating it might still leave them unable to exact meaningful concessions from employers. In other words, what had been the back-up regulatory strategy of minimum labor standards—meant to protect workers at the economy's margins with too little market power to protect themselves through unionization—now stands for most workers as the primary buffer against labor market dynamics that are skewed against most workers most of the time. To make matters worse, those basic labor standards have not kept up with either inflation or productivity improvements.[16]

Both the failings of collective labor law and the stagnation of minimum labor standards are among the reasons why workers' economic fortunes—as represented by labor's share of income and of productivity gains—have stagnated or deteriorated since the

13. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19.

14. *See* Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 22–24 (2000) (describing how the FLSA codifies assumptions about insufficient worker bargaining power into its statutory language).

15. Press Release, Bureau of Lab. Stats., Union Members Summary (Jan. 20, 2022), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/R4HL-LEWX].

16. David Cooper, Sebastian Martinez Hickey & Ben Zipperer, *The Value of the Federal Minimum Wage is at Its Lowest Point in 66 Years*, ECON. POL'Y INST. (July 14, 2022), https://www.epi.org/blog/the-value-of-the-federal-minimum-wage-is-at-its-lowest-point-in-66-years/ [https://perma.cc/8LXV-YY5B].

1970s.[17] During most of that period, conventional economic wisdom was that unequal bargaining power was an incoherent trope, and that labor markets, if not perfectly competitive, were competitive enough to ensure that workers got their fair share of economic output. The mismatch between economic reality and theory is more than ironic, for ideas affect policy. Neoliberal ideas about the superiority of markets and private ordering, and the retrograde impact of both regulatory intervention and labor unions, contributed to both the failure of proposals to reform and revitalize the federal labor laws and the stagnation of labor standards.[18]

The last decade or so has seen a resurgence of scholarly attention to asymmetries of power in the labor market, as already noted.[19] To be sure, workers' labor market power is variable, contingent, and not easily measured.[20] Still, we can fairly say that incumbent employees' bargaining power on the job depends on how costly their departure—whether by quitting or dismissal—would be both to their employer and to themselves. That is, employees have more bargaining power if they could easily find another comparable job in case they quit or were fired, *and* if their departure would be costly to their employer (given both replacement costs and any liabilities or dispute-resolution costs in case of dismissal). Both sides of the equation depend to a great extent on the demand for and supply of workers' particular skills. It seems fair to say, however, that there is a systematic "inequality of bargaining power" if most workers in most labor market conditions would find it harder or more

17. U.S. Dep't of the Treasury, The State of Labor Market Competition 39 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/9W75-8R2P].

18. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947 (1984); Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988 (1984).

19. *See* Lawrence Mishel, *The Goliath in the Room: How the False Assumption of Equal Worker-Employer Power Undercuts Workplace Protections*, 3 U.C. Berkeley J. L. & Pol. Econ. 3, 4 (2022). This entire special issue, entitled "Not So Free to Contract: How Unequal Workplace Power Undercuts the 'Freedom of Contract' Framework," explores unequal bargaining power, its determinants, and its consequences. For another recent overview of contemporary interdisciplinary scholarship on the determinants of workers' versus employers' bargaining power, see Hiba Hafiz, *Structural Labor Rights*, 119 Mich. L. Rev. 651, 688–97 (2021).

20. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479, 496 (2016). ("The notions of 'unequal bargaining power' and 'economic dependence' . . . do not explain when bargaining power is sufficiently unequal or dependence sufficiently grave to warrant employment duties.").

costly to replace one job with another than employers would find it to replace one worker with another.[21] And if all that is so, then changes in the economy and in labor markets may degrade workers' relative labor market power by making it either harder for workers to switch jobs *or easier for employers to replace them*.

Problems of monopsony and growing concentration of product markets, which make it harder for workers to switch jobs or employers, are getting renewed attention.[22] Here I will focus on the other side of the equation: firms' growing ability to replace workers, and especially the role of technology in those developments, including but not only through automation. The proliferation of firms' employee replacement options undermines workers' labor market power and, with it, the viability of collective bargaining as a strategy for improving wages and working conditions, given the unavoidable dependence of workers' *collective* bargaining power on their *individual* bargaining power. For one thing, union density takes a hit, and the domain of collective bargaining shrinks, whenever employers replace union-represented workers, whether with machines or with other workers who are not (and often cannot be) represented by a union. In other words, employee replacement often means union avoidance, whether incidentally or by design. For several reasons, employees' growing replaceability thus raises hard questions about the future of collective bargaining.

III.
AUTOMATION, FISSURING, AND OTHER EMPLOYEE REPLACEMENT OPTIONS

Several important labor market trends in recent decades have expanded firms' ability to replace employees either with other workers or with machines. Those trends contribute to workers' shrinking market power, labor's declining share of income, and growing economic inequality. Nearly all of them are enabled or amplified by technology.

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21. This approach broadly aligns with that of microeconomic game and bargaining theorists, who assess bargaining power through parties' ability to delay action without cost, make credible threats, and incur risk. *See* Hafiz, *supra* note 19, at 688–97.

22. *See, e.g.*, ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021); *see also* Eric Posner, *Antitrust's Labor Market Problem*, PROMARKET (Nov. 8, 2021), https://www.promarket.org/2021/11/08/antitrust-labor-market-concentration-problem/ [https://perma.cc/9QEQ-TT4K] (summarizing the results of several studies looking at monopsony); Hafiz, *supra* note 19, at 654 (describing the failures of antitrust law to protect worker bargaining power).

A. The Automation Option[23]

Predictions of a jobless future have come in waves throughout the history of capitalism, only to recede as new jobs—usually better jobs—replace those lost to machines. But the pace and distinctive nature of recent innovations in artificial intelligence, machine learning, and robotics have led some contemporary observers to believe that this time will be different.[24] With advances in both hard and soft forms of technology (robots and algorithms. for example), machines are replicating a wider range of human capabilities and weaving together those distinct capabilities more seamlessly than ever before. The very terms "artificial intelligence" and "machine learning" hint at what is new: technology is acquiring and refining cognitive and sensory capabilities that were long thought to be uniquely human.

To be sure, the reality does not always live up to the Silicon Valley hype, which portrays the disruptive potential of technological breakthroughs while downplaying their shortcomings and underestimating the human and institutional frictions that slow implementation. So, we should not swallow whole tales from the tech world about the imminent end of work. But neither should we ignore the fact that as machines replicate an ever-wider range of human capabilities, and outpace and surpass humans at increasingly complex tasks, they are putting a growing range of jobs at risk.[25]

A future of less work could obviously be good or bad, depending on how society manages and responds to it. Most workers would welcome a more automated future of less work if the dividends in both prosperity and more time for the rest of life were widely shared.[26] But without a much larger public role in labor markets, job losses may fall heavily and painfully on those without specialized

23. This section borrows liberally from my recent book on automation. *See generally* ESTLUND, *supra* note 5.

24. *See id.* at 1–40.

25. Two widely cited studies using different methodologies reach the same bottom line: nearly half of the work that humans perform in the current U.S. economy is "automatable," and potentially at risk over the next few decades. *See* Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation*?, 114 TECH. FORECASTING & SOC. CHANGE 254 (2017); MCKINSEY GLOB. INST., A FUTURE THAT WORKS: AUTOMATION, EMPLOYMENT, AND PRODUCTIVITY 109 (2017), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/digital%20disruption/harnessing%20automation%20for%20a%20future%20that%20works/mgi-a-future-that-works_full-report.pdf [https://perma.cc/7AA7-WU3W].

26. For my own policy suggestions, see ESTLUND, *supra* note 5, at 105–48.

skills or advanced education, producing growing pockets of unemployment, underemployment, or retreat from the active labor market.

Job destruction is only half the picture, of course. Machines also create new jobs—especially, but not only, skilled jobs working with technology. The history of automation's impact on the labor market has been one of "creative destruction."[27] Here, we can sidestep the vigorous debate over whether new job creation will keep up numerically with job losses or not.[28] For the incontestable fact is that job losses may be devastating to workers and their families and communities even if they are numerically offset by new job opportunities elsewhere in the economy. Apart from geographic mismatches between jobs lost and jobs gained, job losers might have neither the skills needed in new jobs nor a realistic shot at acquiring those skills. Moreover, workers whose jobs *could be* automated suffer a loss of labor market power even if their jobs are not yet automated, and even if other jobs are being created elsewhere. That is, the proliferation and growing cost-effectiveness of technological substitutes for human labor translates into a powerful employee replacement strategy that undermines many workers' market power vis-à-vis employers even before those workers are actually displaced.

B. Fissuring as Employee Replacement and the Role of Technology

The field of labor and employment law, while largely neglecting the automation question, has been thoroughly preoccupied with what David Weil has called "fissuring."[29] "Fissuring" describes the processes by which major branded firms in the past several decades have been systematically shedding workers and labor functions (especially manufacturing, maintenance, logistics, cleaning, security, and food services) and contracting them out to other entities or to individuals. Fissuring includes domestic outsourcing as well as offshoring of jobs to overseas suppliers (think China) and splintering of jobs into gigs that are or purport to be beyond the

27. *See* David H. Autor, *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, 29 J. ECON. PERSPS. 3 (2015).

28. That debate occupies most of Chapter 2 of my book on automation. *See* ESTLUND, *supra* note 5, at 21–40.

29. *See generally* DAVID WEIL, THE FISSURED WORKPLACE (2014). For a concise summary, see Heather Boushey, *Equitable Growth in Conversation: In Conversation with David Weil*, WASH. CTR. FOR EQUITABLE GROWTH (June 22, 2017), https://equitablegrowth.org/equitable-growth-in-conversation-david-weil/ [https://perma.cc/CA6L-TYKU].

employment nexus (think Uber). The latter forms of fissuring replace domestic employees with workers who are beyond the reach of domestic labor and employment law by virtue of their location or their legal classification or misclassification; they enable firms not merely to pass the burdens of employer status down to less visible, profitable, and capable supplier firms, but to eliminate those burdens altogether, along with the corresponding employee protections.

All kinds of fissuring tend to leave workers worse off—without the decent wages, generous benefits, and paths to advancement that their predecessors enjoyed inside the "internal labor markets" of vertically-integrated lead firms.[30] Intense cost-based competition among relatively low-visibility and less capitalized supplier firms squeezes profit margins and puts downward pressure on wages and labor standards, and many supplier firms have little tangible or reputational capital to lose if they break the law or go under. Fissuring allows lead firms to reduce costs, and sometimes to shed or avoid union entanglements, while avoiding direct accountability for the lawless practices that sometimes underlie those lower costs.

Fissuring replaces employees with other workers who are almost always in a weaker market position, whether because they occupy a lower-profit sector of the economy, a poorer or less regulated jurisdiction, or a less protected legal status within the jurisdiction (as with independent contractors). Importantly, the ability of firms to fissure or contract out work undercuts the bargaining power or leverage of incumbent employees even before their jobs are fissured away. Just as with employees whose jobs could be automated, employees who could be replaced with lower-wage workers of a supplier firm suffer a loss of bargaining leverage. But what does the latter have to do with technology?

Technology has facilitated fissuring at every turn, from outsourcing to poorer countries to the growth of platform work, and it has done so by lowering the costs associated with firms' explicit contracting for goods and services that they need for their business.[31]

30. *See* David Weil, *Income Inequality, Wage Determination, and the Fissured Workplace*, *in* AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY 209, 224–27 (Heather Boushey, J. Bradford DeLong & Marshall Steinbaum eds., 2017).

31. *See* WEIL, *supra* note 29, at 54–58, 60–63, 167–74. This relates to the "theory of the firm," and the recurring "make-or-buy" decisions that define the boundaries of the firm. Firms can more readily "buy" labor inputs from outside contractors, and avoid some of the costs associated with "making" those labor inputs through their own employees, when technology reduces the substantial transaction costs associated with making and enforcing explicit contracts over what is needed. *Id.* at 30–31, 60–63.

Technology enables lead firms to break down products and processes into component parts, to identify and contract out the least profitable of those parts, to set standards and specifications by contract, and to monitor performance and outputs of outside suppliers across organizational and geographic boundaries.[32] Technology in the form of container ships and bar-coding allowed Walmart to track goods from Chinese and Vietnamese factories to U.S. retail outlets;[33] technology allows Apple to scrupulously monitor the quality of iPhones while tapping into much cheaper overseas labor markets;[34] and technology enables Uber to monitor drivers, connect them with customers, and capture a large share of the resulting fares, without directly supervising the drivers.[35]

Similarly, technology can facilitate firms' replacement of full-time employees with part-time or temporary workers—precarious or contingent workers—with much the same consequences as fissuring for labor conditions and wages. In particular, "just-in-time" scheduling software enables firms to match staffing levels to fluctuating customer demand through shorter and more intensive on-demand shifts. The impact of both growing precarity and fissuring on labor markets is thus traceable in some significant measure to technology—not disembodied technology, of course, but technology in the hands of profit-seeking firms.

Crucially, all of these employee-replacement strategies—contracting out work to domestic or overseas suppliers or individual contractors or converting full-time jobs into part-time or contingent jobs—tend to undercut workers' bargaining power *even if they are not exercised*. A firm's realistic, cost-effective option to replace a given group of employees will tend to dampen those employees' market power even while it remains just an option. The labor mar-

32. *See* Abraham Seidmann & Arun Sundararajan, *Sharing Logistics Information Across Organizations: Technology, Competition, and Contracting*, *in* INFORMATION TECHNOLOGY AND INDUSTRIAL COMPETITIVENESS 107 (Chris F. Kemerer ed., 1998).

33. On the transformative impact of container ships and bar codes on global supply chains, see Witold Rybcyznski, *Shipping News*, N.Y. REV. BOOKS (Aug. 10, 2006), https://www.nybooks.com/articles/2006/08/10/shipping-news/ [https://perma.cc/NV87-F8RV].

34. *See* Sissi Cao, *Apple Struggles with High Defect Rates as it Shifts Manufacturing from China to India*, OBSERVER (Feb. 14, 2023), https://observer.com/2023/02/apple-india-manufacturing-defect-rate/ [https://perma.cc/YL7G-4QLG].

35. Whether Uber can do so without being the legal employer of those drivers is a hotly contested issue. For a helpful overview of the wide array of classification tests out there, see Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 740–50 (2020); *see also* Pamela A. Izvanariu, *Matters Settled But Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 141–46 (2017).

ket impact of employee-replacement options parallels that of higher unemployment on wages. Workers with skills that are in ample supply on the external labor market, as with most workers in times of high unemployment, have less bargaining power because they are relatively interchangeable with other available job candidates. Similarly, the easier it is for a firm to replace workers through outsourcing or automation, the less bargaining power those replaceable workers have. Either way, workers with scarce skills will be harder to replace at any given level of overall unemployment, whether by hiring a new employee or by contracting out or relocating work. The impact of both high unemployment and greater employee replacement options falls most heavily on workers without advanced education or training.

Automation is thus part of a larger menu of options by which owners and managers of capital seek to grow their returns by securing labor inputs more cheaply than by directly employing people. Fissuring in all its forms accounts for a big section of that menu of options. But if robots or algorithms can supply those inputs more reliably or more cheaply, then firms will turn to them instead of human labor. According to investment banker Steven Berkenfeld, "some CEOs . . . will do anything possible, they'll explore all other alternatives so as not to hire another full-time employee."[36] The alternatives are ever more abundant in the era of fissuring and automation; that depresses the labor market power of the workers for whom fissuring or automation provides a ready substitute.

IV.
LESSONS FOR LABOR: SUPPLEMENTING AND REBALANCING WORKERS' BARGAINING POWER

In principle, and to some degree in fact, workers could improve their bargaining power—their ability to advocate for and advance their own interests—by organizing and bargaining collectively. There is little doubt that the collapse of collective bargaining accounts for some part of the decline in labor's share of income and the rise in economic inequality. And our labor laws undoubtedly should be reformed to make it more feasible for workers to form unions and pursue collective bargaining (and harder

36. Steven Berkenfeld, Presentation at U.S. Dep't of Lab. Conf. on the Future of Work (Dec. 10, 2015) (transcript on file with author). *See also* Olivier Garret & Stephen McBride, *How the Coming Wave of Job Automation Will Affect You and the U.S.*, FORBES (Feb. 23, 2017), https://www.forbes.com/sites/oliviergarret/2017/02/23/how-the-coming-wave-of-job-automation-will-affect-you-and-the-us/?sh=5f8c530d3fd7 [https://perma.cc/BG6T-EAQM].

for employers to escape them). But we also need to reckon with the fact that our labor laws were designed to fortify workers' bargaining power chiefly by enabling them to collectivize that power.[37] Labor law reform, as it has long been pursued in the United States, aims to make good on that crucial commitment. But, even if workers had a fair opportunity to collectivize their market power, most workers today just do not have enough of it; that is, they do not have enough of it to make up the ground they have lost in today's globalized, fissured, and increasingly automated economy.

So, while we should reform labor law to facilitate unionization and collective bargaining, the path to a better future of work may require investing in other strategies for improving wages and working conditions, especially for workers without specialized skills or higher education. We should pursue strategies that promise not merely to *aggregate* the diminishing labor market power that workers can bring to the bargaining table, but also to *bolster* and *supplement* that power through the use of state regulatory power. In particular, the story told here suggests a shift toward greater reliance on state power to make up for workers' loss of market power, and more emphasis on political organizing with the aim of raising minimum labor standards. The story might point as well toward particular regulatory interventions that both directly protect workers and simultaneously bolster their bargaining power, individual and collective, by constraining employers' ability to replace employees.

A. Regulating Labor Standards (With a Sectoral and Tripartite Twist)

Labor and employment law in the United States basically consists of a framework for enterprise-based collective bargaining and a patchwork of employee rights and labor standards that operate at the jurisdiction-wide level: national, state, or local. Other possibilities, including sectoral bargaining, have recently risen to the fore in public and scholarly debates.[38] The advantages of sectoral versus enterprise-based bargaining are indeed becoming increasingly

37. The introduction of mandatory interest arbitration would change that; but that has thus far been proposed, as in the Employee Free Choice Act (EFCA) and the Protecting the Right to Organize (PRO) Act, only for initial contracts in new collective bargaining relationships. *See* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (1st Sess. 2009); Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 104 (1st Sess. 2021).

38. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 37–45 (2021), https://www.cleanslateworkerpower.org/clean-slate-agenda [https://perma.cc/B39X-C3PT].

clear. But genuine sectoral bargaining is still about aggregating and deploying bargaining power, which is what most employees have been losing in today's economy. (Moreover, sectoral bargaining normally requires much greater union density than exists today in the United States.) The thrust of the argument so far is that *regulatory* solutions versus *bargaining* solutions must play a bigger role in the law of work going forward.

Does the turn toward regulatory strategies mean sidelining workers' organizations, or reducing their role to political agitation? Not necessarily. Some public regulatory strategies give stakeholders (here, workers) an institutionalized voice, often through tripartite regulatory bodies. The idea of what I have elsewhere called "co-regulation" is to inject some of the strengths of union representation and collective bargaining into the regulatory process.[39] It is a hybrid of collective bargaining and regulation, and of labor law and employment law as those fields are conventionally understood. Still, co-regulatory strategies as such promise little by way of raising wages or other crucial economic terms above the publicly-prescribed, jurisdiction-wide floor. As long as that floor applies across a whole jurisdiction—federal, state, or local—it is constrained by what is thought to be sustainable in its least productive sectors. Call it the *least-common-denominator problem*.

The various concerns with both enterprise-based collective bargaining and jurisdiction-wide minimum standards point toward a relatively novel regulatory strategy that we might call *sectoral co-regulation*.[40] Sectoral co-regulation would operate at the intersection of both mid-points identified above—that is, at the sectoral level (versus either the jurisdictional or the enterprise level), and in the co-regulatory middle-ground between collective bargaining and conventional regulation. Sectoral co-regulatory approaches could afford workers and their organizations a meaningful role in devising and enforcing sectoral standards that exceed jurisdiction-wide minimum standards. Two examples, both in the fast-food sector, may be found in the tripartite New York State Wage Board, convened 2015, which raised wages for workers in that sector,[41] and California's re-

39. *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 22 (2010).

40. *See* Cynthia Estlund, *Sectoral Solutions That Work: The Case for Sectoral Co-Regulation*, 98 CHI.-KENT L. REV. (forthcoming 2023).

41. *See* Patrick McGeehan, *New York Plans $15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES (July 22, 2015), https://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html [https://perma.cc/4BW6-CXYV].

cent FAST legislation, which would create a similar tripartite board to address a range of terms and conditions of employment within the sector (subject to a state referendum on the ballot in November 2023).[42]

Co-regulation has some advantages relative to both collective bargaining and conventional forms of state regulation, and sectoral-based approaches to raising labor standards have advantages relative to both enterprise-based and jurisdiction-wide approaches. Sectoral co-regulation should not replace either enterprise-based bargaining or across-the-board rights and standards; both need to be fortified. But, alongside those approaches, sectoral co-regulatory reforms could bolster wages and working conditions for many workers and fill part of the gap left by the decline of enterprise-based bargaining. I explore the idea more fully elsewhere,[43] but I raise it here to make the point that shifting from a bargaining to a regulatory frame does not necessarily require settling for least-common-denominator minimum standards, nor does it necessarily cut workers and their organizations out of the process of raising standards. Sectoral regulatory approaches, and especially those with a tripartite or co-regulatory character, can be a focal point for political and workplace-based organizing.

B. Regulating in Pursuit of Rebalancing Bargaining Power

Part III argues that many of the trends and tactics that are depressing workers' relative market power can be seen as employee-replacement or employment-avoidance options. That suggests a regulatory strategy that could compliment collective (and individual) bargaining by constraining employee-replacement techniques and thus boosting employees' labor market power. We can readily imagine several such regulatory strategies apart from outright banning any of the employee-replacement strategies we have discussed.[44] The law could interpose *procedural* duties of notice, consultation, or bargaining with affected employees or their representatives before replacing them; it could condemn certain *motives* for replacing or displacing employees; or it could require some level of *justification* for such decisions, with procedures for judicial

42. *See* Kurtis Lee, *California Voters to Decide on Regulating Fast Food Industry*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/business/economy/california-fast-food-workers.html [https://perma.cc/P47J-2JLB].

43. Estlund, *supra* note 40.

44. Such moves would be difficult to implement politically and, moreover, might have significant unintended consequences to firm productivity and employer decisions on how and who to hire. *See* Estlund, *supra* note 11, at 9–12.

or administrative review. Each of those three types of constraints could be imposed on individual discharge or layoff decisions—for example, through a "just cause" requirement for dismissals—or on decisions affecting groups of employees. (In addition, the law could *muffle the impact* and defeat the employment-avoidance aims of some fissuring options by treating putative independent contractors or the employees of a contractor as the lead firms' employees for some purposes; I will leave that aside here.) As it turns out, the U.S. law of work already does several of these things to some degree.[45]

One crucial thing that U.S. law does not do: protect employees' job security against unjustified dismissal. Under the prevailing U.S. rule of employment-at-will, employees can lawfully be fired, laid off, or replaced at any time for any reason (absent some contractual guarantee of job security, like a union contract with a "just cause" requirement). The modern version of employment-at-will allows dismissal without a demonstrably good reason, though not for reasons or motives that are singled out for legal condemnation, including status- and identity-based discrimination or retaliation against protected activity like union organizing or "whistleblowing."[46] But those laws generally require a fired employee to bear the burden of proving the unlawful motive through the rigors of litigation (where that has not been foreclosed by mandatory arbitration). The United States stands virtually alone in the world in failing to require any *justification* for dismissals or layoffs from employment.[47]

At the risk of belaboring the point: employment-at-will, by making it easier and cheaper to dismiss most workers,[48] effectively depresses the market power of *incumbent* employees who are replaceable, whether by a new hire or by any of the employee-replacement devices discussed above, and who would have difficulty replacing their jobs. More concretely, such workers will be hard-pressed to push back against abusive treatment or obnoxious demands, lest they be fired. That undermines their power to contest employers' high-handed or arbitrary exercises of authority, to de-

45. For a review of existing constraints on employee replacement in U.S. law see Estlund, *supra* note 11, at 12–18.

46. For a recent overview, see Cynthia Estlund, *Employment-at-Will: Too Simple for a Complex World*, TEX. A&M L. REV. (forthcoming 2023).

47. *Id.*

48. I will put aside here the possibility that the aggregate costs associated with the many motive-based restraints on dismissal might be comparable to or even greater than the costs of dismissal under a moderately-protective unjust dismissal regime. *See* Cynthia Estlund, *Wrongful Discharge Law in the Land of Employment-At-Will: A US Perspective on Unjust Dismissal*, 33 KING'S L.J. 298 (2022).

mand better conditions than the law requires, or even to demand compliance with the law, given the rigors and risks of contesting a dismissal.

The second big deficit in the existing U.S. law of work is the lack of mechanisms for collective voice, especially given the failure of the collective bargaining model. Under U.S. law, collective bargaining through a union is the one lawful mechanism by which employees can *participate* collectively in employer decisions that threaten to replace them. Moreover, since the U.S. law of work leaves job security wholly to contract, the path to job security—or "just cause" protection—for the vast majority of private sector workers requires running the gauntlet of unionization. Both deficits—lack of job security and lack of structures of collective participation—could theoretically be addressed through conventional labor law reforms, like those in the proposed Protecting the Right to Organize (PRO) Act,[49] which would make it easier for workers to gain union representation and the right to bargain for both job security and a say in employee-replacement decisions. But even if we imagine away the stubborn political barriers to reforming the basic NLRA model, those reforms would come nowhere close to enabling most workers to secure either job security or a collective voice at work. That is partly because of the hardwired link between collective bargaining power and individual bargaining power that I have already noted.

If we look abroad, as many U.S. worker advocates have done for decades, we would find that employment protection laws—which require employers to justify dismissals or else compensate workers—are nearly ubiquitous in the industrial world outside the United States. And, in some European countries with a strong social democratic tradition and lower levels of income and wealth inequality than in the United States,[50] we would also find laws establishing elected "works councils" in enterprises of a certain scale, with legal entitlements to consultation and co-determination, including over decisions that displace workers.[51] Those institutions

49. Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

50. *See Income Inequality*, OECD, https://data.oecd.org/inequality/income-inequality.htm [https://perma.cc/5MJ3-DWS5]; OECD, *Income and Wealth*, *in* How's Life? Measuring Well-Being, (2020), https://www.oecd-ilibrary.org/sites/2e9dd941-en/index.html?itemId=/Content/component/2e9dd941-en [https://perma.cc/H4K9-USJQ].

51. For several illuminating studies, see Carola M. Frege, *A Critical Assessment of the Theoretical and Empirical Research on German Works Councils*, 40 Brit J. Indus. Rels. 221 (2002); Walther Müller-Jentsch, *Germany: From Collective Voice to Co-man-*

would enhance both workers' job security and their ability to participate collectively in workplace governance. But they would do double duty, for both would also tend to boost workers' labor market power by constraining employers' ability to replace them.

Among the many hurdles to adopting such ambitious reforms are concerns about their economic impact. Both unjust dismissal laws and works councils would encumber firms' flexibility. That is precisely the point here. Moreover, both operate in favor of *incumbent* employees, and at least potentially to the detriment of would-be employees, especially new entrants to the labor market. That, in turn, might increase unemployment, especially among young people, and impair overall economic performance. By now, however, both employment protections and employee participation structures have been operating in various forms across much of the world for decades and have been subjected to extensive empirical research, which I review elsewhere.[52] In this Article, I will simply jump to the bottom line: the most comprehensive and careful studies to date find that employment protection laws (including those protecting employee voice) were associated with small but mostly *positive* long-term net effects on national economic performance, including modestly *lower* unemployment levels in the longer run and a higher labor share of national income.[53] The impact on labor's share underscores the relationship posited here between workers' labor market power and their job security.[54]

One possible source of positive economic effects is that employment protections and mandatory participation structures ap-

agement, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 53–78 (Joel Rogers and Wolfgang Streek eds., 1995); Joel Rogers and Wolfgang Streek, *The Study of Works Councils: Concepts and Problems*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS, *supra*, at 3–26; Wolfgang Streek, *Works Councils in Western Europe: From Consultation to Participation*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS, *supra*, at 313–14.

52. *See* Estlund, *supra* note 11, at 20 n.90.

53. Zoe Adams et al., The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013, 158 Int'l Lab. Rev. 1, 20 (2019). Some scholars criticize the CBR Labour Regulation Index (CBR-LRI) for not including social security regulations and for focusing on formal law versus coverage or effectiveness. *See* Petra Mahy et al., *Measuring Worker Protection Using Leximetrics: Illustrating a New Approach in Four Asia-Pacific Countries*, 67 AM. J. COMPAR. L. 515, 523 (2019). But they recognize the CBR-LRI as essentially the state of the art in this field. *Id.*

54. The Cambridge study found no significant correlation with measures of overall economic inequality across all 117 countries, though it did within several OECD countries. Adams et al., *supra* note 53, at 18.

pear to be associated with higher public and private investments in worker training that mitigate the costs and mine the benefits of job security, at least at the societal level.[55] And indeed, greater public and private investments in worker training might be necessary to capture the potential benefits and mitigate the costs of job security protections. Happily, job-security protections themselves should tend to encourage employers to invest in incumbent workers' skills, and to cultivate their ability to switch to new tasks, instead of treating them as disposable. Any shift from replacement to retraining boosts both workers' labor market power and their productivity.[56]

These studies are the latest word on what kinds of employment laws are good for society as a whole, and especially for those who have been on the losing end of labor market trends for the past several decades. My main point here, again, is that those laws do double duty: they protect employees' economic security and enhance their collective voice at work while also bolstering their market power by constraining employers' employee-replacement options.

V.
CONCLUSION

Technology, among its other consequences for work and workers, has greatly amplified firms' ability to replace employees. That, in turn, has undermined workers' bargaining power and very likely contributed to the well-documented decline in workers' share of income and productivity gains. I have suggested two kinds of responses within the law of work. First, we need more and better regulatory strategies—such as sectoral regulatory and co-regulatory structures for setting labor standards—that reduce workers' reliance on (and perhaps also support) collective bargaining strategies for raising workers' wages and working conditions. Second, we should impose reasonable constraints on firms' ability to replace workers, such as those that have a good track record elsewhere in the developed world: job security protections and structures of co-determination that give workers a voice in workplace decisions, including those that threaten to displace workers.

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55. *See* Simon Deakin et al., How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010, 153 Int'l Lab. Rev. 1, 5–6 (2014).

56. *Id.* at 17. Those productivity benefits of employment protections might offset other negative effects; the Cambridge study found no overall impact of employment protections on productivity. Adams et al., *supra* note 53, at 19.

Another strategy for responding to the depletion of workers' bargaining power, the proliferation of contingent and fissured work, and the prospect of automation-based job losses lies at the margins of labor and employment law as the field is normally conceived. That is to shift away from our reliance on employment as the dominant platform for delivering many of the material requisites of a decent life. That would require building up more universal rights of access to health care and retirement income, and expanding social entitlements to basic and higher education, vocational training, housing, and more.[57] And that in turn would require a dramatic political shift toward redistributive modes of raising and spending public revenues. The latter might currently seem every bit as fantastical as the prospect of robots wholly replacing human labor, but one task of legal scholars is to help lay the intellectual foundations and envision the potential architecture of a better future. As things stand, all of the above—enterprise-level collective bargaining, jurisdiction-wide minimum standards, new structures of sectoral co-regulation, and new entitlements to job security and co-determination—could contribute to that better future.

57. I develop proposals along these lines in Estlund, *supra* note 5, at 105–56, and in Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 301–24 (2018).

THE CHANGING LANDSCAPE OF WORKER RIGHTS IN THE 21ST CENTURY WORKPLACE

ALBERT RIZZO

I. INTRODUCTION

In March 2022, I was privileged to moderate the N.Y.U. Annual Survey of American Law Symposium.[1] The Symposium focused on the future of workers' rights and changes in the workplace at the start of the third decade of the 21st century. What emerged from the panel discussions was a portrait of a changing landscape of worker rights rendered from three seemingly separate but interrelated explanations for the changes. One year after the Symposium, this Article explores those explanations further and examines the effects of automation and the gig economy on the current labor market, COVID-19's post-pandemic impact on workers' rights and the workplace, and the role of labor unions today.

Part II discusses the effects of automation and artificial intelligence on the current labor market and concludes that the effects are positive though paradoxical. While the decline in demand for human labor for particularly routine work tasks is resulting in greater unemployment in some industries, the demand for workers in other industries, such as health care and technology, is increasing. And in those job sectors where demand is increasing, there is a greater need for a certain level of education and skill. As a consequence, although the replacement of hundreds of thousands of employees with robots may not appear to be a welcome change, the trend is generally creating a more educated and highly skilled workforce.

Part II also explores how automation and artificial intelligence are facilitating the growth of the "gig economy," a labor sector comprised of "gig workers" who typically work independently on short-term projects for different clients or consumers through online platforms that are owned and maintained by "gig firms." The gig

1. The N.Y.U. Annual Survey of American Law invites academics and practitioners to NYU each year for a day of discussion devoted to a specific and current area of the law. The 2022 Symposium topic was *"The Future of Workers' Rights"* and was held on March 25, 2022.

economy is an outgrowth of important changes in the traditional workforce and has grown to become a significant component of the overall labor market. However, despite its growing significance and positive impact, the gig world has been threatened by lawsuits, legislation, and labor union efforts attempting to classify gig workers as employees—a classification that runs counter to the notion that gig workers work independently. Part II therefore examines the California landmark decision in *Dynamex Operations West, Inc. v. Superior Court*,[2] which set off a nationwide legal debate over the appropriate test for the classification of gig workers. The importance of appropriately classifying gig workers cannot be overstated because a determination that gig workers are employees would result in the absorption of the gig economy into the more traditional labor market.

Part III examines the impact of the COVID-19 pandemic on workers and the workplace. The obvious impacts have been felt in the areas of health and safety regulations, but the pandemic also ushered in trends toward more paid sick leave time, more benefits, and more flexibility in work schedules. It also refocused where we work and how we work, created the possibility of remote working for millions of workers, and exacerbated a trend toward employment resignations, "quiet quitting," and early retirement that has contributed to a tight labor market—a market that may remain the new reality for some time to come.[3] To compete in this employment environment, businesses are rethinking their work and hiring practices because talent shortages and skills gaps will be a persistent problem, and employee benefits and work flexibility are now in high demand. It appears that the old way of working is past and a new set of worker expectations has developed.

Part IV discusses the role of labor unions in the 21st century and whether labor's relevance has diminished in light of a decline in union membership as a percentage of the overall labor market and significant changes in laws governing workplace and employee rights. Affecting labor's relevance are also "right to work laws,"[4]

2. 416 P.3d 1 (Cal. 2018).

3. *See* Atta Tarki, *Despite Layoffs, It's Still a Workers' Labor Market*, HARVARD BUSINESS REVIEW (Jan. 30, 2023), https://hbr.org/2023/01/despite-layoffs-its-still-a-workers-labor-market [https://perma.cc/DEK7-UDGN].

4. *See infra* Part IV.A. States with right-to-work laws prohibit employers from requiring their employees to join a labor union in order to obtain or keep their employment, and employees may elect not to pay union dues. *See* National Labor Relations Board, *Employer/Union Rights and Obligations*, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations [https://perma.cc/3C4J-2298].

which the majority of states have now enacted, and which enable employees to opt out of union membership and decline financial support for unions. In addition, state and local governments that sometimes required their employees to support unions are now prohibited from collecting dues from non-union employees after the United States Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[5] Moreover, the gig economy is affecting labor's relevance and its unionization efforts as well. This growing sector, largely composed of independent workers, generally does not operate in the same way as, for example, heavily unionized manufacturing, and is therefore seemingly at odds with the idea of labor organization.

But all is not bleak for labor unions. The Protecting the Right to Organize Act,[6] which was re-introduced in Congress in February 2023, would greatly expand various labor protections relating to employees' rights to organize and collectively bargain.[7] And there have also been recent successful unionization efforts at major employers like Starbucks[8] and Amazon,[9] as well as in the healthcare industry,[10] that are outwardly giving unions a period of resurgence. Part IV concludes that strong differences of opinion about the importance and relevance of labor unions may become the impetus for major change this century.

5. 138 S. Ct. 2448, 2460, 2486 (2018).

6. H.R. 20, 118th Cong. (2023).

7. The Bill, as introduced, would amend Section 14(b) of the National Labor Relations Act, 29 U.S.C. §164(b), to allow collective bargaining agreements to require all employees represented by the bargaining unit to contribute fees to the labor organization for the cost of such representation notwithstanding a state law to the contrary. H.R. 20, 118th Cong. §111 (2023).

8. Andrea Hsu, *Starbucks Workers Drive Nationwide Surge in Union Organizing*, NPR (May 1, 2022), https://www.npr.org/2022/05/01/1095477792/union-election-labor-starbucks-workers-food-service-representation [https://perma.cc/K7SR-JTH4].

9. Andrea Hsu, *In a Stunning Victory, Amazon Workers on Staten Island Vote for a Union*, NPR (Apr. 1, 2022), https://www.npr.org/2022/04/01/1089318684/amazon-labor-union-staten-island-election-bessemer-alabama-warehouse-workers [https://perma.cc/G8MJ-TTQ9].

10. Aneri Pattani, *Health Workers Unions See Surge in Interest Amid Covid*, KAISER HEALTH NEWS (Jan. 12, 2021), https://khn.org/news/article/health-workers-unions-see-surge-in-interest-amid-covid/ [https://perma.cc/LF4L-BQK9].

II.
AUTOMATION, ARTIFICIAL INTELLIGENCE AND THE GIG ECONOMY'S EFFECTS ON THE LABOR MARKET

A. Toward a More Educated and Better Skilled Workforce

Automation and artificial intelligence are eliminating jobs for millions of workers[11] and are also transforming the landscape of the workplace and the rights of workers in places where jobs are at risk of being lost. Ten years ago, it was estimated that within twenty years almost half of all current jobs in the United States could be automated.[12] And the drive toward increased automation is certainly not decelerating[13] because with automation, many manufacturers can now produce the same amount of product for a fraction of their previous cost, and employ a fraction of the hundreds, thousands, or even tens of thousands of employees they previously needed. Moreover, consumer demand requires greater automation because we live in a reality where consumers order online and expect to receive products within days—or even on the same day the order is placed. To even attempt to satisfy this consumer expectation, manufacturing without automation would require a factory line of people working continuously 24 hours per day. Automation in manufacturing and other sectors is therefore expanding considerably in the United States and globally.[14] Clearly then, valid concern exists about how the future workforce will be shaped and what it will look like.

An anecdotal argument that is often made about automation is that, over time, it creates as many jobs as it eliminates because work-

11. Jack Flynn, *36+ Alarming Automation & Job Loss Statistics [2023]: Are Robots, Machines, and AI Coming for Your Job?*, ZIPPIA (Feb. 14, 2023), https://www.zippia.com/advice/automation-and-job-loss-statistics/ [https://perma.cc/DP88-D3D8].

12. In a 2013 working paper (published in 2017), Carl Frey and Michael Osborne of the University of Oxford estimated that forty-seven percent of U.S. jobs could be automated within the subsequent twenty years. Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, 114 TECH. FORECASTING & SOC. CHANGE 254, 265 (2017).

13. *See* Flynn, *supra* note 11.

14. Jenny Chang, *40 Jobs Lost to Automation Statistics: 2023 Job Displacement Analysis*, FINANCES ONLINE (Mar. 15, 2023), https://financesonline.com/jobs-lost-to-automation-statistics/ [https://perma.cc/9XT5-XJQC]. Global companies such as Foxconn Technology Group have chosen to manufacture most of their products with robots and artificial intelligence. Jane Wakefield, *Foxconn Technology Group Reportedly Replaces '60,000 Employees with Robots'*, BBC (May 25, 2016), https://www.bbc.com/news/technology-36376966 [https://perma.cc/FSC5-JDA7].

ers who use machines are more productive than those who work without them, which reduces the cost of the goods being produced. With reduced costs and lowered prices, consumers buy more. Buying more products or services generally means greater profitability for businesses, which typically results in the creation of more jobs. Other arguments have also been advanced. For example, while many workers have been displaced by robots and other forms of artificial intelligence, the robots need to be maintained, which creates jobs for the workers who maintain them. And displaced workers who can re-educate and re-train themselves may be able to complement the work of the robots that replaced them. These arguments are not without merit as the World Economic Forum found that fifty-eight million new jobs are expected to be created globally as a result of automation.[15]

We have seen this before. Throughout history, jobs have evolved as manufacturing processes improved. The oft-cited example is Henry Ford's creation of the assembly line. Where it once took a team of factory workers slightly over twelve hours to build a car's chassis, with the assembly-line innovation the factory began producing a chassis every ninety-three minutes.[16] With greater productivity, Ford Motor Company grew, as did the number of available jobs. Another example is the invention of the automated teller machine (ATM). With the increasing installation of ATMs in the mid-1970s, banks found that they needed fewer tellers behind the window, which reduced the cost of opening and maintaining new bank branches.[17] The reduced cost led to an actual net increase in the number of branches[18] and, consequently, the number of employees to operate them. As the installation of ATMs swelled over the ensuing years, the number of teller positions did not decrease but actually increased.[19]

Of course, in the short term those who are displaced by robots and artificial intelligence, and those who are competing with them, stand to lose. In 2019, the Organization for Economic Cooperation

15. Amar Hanspal, *Here's Why Robots Are Actually Going to Increase Human Employment*, WORLD ECON. F. (Feb. 26, 2021), https://www.weforum.org/agenda/2021/02/world-economic-forum-automation-create-jobs-employment-robots/ [https://perma.cc/9BKQ-ZCBX].

16. Carol W. Gelderman, *Henry Ford*, ENCYC. BRITANNICA, https://www.britannica.com/contributor/Carol-W-Gelderman/1050 [https://perma.cc/298V-6UP8].

17. JAMES BESSEN, LEARNING BY DOING: THE REAL CONNECTION BETWEEN INNOVATION, WAGES, AND WEALTH 107–08 (2015).

18. *Id.* at 107.

19. *Id.* at 107–08.

and Development[20] estimated that approximately fourteen percent of jobs in its member countries are at risk of complete automation, while another thirty-two percent are at high risk of partial automation, greatly changing the way the jobs will be performed.[21] Moreover, not only are many low-skilled jobs at risk of being lost to automation, but at the same time the displaced workers will need to enter a job market where many of their previously accessible alternative employment options have also been automated or are at risk of becoming automated in the near future. To illustrate, a person who works as a retail cashier might lose her job because the store installs the increasingly ubiquitous self-checkout station. Where, in the past, the individual could have possibly found an alternative position in customer service, that alternative employment may no longer exist since customer service positions are also at high risk of being automated by customer service bots, or chatbots. Therefore, the worker has now potentially lost not one, but two employment prospects.

Paradoxically, while a greater number of workers are losing their jobs because of automation and artificial intelligence, the number of available jobs is increasing.[22] With an average of 401,000 new nonfarm jobs created each month in 2022,[23] the job market has witnessed greater demand for specific job skill sets.[24] Robotics, for example, has understandably become an emergent job sector because it is part of the $1.2 trillion artificial intelligence industry

20. The OECD is a forum for the governments of thirty-eight democracies with market-based economies to collaborate and develop policy standards to promote sustainable economic growth. *Who We Are*, OECD, https://www.oecd.org/about/ [https://perma.cc/J3X4-EQ4M].

21. OECD, OECD Employment Outlook 2019: The Future of Work 44, 48 (2019), https://www.oecd-ilibrary.org//sites/ef00d169-en/index.html?itemId=Content/component/ef00d169-en# [https://perma.cc/MC7J-9M2Y].

22. The Bureau of Labor Statistics reported that the number of job openings has risen steadily from approximately 2.5 million in 2009 to approximately 11.3 million in 2022. *Job Openings at 11.3 Million in January 2022*, U.S. Bureau of Lab. Stats. (Mar. 14, 2022), https://www.bls.gov/opub/ted/2022/job-openings-at-11-3-million-in-january-2022.htm [https://perma.cc/UA3K-M5ZH]. An exception to this data was a significant drop in 2020, *id.*, which was likely due to the COVID-19 pandemic.

23. *Employment Situation Summary*, U.S. Bureau of Lab. Stats. (Feb. 3, 2023), www.bls.gov/news.release/empsit.nr0.htm# [https://perma.cc/9QSK-3RCM].

24. Sue Cantrell et. al., *The Skills-Based Organization: A New Operating Model for Work and the Workforce*, Deloitte Insights Magazine (Sept. 8, 2022), https://www2.deloitte.com/us/en/insights/topics/talent/organizational-skill-based-hiring.html [https://perma.cc/GYH8-GBFL].

that "continue[s] to proliferate across nearly every industry."[25] There is also greater demand for nurse practitioners, site reliability engineers, software engineers, product designers, and solar consultants—with each position commanding salaries approximating or exceeding $100,000 per year.[26] The paradox can be explained by the disparities between the skills and qualifications required of the new jobs and the skills and qualifications of the unemployed workers. Simply put, an unemployed seamstress who has been replaced by a robot is not likely to be qualified for a position as a software engineer.

In this new labor market, companies are focusing on raising productivity through labor-saving techniques, such as automation and artificial intelligence, and hiring highly skilled workers who often have at least a college degree[27] and who can help drive innovation and technological development.[28] From this, it can be extrapolated that demand for unskilled workers, and perhaps those without a college education, will decline.

As will be discussed in Part III, the COVID-19 pandemic proved that the labor force can adapt to a changing economy and provide an opportunity to rebuild differently. To that end, and to complement the growth in artificial intelligence and automation, more workers will need what is often referred to as "21st century skills."[29] These skills include critical thinking, research, creativity, self-direction, knowledge of information and communication technology, and facility in using virtual workspaces.[30] LinkedIn's 2020 Emerging Jobs Report observed that "[a]rtificial intelligence will require the entire workforce to learn new skills, whether it's to keep up to

25. *2020 Emerging Jobs Report*, LINKEDIN, at 2, https://business.linkedin.com/content/dam/me/business/en-us/talent-solutions/emerging-jobs-report/Emerging_Jobs_Report_U.S._FINAL.pdf [https://perma.cc/Q8YT-ANNR].

26. Audrey Eads, *Tops Jobs of 2022*, INDEED: CAREER GUIDE (Sept. 30, 2022), https://www.indeed.com/career-advice/finding-a-job/best-jobs-of-the-year [https://perma.cc/2PPC-HQA6].

27. Stephanie Ferguson, *Data Deep Dive: Upskilling and Reskilling Our Workforce*, U.S. CHAMBER OF COM. (Dec. 8, 2022) https://www.uschamber.com/workforce/education/data-deep-dive-upskilling-and-reskilling-our-workforce [https://perma.cc/9A8A-GMAP].

28. James Manyika & Kevin Sneader, *AI, Automation, and the Future of Work: Ten Things to Solve for*, MCKINSEY & COMPANY (June 1, 2018), https://www.mckinsey.com/featured-insights/future-of-work/ai-automation-and-the-future-of-work-ten-things-to-solve-for [https://perma.cc/TX75-X265].

29. *21st Century Skills*, THE GLOSSARY OF EDUC. REFORM (Aug. 25, 2016), https://www.edglossary.org/21st-century-skills/ [https://perma.cc/X6WG-Y7GM].

30. *Id.*

date with an existing role, or pursuing a new career as a result of automation."[31] Therefore, improving the quality and scope of education and training will be the challenge of the 21st century workplace, and, if met, it could be a very positive overall change. Government and education policies targeting investments in workforce development and continuing education programs, and alliances with the private sector to develop intelligent policies that create high-productivity and high-income jobs, will hopefully be utilized to balance the changing needs of consumers, workers, and businesses.

B. The Emergence of the Gig Economy and the Threat of Its Absorption into the Traditional Labor Market by Classification of Gig Workers as Employees

Increased automation, the resulting displacement of workers, the demand for different skills, and technological advancements, helped to usher in "gig" work and the "gig economy" at the start of this century. "Gig workers" are self-employed individuals who complete a job, or gig, and move on to the next one. They choose when to work, when not to work, and where to work, and they operate in a variety of industries.

To be sure, gig work is not a new phenomenon. People have worked for themselves ever since humans began working. And, technically, the word "gig" may have been coined in the early part of the last century when jazz musicians used the word to refer to a one-night musical performance.[32] Its etymology probably goes back even earlier than that.[33] However, what is different about the current gig economy is the way that work is obtained. Previously, clients and customers would contact a worker and contract with the worker directly for a specific job. This often involved research and references, so finding the right person for the job took time. For the worker, it also meant getting work on an individual contract basis. The overall process was relatively slow. But the internet and smartphones changed this dynamic dramatically. Work can now be obtained quickly because workers connect with clients faster and more easily through a gig firm and its computer and smartphone apps. Thumbtack, for instance, provides a marketplace for services

31. LINKEDIN, *supra* note 25, at 2.

32. Gig, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/gig [https://perma.cc/CCY4-YNKV].

33. *Id.*

such as house cleaning, lawn mowing, and appliance repair.[34] Once a user describes what service is needed, Thumbtack will send the user a price quote from a gig worker who has paid Thumbtack a fee to provide the quote. Usually, the connection between consumer and gig worker is made instantaneously.

It cannot be overlooked that the gig economy represents a fast-growing and significant sector of today's labor market[35] with gross dollar volume expected to reach $455 billion in 2023.[36] Indeed, as of August 2021, sixteen percent of U.S. adults, over forty-one million people,[37] earned money through an online gig platform.[38] And numerous notable multi-billion-dollar gig economy firms have emerged since the beginning of this century: Airbnb, Uber, Lyft, Etsy, Doordash, Instacart, Postmates, and Shipt are examples. The gig economy has clearly impacted the workplace, the labor market, the way people work, and the way consumers consume over the past twenty years.

Given its rapid growth, issues affecting the gig economy will have a significant impact on the overall labor market. One issue is whether gig workers are classified as employees or independent contractors. Gig workers are generally considered to be independent contractors because they work essentially "independently." This classification, however, has been legally challenged. As discussed below, if these challenges succeed, many gig firms will become liable as employers for the payment of minimum wages and overtime pay and employment-related payroll taxes such as Social Security and Medicare, worker's compensation insurance, and disability coverage. Instead, by classifying gig workers as independent contractors, gig firms reduce their costs by avoiding the payment of

34. THUMBTACK, https://www.thumbtack.com/ [https://perma.cc/RF9A-CHQZ].

35. *Projected Gross Volume of the Gig Economy from 2018 to 2023*, STATISTICA (Sept. 30, 2022), https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume [https://perma.cc/FP87-Y855].

36. *The Ultimate List of Gig Economy Statistics (2022)*, REMOTELY (Nov. 11, 2022), https://blog.tryremotely.com/gig-economy-statistics/ [https://perma.cc/9GRU-KJHD].

37. According to 2020 U.S. Census data, the U.S. adult population (over the age of 18 years) was 258,343,281. Stella U. Ogunwole et al., *U.S. Adult Population Grew Faster Than Nation's Total Population From 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html [https://perma.cc/HX58-P8GW].

38. Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/ [https://perma.cc/W84K-EBPM].

both employment-related payroll taxes and benefits such as paid sick leave. In New York, for example, it is not required that independent contractors receive disability and paid family leave benefits[39] because they are not considered employees as defined by the State's Workers' Compensation Law.[40]

Another consequence of reclassification may be that gig firms will begin to control gig workers' work schedules, as most employers do, thereby undermining two major benefits of being a gig worker: independence and flexibility. This legal challenge to independent contractor status therefore threatens the very nature of the independent gig worker because the consequence may ultimately be the gig worker's absorption into the traditional labor market as an employee.

Whether gig workers are "misclassified" as independent contractors is questionable. Currently, most gig workers are not classified as employees because they work for themselves. They may find customers using a gig firm's app or website, but they do not work for the firm. They set their own hours and use their own tools, equipment, vehicles, and other means to perform their work. They can even find work using multiple different firms' apps. For example, as independent contractors, rideshare drivers may seek riders through both Uber and Lyft at the same time—essentially working for two competing firms simultaneously, a concept frowned upon in the traditional labor market.

The reason why the legal issue is arguable and complicated is because there is no bright-line test to determine a worker's status. Rather, there are various fact-specific tests. In 1987 the Internal Revenue Service developed what was commonly referred to for many years as the "20-Factor Test," which examined twenty factors as guidelines to determine whether an employer-employee relationship existed.[41] These factors largely centered on an examination of the degree of control exerted over the worker. Some years after this initial guideline, the IRS began to look at three broad categories of

39. *Disability and Paid Family Leave Benefits Coverage: Independent Contractor*, N.Y. WORKERS COMP. BD., https://www.wcb.ny.gov/content/main/coverage-requirements-db/independent-contractor.jsp [https://perma.cc/MH5P-LT8N].

40. N.Y. WORKERS' COMP. LAW § 201(5) (Consol. 2023); In re Renouf, 173 N.E. 218, 218 (N.Y. 1930) ("[T]o come within the statutory definition of employee the person must be *in the service* of the employer.") (citing N.Y. WORKERS' COMP. LAW § 2(3)–(5) (Consol. 2023); Comm'rs of the State Ins. Fund v. Fox Run Farms, 600 N.Y.S.2d 239, 241 (N.Y. App. Div. 1993) ("[State Insurance] Fund acknowledges that independent contractors are not employees covered by the Workers' Compensation Law.").

41. Rev. Rul. 87-41, 1987-1 C.B. 296.

evidence which it believed to be relevant in determining whether the requisite control exists under the common-law test of agency to classify the worker as an employee. It grouped illustrative factors under three categories: (1) behavioral control; (2) financial control; and (3) the type of relationship between the parties.[42] This test continues to be used today.[43]

Alternatively, various federal statutes, including the Fair Labor Standards Act (FLSA)[44] and the National Labor Relations Act (NLRA),[45] use variations of a common law test of agency,[46] which looks at the agency relationship between the putative employer and employee. And an "economic realities test"[47] is often used that evaluates whether a worker is economically dependent on the alleged employer.[48] Both the common law test and the economic realities test, like the IRS guideline, focus on the amount of control a business exerts over a worker and how dependent the worker is on the putative employer. The more control that is exerted, the more likely it is that a worker is considered an employee. Control may be exerted over work hours, how a job is performed, whether the company provides tools and equipment, whether the compensation rate is guaranteed, whether there is a duration to the relationship, and whether the worker exercises independent judgment. However, the economic realities test, specifically, has been criticized for two prin-

42. Joint Committee on Taxation, Present Law and Background Relating to Worker Classification for Federal Tax Purposes, JCX-26-07, at 5 (2007), https://www.irs.gov/pub/irs-utl/x-26-07.pdf [https://perma.cc/PH2M-JMWM] ("The IRS emphasizes that factors in addition to the 20 factors identified in 1987 may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.") (citing Department of the Treasury, Internal Revenue Service, *Independent Contractor or Employee? Training Materials*, Training 3320-102 (10-96) TPDS 84238I, at 2–7.).

43. I.R.S. Publication 15-A, Employer's Supplemental Tax Guide, 6–7 (Dec. 19, 2022), https://www.irs.gov/pub/irs-pdf/p15a.pdf [https://perma.cc/MT23-M26W].

44. 29 U.S.C. § 201.

45. 29 U.S.C. §§ 151–69.

46. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

47. *See* Brown v. N.Y. City Dep't of Educ., 755 F.3d 154, 167–68 (2d Cir. 2014) (discussing use of variations of common law and economic realities test in the Second Circuit); Hatcher v. Augustus, 956 F. Supp. 387, 390 (E.D.N.Y. 1997) (using economic realities test for FLSA analysis); NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968) (using common law agency test for NLRA analysis).

48. *See, e.g.*, Copantitla v. Fiskardo Estiatorio, Inc., No. 09 Civ. 1608, 2010 U.S. Dist. LEXIS 33430, at *16 (S.D.N.Y. Apr. 5, 2010) ("The goal of the economic-realities test 'is to determine whether the employees in question are economically dependent upon the putative employer.'" (quoting Lopez v. Silverman, 14 F. Supp. 2d 405, 414 (S.D.N.Y. 1998))).

cipal reasons. First, because it offers little guidance for future cases, and second, because it begs the question: which aspects of economic reality matter?[49] The test also does not account for the growth of the gig economy and the desire of millions of gig workers to control their work hours and have greater flexibility.

The appropriate definition of an independent contractor is not just a complicated legal issue, it is also an intensely political one. In January 2021, the Department of Labor (DOL) under the Trump Administration issued regulations that would have changed the analysis by considering only five factors to determine independent contractor status,[50] but the Biden Administration subsequently delayed and ultimately withdrew that regulation.[51] Then, in March 2022, the Eastern District of Texas ruled in *Coalition for Workforce Innovation et al. v. Walsh* that the Biden DOL *unlawfully* delayed and withdrew the Trump-era independent contractor rule.[52] As a result of the decision, the withdrawal of the rule was invalidated, and for now, the rule is in effect, though the DOL has recently proposed another rule that essentially restores the old multi-factor economic realities test.[53]

Different from the common law and economic realities tests, thirty-five states[54] have adopted some form of the "ABC test," which is a three-factor test for determining worker status. The three factors are: (A) whether the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of the service and in fact; (B) whether the service is performed outside the usual course of the business of the hiring entity; *and* (C) whether the individual is customarily engaged in an independently established trade, occupa-

49. U.S. Dep't of Lab. v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) (arguing that the economic realities test is "unsatisfactory both because it offers little guidance for future cases and because any balancing test begs the questions of which aspects of 'economic reality' matter, and why.").

50. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

51. Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 6, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

52. Coal. for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 U.S. Dist. LEXIS 68401, at *49–50 (E.D. Tex. Mar. 14, 2022).

53. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62219 (proposed Oct. 13, 2022) (to be codified at 29 CFR pts. 780, 788, 795).

54. *Independent Contractor Laws by State 2023*, World Population Review, https://worldpopulationreview.com/state-rankings/independent-contractor-laws-by-state [https://perma.cc/YXB2-EPU6].

tion, profession, or business of the same nature as that involved in the service performed.[55] On its face, the ABC test appears to simplify the common law and economic realities tests of control by reducing the number of factors presumably needed to analyze the relationship. But the essential precept is still the question of control. Moreover, it makes it more difficult to establish that a worker is an independent contractor because there is an initial presumption that the worker is an employee and *all* three factors must be met in order to consider the worker an independent contractor.[56]

Though adopted by some states years before,[57] the ABC test came to the fore after the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*,[58] and after the state incorporated the test into a state assembly bill known as "AB5."[59] The ABC test was spotlighted because of the notable size of the labor force affected by the rule in California.[60] In *Dynamex*, a national delivery and courier service changed the status of its drivers from employee to independent contractor.[61] But the California Court of Appeals sided with the view that Dynamex drivers continued to perform the same tasks as they had when they were classified as employees "with no substantive changes to the means of performing their work or the degree of control exercised by Dynamex."[62] In affirming the lower court's decision, the California Supreme Court concluded that "in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of con-

55. Dynamex Operations W., Inc. v. Super. Ct., 416 P.3d 1, 35 (Cal. 2018).

56. *Id.* at 41.

57. The ABC test originated in Maine in 1935 with the passage of the Maine Employment Security Law and was adopted thereafter by several states. Eric Markovitz, *Easy as ABC: Why the ABC Test Should Be Adopted as the Sole Test of Employee–Independent Contractor Status*, 42 CARDOZO L. REV. 224, 238 (2020) (citing John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 9 (2018)); Christopher J. Cotnoir, Comment, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325, 332 (1994).

58. 416 P.3d 1.

59. A.B. 5, 2019–2020 Sess. (Cal. 2019).

60. Markovitz, *supra* note 57, at 239.

61. Dynamex, 416 P.3d at 5–6.

62. Dynamex Operations W., Inc. v. Super. Ct., 179 Cal. Rptr. 3d 69, 71 (Ct. App. 2014).

texts to distinguish employees from independent contractors."[63] By its decision, California's highest court overturned almost thirty years of case law that governed how workers were classified in California under its seminal decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[64]

In reaction to the *Dynamex* decision, California voters passed Proposition 22,[65] which *exempted* gig firm drivers from the ABC test. Uber, Lyft, Doordash, and Instacart were some of the gig firms that benefited directly from the passage of Proposition 22.[66] Yet notwithstanding this victory for these gig firms, the ABC test still remains the test for many other industries in California, like construction.[67]

Since many gig workers have elements of both employee and independent contractor status, legitimate legal arguments can be made on both sides. In fact, courts have ruled on different sides of the question. In *In re Vega*, the New York Court of Appeals, applying the common law test of control,[68] held that Postmates delivery workers were employees because Postmates exercised unilateral control over compensation, determined their delivery destinations, and hired replacement drivers.[69] In *Lawson v. Grubhub, Inc.*, the United States District Court for the Northern District of California held that delivery drivers were independent contractors because Grubhub did not control the workers' number of deliveries, dictate their work schedules, or require training.[70] The cases involved identical food delivery services and gig platforms, but reached different legal conclusions. Thus far, many employee misclassification cases

63. Dynamex, 416 P.3d at 7.

64. 48 Cal. 3d 341 (Cal. 1989).

65. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/GL5W-BNN7].

66. Tyler Sonnemaker and Allana Akhtar, *California Voters Approved Proposition 22, Keeping Ride-Share and Food Delivery Drivers as Contractors—Here's What That Means for Companies like Uber, Lyft, Instacart, DoorDash and Their Workers*, BUS. INSIDER (Nov. 5, 2020), https://www.businessinsider.com/proposition-22-faq-impact-uber-lyft-instacart-doordash-2020-11?op=1 [https://perma.cc/4KL8-K2P3].

67. *Information Sheet: Construction Industry*, CAL. EMP. DEV. DEP'T, https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de231g.pdf [https://perma.cc/4VWL-DR2K]; CAL. LAB. CODE §§ 2775–87 (Deering 2023).

68. 149 N.E.3d 401, 404–05 (N.Y. 2020).

69. *Id.* at 405–06.

70. 302 F. Supp. 3d 1071, 1084, 1091–92 (N.D. Cal. 2018).

have been settled,[71] but many more lawsuits nationwide involving, for example, Shipt,[72] are still pending as of May 2023.

Uber is a good example of why gig work has become so attractive to workers and why gig workers may not want to be considered employees. Millions of drivers joined Uber because it meets a need for a flexible schedule.[73] A National Bureau of Economic Research working paper concluded that flexibility is important because most drivers have another job and drive to supplement their regular incomes; some are students, and some are stay-at-home parents who need additional income.[74] Gig work for Uber, and many other firms, allows workers to schedule their work around their other obligations. But a conclusive determination that gig workers are employees may destroy much of the gig economy and may result in businesses controlling workers' schedules, activities, and how they perform their work. The result could also be the elimination of some of the most significant advantages of being a gig worker.

Moreover, if gig firms are considered employers, their business model, which is built around hiring workers for whom the firms are not responsible for the costs of employment-related taxes and benefits, may no longer work. Gig firms, therefore, would likely avoid any actions that would imply that they are employers, and therefore may not provide worker training, for instance, because training implies that they want the work performed in a certain way, which is a type of control. They also may not provide benefits because benefits

71. *See, e.g.*, Press Release, N.J. Dep't of Lab., Uber Pays $100M in Driver Misclassification Case with NJ Department of Labor and Workforce Development and Attorney General's Office (Sept. 13, 2022), https://www.nj.gov/labor/lwdhome/press/2022/20220913_misclassification.shtml [https://perma.cc/TF8M-6QTV]; Erin Mulvaney, *Uber Will Pay $8.4 Million to End Years-Long Driver Class Action*, BLOOMBERG L. (Feb. 18, 2022), https://news.bloomberglaw.com/daily-labor-report/uber-will-pay-8-4-million-to-end-years-long-driver-class-action [https://perma.cc/U3K5-LY7P]; Instacart recently settled its action in California in October 2022. Although it did not have to admit that it misclassified the workers as employees, it agreed to a $46.5 million settlement. Joyce E. Cutler, *Instacart Settles Worker Classification Suit for $46.5 Million*, BLOOMBERG L. (Oct. 12, 2022, 11:23 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X8BP40MK000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/FD9L-LR4D].

72. Complaint, Ellison v. Shipt, Inc., No. 27-CV-22-15991, 2022 WL 15811468 (Minn. Dist. Ct. Apr. 4, 2023).

73. Eighty-five percent of Uber drivers said they drive to have more flexibility and work-life balance, and because they want to be their own boss and establish their own schedule. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22843, 2016).

74. *Id.* at 10.

are usually linked to aspects of work performance or seniority—which are also *indicia* of control. Not only do defensive reactions, like the adoption of the ABC test, run contrary to the desires of gig firms and gig workers to maintain an independent relationship, they adversely affect both gig firms and workers. Firms experience higher labor costs, while workers may be deprived of valuable training and benefits from gig firms that may be willing to provide these regardless of the worker's non-employee status.

An obvious resolution to the misclassification debate would be to simplify and clarify the independent contractor test. The common law and economic realities tests have too many factors that leave the question of "control" open for interpretation and continued debate. The ABC test, though seemingly simpler, makes it difficult to establish independent contractor status when a worker is presumed to be an employee until proven otherwise.

Perhaps it is time to eliminate "control" as a determinative factor in the test to determine worker status because, whether by a hiring firm, customer, or client, to some degree a worker is always controlled by the party paying for the services. Moreover, variations in the degree of control are fodder for continued debate, interpretation, and litigation. A better test would be to simply ask whether the worker works *independently* of the company. In this regard, the second and third prongs of the ABC test (whether the service is performed outside the usual course of the business of the hiring entity *and* whether the individual is customarily engaged in an independently established trade) may be utilized. This would eliminate any unnecessary analysis of many subjective factors, such as whether the worker reports to the company on the progress of the work. Without a redefinition of the term "independent contractor" to exclude the concept of "control," the arguments over misclassification will continue. Moreover, decisions in every court and jurisdiction will continue to be challenged with the hope that an appellate court will see the question differently. The ultimate determination of this issue will have far-reaching results for millions of workers.

III.
THE NEED FOR GREATER FLEXIBILITY AND BENEFITS IN A TIGHTENING LABOR MARKET FOLLOWING THE COVID-19 PANDEMIC

A. The COVID-19 Pandemic Has Fostered More Work Flexibility and an Expectation of Greater Benefits

The COVID-19 pandemic impacted workers and the workplace in a number of ways. The more obvious impact was felt in the physical workspace. While governments around the world took extraordinary actions to close schools and businesses and require people to socially distance themselves, at a micro-level, employers also changed their work protocols to protect the health and safety of their employees. Assisting employers with these protocols, the Occupational Safety and Health Administration (OSHA) periodically promulgated guidance on physical distancing in all communal work areas for unvaccinated workers, recommended face coverings and masks, and suggested educating and training workers on COVID-19 policies and procedures, maintaining ventilated work areas, and performing routine cleaning and disinfection of workspaces.[75]

Many of these guidance recommendations have contributed to a changing workplace landscape that, for the most part, may continue post-pandemic. This is because the recommendations not only make sense as a matter of general cleanliness to prevent the spread of illness and disease, but guidance that was enacted in response to the pandemic has, to some degree, remained in place[76] despite the view that the COVID-19 pandemic is, by and large, past.[77] OSHA's General Duty Clause, for example, which compels

75. Occupational Safety & Health Admin., *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. Dep't of Lab. (Aug. 13, 2021), https://www.osha.gov/coronavirus/safework [https://perma.cc/5H45-2UNV].

76. As of May 1, 2023, OSHA has not yet updated its guidance and recommendations posted in January 2021. *See id.*

77. In New York, for example, COVID-19 is no longer designated as an infectious disease that presents a serious risk of harm to the public. *See, e.g.*, N.Y. Comp. Codes R. & Regs tit. 12, § 840.1 (2021). The New York Health and Essential Rights Act (the NY HERO Act), enacted on May 5, 2021, mandated extensive new workplace health and safety protections to protect employees against exposure and disease during any future outbreak of airborne infectious disease. *Id.* However, on March 17, 2022, the designation of COVID-19 as an airborne infectious disease that presents a serious risk to public health was removed. Press Release, N.Y. State Dep't of Health, NYS HERO Act, https://www.health.ny.gov/press/releases/2022/2022-03-18_hero_act.htm [https://perma.cc/9R9V-6UTZ] (last modified

employers to provide a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm,"[78] still applies, and can be made applicable to COVID-19 albeit there are no specifically applicable OSHA workplace safety rules in this regard. And consider pandemic-era vaccination and testing policies. Questions still exist as to whether vaccine mandates and testing should be allowed and whether workers can continue to work remotely as a disability accommodation. The answers to these questions were not clear during the pandemic nor are they clear post-pandemic.

Perhaps not as obvious an impact, COVID-19 also fostered a greater need for work flexibility and benefits. By way of example, before the pandemic, working from home was a "luxury" only enjoyed by relatively few employees. While the concept of working remotely was not new, it was not common to see businesses operating fully and continuously this way. Once the pandemic surfaced and spread, out of necessity millions of people suddenly learned to navigate Zoom meetings as the world witnessed a massive shift of workers to remote working from home. The ability to work whenever and from wherever creates significant flexibility for many employees and is, in fact, feasible for many jobs.

Certainly, in many cases the expectation of working remotely, or at least in a hybrid format, has greatly increased.[79] In a nationally representative survey of 5,889 employees conducted in 2022, Pew Research Center found that, compared to 2020, those who are teleworking by choice said they prefer it, and a majority of teleworkers new to working remotely said balancing work and personal life is easier with their current arrangement.[80] The survey also

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Mar. 2022). On April 10, 2023, House Joint Resolution 7 was signed into law, officially terminating the COVID-19 National Emergency. Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6 (2023).

78. 29 U.S.C. § 654.

79. Ben Wigert, *The Future of Hybrid Work: 5 Key Questions Answered with Data*, GALLUP (Mar. 15, 2022), https://www.gallup.com/workplace/390632/future-hybrid-work-key-questions-answered-data.aspx [https://perma.cc/S8EN-DVVJ] ("When asked where they plan to work long term . . . remote-capable employees confirmed that a hybrid work schedule will be the predominant office arrangement going forward. About 53% expect a hybrid arrangement, and 24% expect to work exclusively remotely.").

80. Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/ [https://perma.cc/T38V-T7X3]. The survey was conducted using Pew Research Center's American Trends Panel, which is a "nationally representative online survey panel . . . composed of more than 10,000 adults selected at random from across

found that fifty-nine percent of U.S. workers who said they could perform their jobs from home are now working from home all or most of the time.[81] Moreover, since 2020, the rationale for working from home has shifted considerably and more workers admit that working from home has become a choice, not simply a necessity.[82] It is not a big leap of faith to believe that remote working or a hybrid form of remote work and in-person work, is likely the new work model for many employers, and that remote working, for the most part, has now gained acceptance even if the number of remote job listings has decreased from its peak in March 2022.[83]

Like remote working, employees have now come to expect other work benefits. For instance, the pandemic seemed to have amplified certain preexisting imbalances among workers, and it brought to light the need for employees to have some amount of mandatory paid leave time. According to the DOL, as of March 2020, i.e., pre-pandemic, only about twenty percent of workers had access to paid family leave.[84] Since lower-paid employees generally do not have sufficient savings to cover an unpaid leave of absence, the pandemic naturally exacerbated situations where these employees were required to take a leave of absence to care for themselves or their families. The government's COVID-19 interventions therefore tried to remedy this inequality for the approximately eighty

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the entire U.S." *The American Trends Panel*, PEW RSCH. CTR., https://www.pewresearch.org/our-methods/u-s-surveys/the-american-trends-panel/ [https://perma.cc/M27Q-WXA4].

81. Parker et al., *supra* note 80.

82. *Id.* ("Among those who have a workplace outside of their home, 61% now say they are choosing not to go into their workplace, while 38% say they're working from home because their workplace is closed or unavailable to them. Earlier in the pandemic, just the opposite was true: 64% said they were working from home because their office was closed, and 36% said they were choosing to work from home.").

83. An analysis based on a review of more than 60 million paid job listings on LinkedIn between January 2021 and November 2022 showed a rapid rise and fall in employers' willingness to create remote-work job postings. At its peak in March 2022, remote-focused listings accounted for more than 20% of all paid job postings—a significant increase from less than 10% in January 2021. However, the spike gave way in November 2022 to 14% of paid job postings. George Anders, *Are Remote Jobs Fading Like Pelotons or Bread-Baking? Employers Say Yes*, LINKEDIN (Jan. 4, 2023), https://www.linkedin.com/pulse/remote-jobs-fading-like-pelotons-bread-baking-employers-george-anders/ [https://perma.cc/H4QM-KABS].

84. *News Release: Employee Benefits in the United States – March 2020*, U.S. BUREAU OF LAB. STATS. (Sept. 24, 2022), https://www.bls.gov/news.release/archives/ebs2_09242020.pdf [https://perma.cc/8QYG-CRC4].

percent of the working population that did not have access to paid family leave.[85]

In March 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA),[86] which included two major overhauls of leave programs for employers: first, it expanded the Family and Medical Leave Act by way of the Emergency Family and Medical Leave Expansion Act,[87] and, second, it established the Emergency Paid Sick Leave Act (EPSLA).[88] Among other things, the FFCRA provided paid sick and family leave as a result of COVID-19 and offered additional flexibility for state unemployment agencies to provide additional unemployment benefits.[89] Under the EPSLA, employers with less than 500 employees were required to provide paid sick leave to any employee (regardless of days of employment) for reasons associated with COVID-19 along with up to eighty hours of paid leave to full-time employees.[90] Later that same month, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[91] into law. Among other things, the CARES Act amended portions of the FFCRA and introduced the paycheck protection program that enabled employers to continue to pay workers during the pandemic and keep them employed.[92] Individual states also passed their own form of paid leave laws. New York, for example, enacted legislation that guaranteed workers job protection and financial compensation if they or their minor dependent children needed care as a result of the coronavirus.[93]

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85. *Id.*

86. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of 7 U.S.C.).

87. Emergency Family and Medical Leave Expansion Act, Pub. L. No. 116-127, §§ 3101–06, 134 Stat. 178, 189–92 (2020) (codified as amended at 29 U.S.C. §§ 2612, 2620).

88. Emergency Paid Sick Leave Act, Pub. L. No. 116-127, §§ 5101–11, 134 Stat. 178, 195–201 (2020).

89. Families First Coronavirus Response Act §§ 3102–4102.

90. Emergency Paid Sick Leave Act §§ 5102, 5110(2)(B).

91. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

92. *Id.* at § 1102.

93. S.B. 8091, 2020 Gen. Assembly., Reg. Sess. (N.Y. 2020). Under the new law, enacted on March 18, 2020, employers with ten or fewer employees and a net income of less than one million dollars in the prior year had to guarantee job protection, provide Paid Family Leave and Disability Benefits through the employer's existing policy, and pay salary to a maximum of $2,884.62 per week. Employers with ten or fewer employees and a net income of more than one million dollars had to guarantee job protection, provide at least five days of paid sick leave through existing policy, and pay salary to a maximum of $2,884.62 per week. Em-

Workplace safety guidelines, remote work and flexible work arrangements, and paid leave time were some of the more important changes to emerge from the COVID-19 pandemic. These changes may have long-lasting effects on workers and the workplace despite the end of the pandemic. In this regard, the effect of COVID-19 on the workplace was summed up recently by professor Maryanne Spatola in her research about the effects of the pandemic on the workplace: "COVID-19 ignited a significant shift in workforce expectations. Employees are demanding flexibility and are willing to quit jobs when it's not offered. The pandemic surfaced health-related issues such as burnout and mental health that are lingering in a confused labor market giving rise to the Great Resignation."[94]

B. COVID-19 Contributes to a Tightening Labor Market

With many workers resigning from their jobs during the pandemic, COVID-19 also ushered in a trend toward a tightening labor market. The pandemic period has been referred to as the "Great Resignation"[95] because in January 2020, the annual "quits rate," that is, the number of quits during the month as a percent of total employment, was 2.3%, but by the end of 2021 it had reached a peak of 3%.[96] More alarmingly, in November 2021, a Harris Poll conducted on behalf of CareerArc, a social recruiting platform, found that 23% of employed Americans planned to resign within the following year.[97] And since that poll was conducted, the desire

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ployers with eleven to ninety-nine employees (regardless of income) had to guarantee job protection, provide at least five days of paid sick leave, and pay salary to a maximum of $2,884.62 per week. Employers with one hundred or more employees had to guarantee job protection and provide fourteen days of paid sick leave. COVID-19 Paid Sick Leave, N.Y. Dep't of Lab., https://dol.ny.gov/system/files/documents/2021/08/covid-sick-leave-employees-8-24-21.pdf [https://perma.cc/MXR5-G8S8].

94. Maryanne Spatola, The Office is Dead, Now What?: A Post-Pandemic Field Guide for Leadership 10 (2023). Ms. Spatola is an assistant adjunct professor at New York University School of Professional Studies.

95. *See, e.g.*, Maury Gittleman, Bureau of Lab. Stats., *The Great Resignation in Perspective*, Monthly Lab. Rev. (July 2022), https://www.bls.gov/opub/mlr/2022/article/the-great-resignation-in-perspective.htm [https://perma.cc/UW9G-LJXS].

96. *News Release: Job Openings and Labor Turnover – January 2020*, U.S. Bureau of Lab. Stats. (Mar. 17, 2020), https://www.bls.gov/news.release/archives/jolts_03172020.pdf [https://perma.cc/CHU5-XJZR]; *News Release: Job Openings and Labor Turnover – November 2021*, U.S. Bureau of Lab. Stats. (Jan. 4, 2022), https://www.bls.gov/news.release/archives/jolts_01042022.pdf [https://perma.cc/36DK-85E8].

97. Tallulah David, *23% of Employed Americans Plan to Quit in the Next 12 Months: 23 Key Stats from the Great Resignation + Rehire Survey*, CareerArc, https://

to quit and resign has not abated. The U.S. Bureau of Labor Statistics reported that in October 2022 the "quits rate" was still hovering around 2.6%.[98]

In addition to resignations, there has also arisen an insidious form of "quiet quitting," or the notion that you work just enough to get your work done and no more,[99] that seems to have accelerated during and after COVID-19. Employees who are quietly quitting are not interested or willing to do what may be necessary for promotion or improvement of their status within the company and are instead now searching for more balance between their work and personal life. According to a Gallup poll conducted in June 2022, of 15,091 full and part-time employees over eighteen-years old, the number of employees who are "engaged" dropped from 36% in 2020 to 32% in 2022, and the number of employees "actively disengaged" rose from 14% in 2020 to 18% in 2022. The remaining 50% of the workers are "not engaged," meaning that at least half of the workforce is quiet quitting.[100] If the phenomenon continues, it will be interesting to observe how this type of workforce will be managed in the future.

Retirement also seems to have accelerated as a result of the pandemic. The Federal Reserve Bank of St. Louis indicated that the percentage of retirees under the age of sixty-five had been steadily declining between 2010 and 2020 from slightly over 50% to 44.5%, but that in 2021 the number climbed to almost 47%.[101] With an estimated seventy-three million baby boomers reaching the general retirement age of sixty-five by 2030,[102] a "Great Retirement" may

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www.careerarc.com/blog/great-resignation-rehire-survey-infographic/ [https://perma.cc/WQF7-3LP8].

98. *Quits Rate at 2.6 Percent in October 2022, Little Different from Recent Months*, U.S. Bureau of Lab. Stats: The Econ. Daily (Dec. 5, 2022), https://www.bls.gov/opub/ted/2022/quits-rate-at-2-6-percent-in-october-2022-little-different-from-recent-months.htm [https://perma.cc/W5DQ-KZAR].

99. Anthony C. Klotz & Mark C. Bolino, *When Quiet Quitting Is Worse Than the Real Thing*, Harv. Bus. Rev. (Sept. 15, 2022), https://hbr.org/2022/09/when-quiet-quitting-is-worse-than-the-real-thing [https://perma.cc/6P3R-3WX8].

100. Jim Harter, *Is Quiet Quitting Real?*, Gallup (Sept. 6, 2022), https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx [https://perma.cc/76X2-UKEV].

101. Victoria Gregory & Joel Steinberg, *Why Are Workers Staying Out of the U.S. Labor Force?*, Fed. Rsrv. Bank of St. Louis Reg'l Economist (Feb. 2, 2022), https://www.stlouisfed.org/publications/regional-economist/2022/feb/why-workers-staying-out-us-labor-force [https://perma.cc/DBU2-JXZH].

102. America Counts Staff, *2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, U.S. Census Bureau (Dec. 10, 2019), https://

actually supersede the Great Resignation as the most important labor trend this century.

Notably, attitudes about work stemming from COVID-19 and the tight labor market have increased workers' demands to maintain some of the benefits and flexibility that they were given during the pandemic. Spatola notes: "[t]he pandemic brought us to a new inflection point between work and life. An empowered workforce has emerged, and they are voting with their feet. People are now setting boundaries between what is acceptable and not acceptable."[103] As the pandemic recedes, with businesses seeking to respond to the tight labor market and changed worker attitudes, the topic of flexibility and benefits is becoming increasingly important. Employers who can offer a better work-life balance and more benefits will likely be better equipped to attract the best talent in the future. Indeed, because talent shortages and skills gaps will be a persistent problem, and benefits—like paid sick leave, workplace flexibility, and hybrid working models—are growing in demand, businesses are reconsidering their hiring practices. Significant employment trends in 2023 are likely to involve: (a) attracting qualified talent by offering more job flexibility; (b) obtaining employee feedback for improving retention in what is expected to be a continuing Great Resignation; (c) seeking adaptable employees after the lessons learned from the sudden and unexpected onset of the COVID-19 pandemic; and, of course, (d) employee well-being, which will continue to be a high priority.[104] Professor Anna A. Tavis has observed:

> From the "great resignation" to "quiet quitting," "hybrid working," and "work from anywhere," the theme of "employee experience comes first" has dominated the post-pandemic headlines. It appears the "new employment contract" has been redrawn in favor of the employees. The question today is whether the next economic stress test will expose the weak links in the employee-centric management model.[105]

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www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html [https://perma.cc/J7BZ-YHBK].

103. SPATOLA, *supra* note 94, at 37.

104. Beth Braccio Hering, *2023 Trends to Watch in HR & Business*, BUS. MGMT. DAILY (Dec. 28, 2022), https://www.businessmanagementdaily.com/69398/2023-trends-to-watch-in-hr-business/ [https://perma.cc/DS8Y-C5VM].

105. Anna A. Tavis, *HR Lessons from Elon Musk's Twitter Takeover*, BENEFITSPRO (Dec. 12, 2022, 8:50 AM), https://www.benefitspro.com/2022/12/12/hr-lessons-from-twitters-acquisition-by-elon-musk/ [https://perma.cc/95EW-ZKGG]. Professor Tavis is a Clinical Professor and Academic Director of the Human Capital Management Department of New York University School of Professional Studies and

It seems that the COVID-19 pandemic both signals and underscores that the old way of working is probably past.

IV.
THE ROLE OF LABOR UNIONS IN THE 21ST CENTURY

A. Labor's Diminished Relevancy?

Two questions surface amid the growing implementation of automation and artificial intelligence, the displacement of workers by robots, a burgeoning gig economy, and a pandemic that upturned the way millions of people work. The first is whether, given these changes affecting workers and the workplace, labor unions have become less relevant to today's labor market; the second is whether their role will change in the coming decades.

Historically, unions have been the primary representative of workers in the workplace. Membership in labor unions rose steadily over the years after the passage of the National Labor Relations Act in 1935[106] and peaked among non-agricultural workers in 1945.[107] Between 1950 and 1954 unions consistently represented between 35% and 39% of private sector nonfarm, non-construction wage and salary workers.[108] However, membership began to decline precipitously in the 1960s,[109] and by 1983 the percentage of workers that were union members was 20.1%; by 2015, that percentage had declined to 11.1%.[110] In 2022, the number declined further, to 10.1%.[111]

At the risk of oversimplifying the explanations, many reasons may be attributed to labor union's diminished numbers; arguably,

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Co-Author of HUMANS AT WORK: THE ART AND PRACTICE OF CREATING THE HYBRID WORKPLACE (2022).

106. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

107. GERALD MAYER, CONG. RSCH. SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22 (2004) https://ecommons.cornell.edu/bitstream/handle/1813/77776/August_2004_Union_Membership_Trends_in_the_United_States.pdf [https://perma.cc/P54M-3WGW].

108. William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950–1980*, 38 INDUS. & LAB. REL. REV. 323, 323 (1985).

109. MAYER, *supra* note 107.

110. Megan J. Dunn & James A. Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STATS (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/ [https://perma.cc/8DQU-6YFA].

111. *Economic News Release: Table 1. Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/news.release/union2.t01.htm [https://perma.cc/J59Z-VUGX].

for example, decades-long relative strength in the economy and automation. However, another explanation for unions' waning membership may be that government legislation for workers' rights has reduced, and even nullified to some extent, the ability or necessity of unions to negotiate for these rights. Societal shifts have created the environment necessary for legislative changes, and the passage of laws affecting working conditions and access to work opportunities has resulted in discernable changes in the workplace. By way of example, in the early 1900s discrimination in the workplace was common and acceptable, hazardous working conditions persisted because of a lack of safety regulations, and child labor was part of American society.[112] But as the nation evolved, so did the law. Very young children, who were commonplace in the workforce at the turn of the last century, are now, by and large, prohibited from working.[113] As women began to play a more prominent role in the workplace, legislation was passed to address gender inequities, which resulted in the codification of the concept of "equal pay for equal work" with the passage of the Equal Pay Act in 1963.[114] In addition, the passage of the Civil Rights Act of 1964 made it illegal for employers to discriminate based on race, color, sex, national origin, or religion.[115] And, the passage of the Occupational Safety and Health Act in 1970 expanded federal legislation regulating workplace safety to require employers to keep workplaces "free from recognized hazards that are causing or are likely to cause

112. Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. Bureau of Lab. Stats: Monthly Labor Review (Jan. 2017), https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm [https://perma.cc/R45E-WKR7].

113. Though later subject to challenge, the Keating-Owen Act prohibited the sale of products manufactured by children under the age of fourteen and generally restricted the use of the labor of children under the age of sixteen. Keating-Owen Child Labor Act of 1916 (Wick's Bill), Pub. L. No. 64-249, 39 Stat. 675, *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918). The Act was challenged and held unconstitutional in 1918 by the Supreme Court's decision in Hammer, 247 U.S. at 277, *overruled by* United States v. Darby, 312 U.S. 100 (1941). In the same year, additional child labor protections were passed as part of the Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057 (1919), but they were also declared unconstitutional by Child Labor Tax Case, 259 U.S. 20 (1922). However, with the passage of the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19), permanent federal protections for children in the workplace were instituted. 29 U.S.C. § 203(l).

114. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

115. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701–16, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17).

death or serious physical harm . . . ."[116] Following those major federal legislative initiatives, the next few decades saw the enactment of additional federal legislation affecting the workplace.[117] Most recently, Congress passed the Pregnant Workers' Fairness Act,[118] which prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.[119]

There has also been a steady proliferation of laws and regulations at the state and local levels concerning discrimination in the workplace and workplace rules, wages, hours, and conditions of work—traditional bargaining points for unions. New York is a prime example of an increasingly progressive agenda on employee and workplace rights. In 2021, New York raised the salary threshold for exempt employees, that is, employees who are exempt from receiving overtime pay, to $51,480 per year;[120] it enacted the Digital

116. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, §5(a)(1), 84 Stat. 1590, 1593 (codified as amended at 29 U.S.C. § 654(a)(1)).

117. Since 1970, Congress has passed a variety of laws significantly impacting workers. *See, e.g.*, Employee Retirement and Security Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–453, and in I.R.C. §§ 401–15 and 4972–75); Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. §§ 7101–35 (Supp. V 1981)); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000(e)); Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, 102 Stat. 890 (codified as amended at 29 U.S.C §§ 2101–09); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et. seq.); Family and Medical Leave Act of 1993, Pub, L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C § 2601); and Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5).

118. Pregnant Workers Fairness Act, Pub. L. No. 117-328, § 6, DIVISION II, 136 Stat. 4459 (2022).

119. Under the Pregnant Workers Fairness Act, it would be unlawful to: (a) not make reasonable accommodations to known limitations related to pregnancy unless the accommodation would impose an undue hardship on an entity's business operation; (b) require a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process; (c) deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee; (d) require such employees to take paid or unpaid leave if another reasonable accommodation can be provided; or, (e) take adverse action against a qualified employee on account of the employee requesting or using a reasonable accommodation. *Id.*

120. Effective December 31, 2021, the statewide salary threshold for exempt employees increased to $51,480 per year, with the exception of New York City, Nassau, Suffolk and Westchester counties, where otherwise exempt employees who earn less than $58,500 per year will now qualify for overtime pay. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14.

Workplace Monitoring Law,[121] which requires employers who monitor telephone calls, emails, or internet usage in the workplace to provide written notice to employees of the monitoring and to post a notice in the workplace informing them of the surveillance; it amended New York Labor Law Section 196-b to allow employees to use sick leave for "mental or physical illness, injury, or health condition . . . regardless of whether such illness, injury, or health condition has been diagnosed or requires medical care at the time that such employee request such leave;"[122] it raised the statewide general minimum wage on December 31, 2022 after steady increases each year since 2016;[123] it amended the Workers' Compensation Board regulations to clarify that when paid family leave is taken intermittently, the maximum number of leave days an employee can take is determined by the average number of days per week the employee works;[124] and, by amendment to New York Labor Law Section 740, it broadened its whistleblower protection laws in the private sector, that were once limited to reporting health and safety concerns and claims of health care fraud, to protect an employee against retaliation for making such a report.[125] New York City also recently passed the "Salary Transparency Law" as an amendment to the New York City Human Rights Law, making it unlawful for employers to advertise jobs without stating the minimum and maximum salary for a job position.[126] New York State followed suit with

121. N.Y. Civ. Rights Law § 52-c (Consol. 2023).

122. N.Y. Lab. Law § 196-b(4)(i) (Consol. 2023).

123. *Id.* § 652. (From 2016 through 2021 the New York State minimum wage increased from $9.70 per hour to $13.20 per hour). Governor Kathy Hochul announced in December 2022 that the minimum wage in New York would increase to $14.20 per hour. *Governor Hochul Announces Minimum Wage Increase for Upstate New Yorkers*, N.Y. State (Dec. 21, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-minimum-wage-increase-upstate-new-yorkers [https://perma.cc/6QC6-UYH3].

124. N.Y. Comp. Codes R. & Regs. tit. 12 § 380-2.5 (c). The regulations initially capped intermittent Paid Family Leave (PFL) at sixty days. This sixty-day cap has been removed, allowing for additional days of intermittent PFL for employees who work an average of more than five days per week. New York State also amended the PFL law to expand the definition of "family member" to include siblings, effective January 1, 2023. N.Y. Lab. Law § 196-b(4)(b).

125. Highlights of the amendment include: (a) the expansion of the definition of employee to add "former employee or . . . independent contractors" as those permitted to bring claims, (b) a change to a "reasonable belief standard" as the basis from bringing a claim, (c) expansion of "protected activity," (d) expansion of the definition to retaliatory conduct, and (e) additional remedies and civil penalties and a longer statute of limitations to two years from one year. *Id.*

126. N.Y.C. Admin. Code § 8-107(32)(a), *amended by* L.L. 59/2022 § 1 (2022).

the passage of its statewide salary transparency law signed on December 21, 2022.[127]

The foregoing are just a few examples of the explosion of federal, state, and local laws that have been passed with or without the support and participation of labor unions. As a consequence, in the context of ever-increasing government legislation aimed at protecting workers, it is not clear whether labor can make a convincing argument that it remains necessary or relevant to protect workers' rights.

Labor's relevancy has also been challenged by state "right-to-work" laws, which are enabled by the Taft-Hartley Act.[128] Under right-to-work laws, adopted in twenty-seven states so far, states may prohibit compulsory membership in a union as a condition of employment.[129] By contrast, in states without right-to-work laws, Section 8(a)(3) of the NLRA declares that an employer cannot be precluded from making an agreement with a labor organization to require, as a condition of employment, membership in a union.[130] Although, to date, there is no federal right-to-work law, Congress has introduced the National Right to Work Act multiple times,[131] signaling the potential for a nationwide choice to opt-out of joining or paying dues to unions.

Interesting findings from the National Bureau of Economic Research indicate that right-to-work laws

> are associated with a drop of about 4 percentage points in unionization rates five years after adoption, as well as a wage drop of about 1 percent. These impacts are almost entirely driven by three industries with high unionization rates at baseline—construction, education, and public administration—where right-to-work laws reduce unionization by almost 13 percentage points and wages by more than 4 percent, again over five years.[132]

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127. Act of Dec. 21, 2023, 2023 N.Y. Laws 94 (codified at N.Y. LAB. LAW. § 194-b (2023)).

128. Labor-Management Relations Act of 1947, Pub L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–44).

129. *Right-to-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 9, 2023), https://www.ncsl.org/labor-and-employment/right-to-work-resources [https://perma.cc/QL89-GC9R].

130. National Labor Relations Act of 1935, Pub. L. No. 86-257, 73 Stat. 542-543 (codified as amended at 29 U.S.C. § 158(a)(3)).

131. S. 525, 116th Cong. (2019); S.3464, 117th Cong. (2022).

132. Lucy E. Page, *Impacts of Right-to-Work Laws on Unionization and Wages*, NAT'L BUREAU OF ECON. RSCH. (Aug. 2022), https://www.nber.org/digest/

Thus, according to the findings, if more states continue to adopt right-to-work laws, as appears to be the trend, the number of union members may continue to decrease even further.

Moreover, the landmark 2018 U.S. Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, extended this right-to-work protection to all government or public employees.[133] The issue in *Janus* centered on an Illinois law that permitted public sector employees to unionize.[134] Under the law, if a majority of the public employees in a bargaining unit voted to unionize, the union would be permitted to represent *all* of the employees in the unit regardless of whether they joined the union.[135] The non-union members were then required to pay an "agency fee," which was a percentage of the full union dues.[136] The imposition of this agency fee was challenged as unconstitutional.[137] Justice Alito, writing for the majority, held that the law violated the First Amendment as the imposition of the public sector union fees on non-union members "compel[s] them to subsidize private speech on matters of substantial public concern."[138] The decision in *Janus* can be said to have had a stifling effect on unions because it directly impacts their ability to raise money through membership dues.

Despite diminishing membership and adverse legislation and court decisions, it is also true that there has been a recent upswing in union organization and strikes that have been widely covered in the media,[139] and which may signal a renewed interest in unionization. And the number of employees represented by unions actually increased by over 200,000 in 2022.[140] But as previously noted, the actual percentage of employees who are union members, as a percentage of the total number of employees, declined to 10.1% in

202208/impacts-right-work-laws-unionization-and-wages [https://perma.cc/9LBV-DAK8].

133. 138 S. Ct. 2448, 2460, 2486 (2018).

134. *Id.* at 2460.

135. *Id.*

136. *Id.*

137. *Id.* at 2462.

138. *Id.* at 2460.

139. *E.g.*, Hsu, *supra* note 8; Hsu, *supra* note 9; Kate Gibson, *Trader Joe's Workers File to Form Chain's First Union*, CBS NEWS (June 9, 2022) https://www.cbsnews.com/news/trader-joes-union-service-workers-amazon-starbucks/ [https://perma.cc/5AGY-F5BR].

140. Greg Rolasky, *You May Have Heard of the 'Union Boom.' The Numbers Tell a Different Story*, NPR (Feb. 28, 2023, 6:31 AM), https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story [https://perma.cc/QBL9-GALT].

2022. This divergence can be explained by the greater increase in the number of nonunion jobs.[141] Which brings us to this final point: the labor market is changing in a way that may not suit labor unions.

B. The Impact of the Gig Economy on Labor Union's Relevancy and Unionization Efforts

The strengthening gig economy has also been a challenge to the relevancy of labor unions and has, at the same time, impacted unionization efforts. As discussed in Part II, in the gig economy, workers complete a task and move on to the next gig. A gig worker typically reports independently to a team leader, manager, or department head, and takes little, if any, direction from the gig firm. Compensation is not determined by title, seniority, or longevity because gig workers work independently. This gig work model does not resonate in the manufacturing industry, which is heavily unionized, because workers do not work the same way. Workers in unionized manufacturing are subject to the terms and conditions of a collective bargaining agreement (CBA). The CBA typically addresses a multitude of aspects of the employer-employee relationship, including wage increases, benefits, and seniority. In the traditional labor model, union workers also generally follow a defined career path that begins with apprenticeship and moves through the ranks of journeyman and master. Pay and promotions are generally based on longevity and status. The dichotomy between the two work models highlights the difference between the independent gig worker and the union worker and amplifies why unionization in this new economy may not work as it did before. And now, as manufacturing becomes more innovative with solutions such as 3-D printing, robotics, machine learning and artificial intelligence, jobs that can be performed by gig workers, these workers may become a significant part of this industry as well.

As a result, because technology is now embedded in society and in many workplaces, and the gig economy is affecting almost every industry, the developing movement to turn gig workers into employees is strongly supported and fueled by labor unions[142] in

141. Heidi Shierholz, Margaret Poydock, and Celine McNicholas, *Unionization Increased by 200,000 in 2022*, ECON. POL'Y INST., (Jan. 19, 2023), https://www.epi.org/publication/unionization-2022/ [https://perma.cc/296Q-HHJM].

142. *See, e.g.*, Art Pulaski, *AB 5 Approval a Historic Win for California Workers*, CAL. LAB. FED'N (Sept. 11, 2019), https://calaborfed.org/ab-5-approval-a-historic-win-for-california-workers/ [https://perma.cc/5H2C-FWFS]. The California Labor Federation is "made up of more than 1,200 union, [and represents] 2.1 million

order to increase their membership and preserve their relevancy. As was seen in California with the passage of California Assembly Bill 5 (AB5) in 2019,[143] companies that hire independent contractors must reclassify them as employees if they do not satisfy the ABC test because the legislation presumes the worker to be an employee unless the test is met.[144] It is likely that unions hope that what they helped to achieve with California's AB5 can be achieved in other states—specifically in manufacturing states where they continue to have a significant presence and maintain a degree of influence. Should similar laws pass in those States, gig workers in the manufacturing industry may also become employees. Similar efforts are being made locally in New York City.[145]

Unions will likely continue to play a significant role because their fundamental purposes—collective bargaining for wages and compensation and providing a collective representative voice—remain unchanged. But their strength is certainly diminished as the union labor force as a percentage of the overall labor market is decreasing, and the way workers work is changing. Moreover, arguably, the proliferation of laws governing the workplace, the employer-employee relationship, and workers' rights, are also usurping union bargaining points. Given the significant impact of the gig economy on the labor market, labor unions may be adjusting to changes and challenges this century because they may not be able to impose the traditional union structure on new work models. Since millions of workers no longer fit the traditional employer-employee framework, unions may have an opportunity to reinvent themselves and become innovative in their approach to relationships among employers, employees and independent workers.

V.
CONCLUSION

The 21st century is seeing a revolutionary change in the way Americans work and in what workers want and need. The trends

union members." About Us, CAL. LAB. FED'N, https://calaborfed.org/about-us/ [https://perma.cc/C6TQ-NFHW].

143. Act of Sept. 18, 2019, ch. 296 (codified as amended at CAL. LAB. CODE § 2750.3 (2019)).

144. The specific language of AB5 states that "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor" unless all of the elements of the ABC test are met. CAL. LAB. CODE § 2775 (Deering 2023).

145. *See* N.Y.C. Council, 1926, 2020 Council, Reg. Sess. (N.Y.C 2020) (proposing legislation which would codify the ABC test).

and changes appear to be a prologue to a deeper transformation. As machines become more autonomous and able to learn, they can be expected to become more sophisticated. Because the gig economy continues to grow and because of ongoing innovations in technology, the gig economy is presently viewed as a transitional phase to a fully digitalized economy. The technological changes in the global labor market may also have significant social implications and will likely be accompanied by more legislation to evolve with a changing society and workplace. With the experience of the COVID-19 pandemic, governments, employers, and workplaces may also be better prepared for greater work flexibility and more benefits in the future. And, finally, despite the relative decline in their influence, labor unions are still an important voice in local and national politics that can influence legislation and the rights of workers. However, the substitution of a significant portion of workers by robots and intelligent machines, combined with a strengthening gig economy, will challenge the viability of labor unions—as well as their relevance—if they do not adapt to the new 21st century workplace.

MERRY 2022: THE WAR BETWEEN CAPITAL AND LABOR MUST BE OVER FOR THE SAKE OF UNIONS, EMPLOYERS, EMPLOYEES, CONSUMERS, AND THE UNITED STATES ECONOMY

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In 1935, Congress drafted articles of war for the age-old battle between labor and capital. The National Labor Relations Act (NLRA) is based on the theory that capital and labor are at war, that both sides have weapons, and that the goal is peace (for example, Title II, Section 201 of the NLRA states the goal is industrial peace, and then the Act discusses the use of economic weapons such as the strike, the lock out, picketing, and boycotts).[1] That war was in full force in 1954, when just under 35% of the workforce was unionized.[2] By 1979, the rate had fallen below 25%,[3] and in 2021, the overall rate had further dropped to 10.3%.[4] In the private sector, the unionization rate fell to a record low of 6.1%.[5] It seemed that the battle was over, capital had won, and organized labor would go the way of carbon paper and switchboards—common aspects of employment that are no longer part of the employment experience. Then, a strange thing happened on the road to obsolescence—organized labor suddenly made a comeback in early

1. 29 U.S.C. §§ 151–69 (1935).

2. Drew DeSilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RES. CTR. (Feb. 20, 2014), https://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/ [https://perma.cc/NZ58-ESJN] ("At their peak in 1954, 34.8% of all U.S. wage and salary workers belonged to unions, according to the Congressional Research Service.").

3. Raymond J. Keating, *The 40-Year Decline in Labor Union Membership and the Modern Economy*, SBE COUNCIL (Jan. 24, 2020, 11:58 AM), https://sbecouncil.org/2020/01/24/the-40-year-decline-in-labor-union-membership-and-the-modern-economy/ [https://perma.cc/G3C3-UR8U] (stating that in 1979 union density was 24.1%).

4. News Release, U.S. Dep't of Lab., Union Members – 2021 (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/7VM3-6CXP].

5. *Id.*; *see also* David Brancaccio & Rose Canlon, *Union Membership Fell in 2021, Despite High-Profile Campaigns. Where Do Workers Go from Here?* (Jan. 31, 2022), https://www.marketplace.org/2022/01/31/union-membership-fell-in-2021-despite-high-profile-campaigns-where-do-workers-go-from-here/ [https://perma.cc/R8VW-LUZW].

2022, and it seemed like the battle was back on. One question is whether this trend is something sustainable or just a momentary, positive upward tick in an otherwise long, slow decline. The second, and more important, question is whether the battle between labor and capital should be a battle at all. The purpose of this Article is, in the wake of organized labor's apparent new-found relevance, to examine the failed attempts at labor law reform by pro-union administrations, contend that the failure is due to the perceived "battle," and propose new legislation based on a novel approach to union/management relations.

I.
ARE UNIONS BACK?—MAYBE

The pandemic fundamentally changed the perception of both front-line workers and unions. The same employees who historically had toiled as the faceless providers of cheap goods and services emerged during the pandemic as "essential." Grocery store clerks, meat packers, restaurant cooks, servers, and nurses were now lauded and applauded.[6] When the applause subsided, however, these same people compared their wages, hours, and conditions of employment with those of the so-called knowledge workers who enjoyed working from home while watching their 401(k)'s grow to record levels.[7] In addition, as the service world opened back up, customers came roaring back with pent-up demands and expectations. Retail and hospitality employees reported record numbers of negative interactions and abuse from their customers.[8] Owners and

6. *See Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html [https://perma.cc/4TP8-8NG8]; Todd Hollingshead, *Praising Essential Workers Is Not Just a Good Thing, It's Critical, BYU Study Finds*, BYU NEWS (Apr. 12, 2022), https://news.byu.edu/praising-essential-workers-is-not-just-a-good-thing-its-critical-byu-study-finds [https://perma.cc/V5GD-5EHQ].

7. David Caplinger, *How the Stock Market Fared in 2021*, THE MOTLEY FOOL (Dec. 31, 2021, 6:00 PM), https://www.fool.com/investing/2021/12/31/how-the-stock-market-fared-in-2021/ [https://perma.cc/L92Y-PVCY]. *See also Frequently Asked Questions About 401(k) Plan Research*, INV. CO. INST., https://www.ici.org/faqs/faq/401k/faqs_401k [https://perma.cc/X3P7-WDM6].

8. Biyan Xiao et al., *Service Staff Encounters with Dysfunctional Customer Behavior: Does Supervisor Support Mitigate Negative Emotions?*, FRONTIERS IN PSYCH., at 1 (2022), https://www.frontiersin.org/articles/10.3389/fpsyg.2022.987428/full#:~:text=importantly%2C%20support%20from%20leaders%20or,or%20preventing%20stress%20assessment%20responses. [https://perma.cc/VBK9-2PMA]; Amanda Mull, *American Shoppers Are a Nightmare*, THE ATLANTIC (Aug. 3, 2021), https://www.theatlantic.com/health/archive/2021/08/pandemic-american-shoppers-

managers, who had suffered unprecedented losses, were caught between the need to recoup losses and retention of their employees. Employees, now both empowered and fed up, began searching for alternatives.[9] Some quit and found other jobs, others just quit, and finally, some turned the clock back and sought protection and voice from what only two years before seemed nearly obsolete—organized labor.[10]

Between 1936 and 1967, the union approval rate in the United States averaged 68% and included record-high 75% approval ratings in 1953 and 1957.[11] Then, from 1972 through 2016, support slowly declined, with very few years recording an approval rate over 60%.[12] In 2009, the rating hit an all-time low of 48%—the only time that that the approval fell below 50%.[13] Since 2016, approval has steadily increased and is now 71%, more than 20 percentage points above the historical low.[14] Moreover, union approval ratings for those 18–34 is now at 77%![15] As the pandemic continued longer

nightmare/619650/ [https://perma.cc/5CYK-TJFE]. *See also* Doug Robertson, *The Rise of the Abusive Customer (And How to Defuse Their Anger)*, PRACTICA LEARNING (July 2020), https://www.practica-learning.com/blog/the-rise-of-the-abusive-customer [https://perma.cc/D9DL-U6YR].

9. *See* Alí R. Bustamante, *A New Era for Worker Power: Labor Wins During the Pandemic, and the Policies We Need to Sustain the Momentum*, ROOSEVELT INST., at 6 (Sept. 21, 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/09/RI_ANewEraForWorkerPower_IssueBrief_202209.pdf [https://perma.cc/YCG7-SFN8]; Anna Kramer, *This Was the Year Tech Workers Found Their Power*, PROTOCOL (Dec. 31, 2021), https://www.protocol.com/workplace/2021-year-workers-found-power [https://perma.cc/9UKA-KTM3]; Mark John, *Analysis: Workers Seize Their Moment to Shift the Balance of Power*, REUTERS (July 26, 2022, 10:09 AM), https://www.reuters.com/world/the-great-reboot/workers-seize-their-moment-shift-balance-power-2022-07-26/ [https://perma.cc/D8BD-XVVT]. *See also* Andrew Moreo, *Why Record Numbers of Hospitality Workers Are Quitting the Industry for Good*, BRADENTON HERALD (Jan. 31, 2022, 11:59 AM), https://www.bradenton.com/news/business/article257886823.html#storylink=cpy [https://perma.cc/B7DK-S94V]; Robertson, *supra* note 8.

10. Jennifer Dorning, *A Chance for More Worker Power*, THE PROGRESSIVE MAG. (Nov. 11, 2021, 10:52 AM), https://progressive.org/op-eds/more-worker-power-dorning-211111/ [https://perma.cc/H3WE-6GKW]; Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here's Why It's Happening Now*, CNBC (May 7, 2022, 12:05 PM), https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html [https://perma.cc/H9PH-2GKE].

11. *See* Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/4G78-GEGU].

12. *Id.*

13. *Id.*

14. *Id.*

15. Elias & Lucas, *supra* note 10.

than expected and then subsided, workers' attitudes towards unions changed even more. With the momentum of a 71% approval rating, successful grass roots union organizing emerged in the service and retail sectors. As of the date of this Article, Starbucks has won over 200 separate elections.[16] Even more surprising, employees at an Amazon warehouse in Staten Island, New York successfully organized without the backing of a traditional labor union.[17]

The reason for this change in America cannot be explained solely by the pandemic. The Biden Administration has proudly billed itself as the most pro-union administration in the last half-century. When President Biden speaks of job creation, he calls for "good union jobs!"[18] He credits unions for building the middle class and has declared he would become the most pro-union president in history.[19] He operationalized his pro-union beliefs on his first day in office when he, in an unprecedented move, fired National Labor Relations Board (NLRB) General Counsel Peter Robb, and replaced him, less than a month later, with Jennifer Abruzzo.[20] Abruzzo has a strong policy agenda that she began implementing

16. Emma Goldberg, *Starbucks Asks for a Suspension of Union Elections*, N.Y. TIMES (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/business/starbucks-union-elections.html [https://perma.cc/5CYL-5YC9].

17. *See* Karen Weise, Noam Scheiber & Coral Murphy Marcos, *Amazon Union Loses Vote at Second Staten Island Warehouse*, N.Y. TIMES (May 2, 2022), https://www.nytimes.com/2022/05/02/technology/amazon-union-staten-island.html [https://perma.cc/C9K9-V9Y9].

18. *See* News Release, U.S. Dep't of Lab., US Secretary of Labor Announces Biden-Harris Administration's Coordinated Effort to Improve Job Quality Nationwide (Jan. 21, 2022), https://www.dol.gov/newsroom/releases/osec/osec20220121 [https://perma.cc/5A6Z-LS4U].

19. *See* President Biden, Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/ [https://perma.cc/F3KE-WR34]. *See also* President Biden, Remarks by President Biden at North America's Building Trades Unions (NABTU) Legis. Conf. (Apr. 25, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/25/remarks-by-president-biden-at-north-americas-building-trades-unions-nabtu-legislative-conference/ [https://perma.cc/S3LX-TSMP]; Steven Greenhouse, *Biden Stakes Claim to Being America's Most Pro-Union President Ever*, THE GUARDIAN (May 2, 2021), https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions [https://perma.cc/R9YP-6L7K].

20. Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BLOOMBERG L. (Jan. 20, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-moves-to-oust-top-labor-board-attorney-robb [https://perma.cc/2TWZ-LWVV]; *see also* Allen Smith, *Biden Nominates NLRB General Counsel*, SOC'Y FOR HUM. RES. MGMT. (Feb. 18, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/biden-nominates-nlrb-general-counsel.aspx [https://perma.cc/3X8W-CR3L].

immediately after accepting her appointment.[21] In addition, the House of Representatives passed the Protecting the Right to Organize Act (PRO Act)—an extremely union-friendly bill that has since stalled in the Senate.[22]

All this positive union news may not, however, result in positive material change for unions and employees in the medium or long term. Despite their numerous victories, Starbucks employees have not signed a collective bargaining agreement with the Company.[23] The changes being proposed by the NLRB may not be enacted and, if they are, they will almost certainly be reversed when there is a Republican administration and a 3–2 Republican majority on the NLRB. Finally, as stated above, the PRO Act is stalled in the Senate and will remain so as long as the filibuster exists. Thus, one can argue that this positive union news is simply a blip on the screen and that the battle between labor and capital will continue and, once again, tip decidedly in capital's favor. Conversely, this can be an opportunity for both sides to seek meaningful labor law reform to bring labor law into the twenty-first century.

II.
LABOR LAW REFORM HAS BEEN A FAILED DEMOCRATIC PROMISE FOR OVER 45 YEARS

Since 1976, there have been four Democratic presidents: Carter, Clinton, Obama, and Biden. The first three tried and failed to pass major labor law reform.[24] While the Biden Administration still has time, passing the PRO Act with a Republican controlled House of Representatives and 51–49 Senate is at best unlikely, and

21. Press Release, NLRB Off. of Pub. Affs., NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings (Apr. 7, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and [https://perma.cc/GC44-YQ75]; *see also* Office of the Gen. Couns. Mem. GC 21-04 (Aug. 12, 2021).

22. Nick Niedzwiadek, *PRO Act Allies Stick Senate Battlegrounds in Their Crosshairs*, POLITICO (Sept. 12, 2022, 10:00 AM), https://www.politico.com/newsletters/weekly-shift/2022/09/12/pro-act-allies-stick-senate-battlegrounds-in-their-crosshairs-00056078 [https://perma.cc/625P-78HT].

23. Lauren Kaori Gurley, *Inside the Battle for the First Union Contract at Starbucks*, WASH. POST (Mar. 24, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/03/24/starbucks-union-shareholder-howard-schultz-bargaining/ [https://perma.cc/X29P-3376].

24. *See, e.g.*, William R. Corbett, *The More Things Change: Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 232 n.32 (2011) (describing how labor law in the U.S. remains unchanged from administration to administration).

realistically impossible.[25] Along with failing to pass the new labor laws they each pursued, the four administrations' proposals have one thing in common: they all have sought to "reform" labor law simply by making the law more union friendly. Below, we set forth each of the Democratic administrations proposed "labor law reforms" and show that the driving force is not to modernize the union/management relationship in order to improve America's economy, efficiency, and ability to compete against global competition and, instead, is to increase union density and power.

A. The Carter Administration

When one looks back at the Carter Administration, the first thoughts are likely to be the aftermath of Watergate, the Iran Hostage crisis, and the so-called stagflation. Labor historians do not, of course, dismiss these vital issues, but instead focus on the changing American economic condition. With income disparity on the rise, foreign competition affecting U.S. manufacturing and the inflation and interest rates both at double digits, the way of life for the "American worker" had changed. No longer could a blue-collar worker support a family on a single income. No longer could a high school degree result in a middle-class life. No longer did unions have the power to protect and advocate for American workers.[26]

As unions attempted to garner national support for American manufacturing with an advertising campaign featuring the catchy jingle, "look for the union label,"[27] the Carter Administration, which arguably owed its victory to union support,[28] sought to "pay back" organized labor with labor law reform. Below, we set forth what the administration attempted to do. Fitting with the thesis of this paper, labor law reform was not to address foreign competition or to address problems with the American economy. Instead, the Carter Administration's labor law reform was simply an attempt to make it easier for unions to organize and secure contracts. As described below, the Carter White House attempted to balance organized labor's wish list with that which could get Congressional

25. Moreover, even if all that occurs, red and purple state Democratic senators would be unlikely to support the bill.

26. JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 464 (2010).

27. *Look for the Union Label 1978 ILGWU Ad*, YOUTUBE (May 22, 2010), https://www.youtube.com/watch?v=7Lg4gGk53iY [https://perma.cc/CZY5-Z7S5].

28. Warren Weaver Jr., *Labor's Drive for Carter Is Biggest It Has Made in a Presidential Race*, N.Y. TIMES (Oct. 26, 1976), https://www.nytimes.com/1976/10/26/archives/labors-drive-for-carter-is-biggest-it-has-made-in-a-presidential.html [https://perma.cc/UG7E-7G3A].

support—not what was best for the U.S. economy, unless, of course, one believes that increasing union density is always the best thing for the U.S. economy regardless of any intended or unintended consequences.

The Carter Set of Reforms are laid out in a June 1977 memo to the President from Stu Eizenstat, Carter's Chief Domestic Policy Adviser, and Executive Director of the White House Domestic Policy from 1977–1981.[29] The memo begins by explaining that the proposals were the result of a series of negotiations between the Labor Department, the White House, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), during which the AFL-CIO agreed to a series of concessions in exchange for White House support.[30] Specifically, the AFL-CIO gave up, among other things, their proposal for union certification without elections when a majority of employees signed authorization cards (*i.e.*, "card check") and to allow new employers to disavow prior union contracts and "[some] lesser ones."[31] The memo made clear its intended purpose: "*The effect of this set of proposals is generally to streamline the labor laws and to make it easier for unions to organize.*"[32]

The final proposals, none of which were ever adopted,[33] included the following:

1. An efficiency proposal that would increase the number of NLRB Members from five to seven and allow two-member panels to affirm or decide cases and affirm Administrative Law Judge's decisions;[34]
2. Time Limits for Elections: if a majority of employees signed authorization cards, an election would be scheduled within 15 days from the filling for units under 250 employees, and 25 days for units of 250 or greater. If the union did not have a majority supporting the petition—which is rare—an election would be scheduled within 45 days except for complex or novel cases where the time limit would be 75 days. At the time, the median timing for an election was 57 days for uncontested elections, 75 days

29. Memorandum from Stu Eizenstat, Chief Domestic Policy Adviser, to President Jimmy Carter (June 29, 1977), *in* OFFICE OF THE CHIEF OF STAFF FILES, HAMILTON JORDAN'S CONFIDENTIAL FILES (1977).

30. *Id.* at 1.

31. *Id.*

32. *Id.* (emphasis added).

33. *The Death of Labor Law Reform*, N.Y. TIMES (June 23, 1978), https://www.nytimes.com/1978/06/23/archives/the-death-of-labor-law-reform.html [https://perma.cc/K4UH-QWM9].

34. *Id.* at 4.

for cases resolved by the Regional Director, and 275 days for cases decided by the NLRB (1% of the cases);[35]

3. Bargaining Unit Determination: instead of following case law and allowing the Regional Director to determine the appropriateness of a bargaining unit by holding a hearing and examining Board precedent, the memo proposed rulemaking to establish standard rules for unit determination;[36]
4. Equal Opportunity for Unions to Address Employees: the proposal recommended that the Board be instructed to promulgate rules granting unions the ability to come onto company property and receive "equal assured opportunity to address employees prior to an election consistent with the unimpeded operation of the business";[37]
5. Increasing the Penalties for Unfair Labor Practices by employers:[38]
   a. Willful violators would be banned from participating in federal contracts for three years;
   b. Employees unlawfully terminated during union campaigns would receive reinstatement and double back pay;
   c. Employers who refused to bargain first contracts would have to provide the employees with their current wages and benefits multiplied by the average percentage increases in all union contracts signed in the time period in which the contract was delayed;
   d. Preliminary injunctions would be granted against employers who refused to bargain and/or who were accused for illegally firing employees;
   e. Employees who worked at foreign flag ships would be protected by the NLRA;
   f. Guards (*i.e.*, employees who protect employer's property) would be covered by the NLRA;
   g. Employers could no longer permanently replace strikers and, instead, economic strikers would be entitled to their jobs back at the cessation of the strike.

35. *Id.* at 5.
36. *Id.* at 6.
37. *Id.* at 7.
38. *Id.* at 7–8.

B. The Clinton Administration

By the end of the Reagan and H.W. Bush years, organized labor was reeling. Between 1983 and 1993, unions density rate dropped from 20.1% to 15.7%[39] in a time period where employment increased from 108 million[40] to 122.8 million jobs.[41] Several factors contributed to this decline. First, the economy had shifted. While traditional union strongholds (steel, textiles, paper, rubber, and coal) were all in decline, traditional non-union sectors (healthcare, finance, retail, and technology) began rapid expansion. Consequently, union elections declined from 5,116 in 1982[42] to only 3,599 in 1992.[43] At the same time, employer resistance to unionization became more sophisticated and effective. While labor was heartened that Bill Clinton defeated George H.W. Bush, the new president was not seen as being beholden to or strongly aligned with traditional labor. In response, organized labor became divided on how to approach this new Democratic administration, such that labor law reform during the Clinton Administration was as much a battle between factions of organized labor as it was between labor and the business community.

Organized labor was divided between trying to invoke sweeping reform and simply trying to achieve small concessions to grow their ever-decreasing ranks. What seemed like the proverbial low hanging fruit was the bill introduced to overturn the 1938 *Mackay Radio* decision, which held that employers need not bring strikers

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39. *Rate of Union Membership of Employees in the United States from 1983 to 2022*, STATISTICA (2023), https://www.statista.com/statistics/195349/union-membership-rate-of-employees-in-the-us-since-2000/ [https://perma.cc/8CZD-J3U9].

40. Susan E. Shank & Patricia M. Getz, *Employment and Unemployment: Developments in 1985*, MONTHLY LAB. REV., at 13 (Feb. 1986), https://www.bls.gov/opub/mlr/1986/02/art1full.pdf [https://perma.cc/R97J-ZRX6].

41. Valerie A. Personick, *A Second Look at Industry Output and Employment Trends Through 1995*, MONTHLY LAB. REV. (Nov. 1985), https://www.bls.gov/opub/mlr/1985/11/art3full.pdf [https://perma.cc/36CE-NJRZ]; *see also* G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.* (Feb. 2013), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/4KMB-QAGN].

42. NAT'L LAB. RELS. BD., FORTY-EIGHT ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1983 (1983), https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1983.pdf [https://perma.cc/86HQ-VZ49].

43. NAT'L LAB. RELS. BD., FIFTY-SEVENTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1992, at 13 (1992), https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1992.pdf [https://perma.cc/9S32-26DC].

back to work if replacements[44] were still employed.[45] The issue in the case was whether the employer violated the law when it refused to recall the employees most active in a union strike.[46] In holding that such actions violated the NLRA, the Supreme Court stated, in dicta, that, while the employer did not have to terminate replacements to make room for strikers, the company could not base recalls on union activity.[47] At the time of the bill, and to this day, that case still controls the striker recall process.[48] Organized labor believed that effectively firing those who exercised their right to strike would strike a chord with the public, clergy, and politicians. Labor was wrong. Despite the fact that the end of permanent strike replacements had little real effect on broader labor policy or practice,[49] and that it seemed to be a simple and fair request, Congress declined to overturn *Mackay Radio*. The remainder of organized labor's wish list stalled out. The NLRB did issue a number of pro-labor decisions and rules affecting elections, 10(j) injunctions, and the ability for supplied labor to join in bargaining units, but, per usual, these cases were overturned by the subsequent Bush Board.[50] In addition, the Clinton Administration passed the WARN Act and FMLA. While these new laws were both supported by organized labor, they protected union and non-union employees alike.[51] At the conclusion of the Clinton Administration, organized labor believed

44. *Id.*; *see also* Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843 (1993).

45. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 347 (1938). *See also* Julius G. Getman & Thomas C. Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.: *The High Cost of Solidarity*, in LAB. L. STORIES (L.J. Cooper & C.I. Fisk eds.; New York: Foundation Press, 2005).

46. Mackay Radio, 304 U.S. at 339.

47. *Id.* at 348.

48. Matt Austin, *NLRB GC to Undo 60-Year Law and Strictly Limit Permanent Replacement Workers*, AUSTIN LEGAL (Mar. 1, 2023), https://mattaustinlaborlaw.com/nlrb-gc-to-undo-60-year-law-and-strictly-limit-permanent-replacement-workers/ [https://perma.cc/XRP2-F9KK].

49. *Striker Replacements: The Law, The Myths, The Realities*, FINDLAW (Jan. 12, 2018), https://corporate.findlaw.com/law-library/striker-replacements-the-law-the-myths-the-realities.html [https://perma.cc/SBW3-XWPG]; Howard M. Wexler, Samuel Sverdlov & Kyllan B. Kershaw, *A Costly Lesson for Employers on Replacement Workers*, SEYFARTH SHAW LLP (June 6, 2016), https://www.employerlaborrelations.com/2016/06/06/1391/ [https://perma.cc/B5MP-ZDTY].

50. Robert B. Moberly, *Labor-Management Relations During the Clinton Administration*, 24 HOFSTRA LAB. & EMP. L.J. 32, 54–57 (2006).

51. *Id.*

a Gore presidency would be more fruitful than Clinton's had been.[52] That, of course, never occurred.

C. The Obama Presidency and EFCA

Labor's hopes were revived with the election of Barack Obama. While still a Senator, Obama had co-sponsored the Employee Free Choice Act (EFCA).[53] With his election and the accompanying 60-seat Senate majority, the passing of EFCA seemed not only possible, but likely. However, EFCA represented a sea change in labor law that even some Democrats in Congress could not abide.

EFCA had three main parts. Section 2 required employers to recognize a union if a majority of employees signed authorization cards and eliminated employers' ability to demand an election.[54] Section 3 allowed the union to demand interest arbitration if the parties could not reach a contract in 90 days.[55] Section 4(a) of the bill would have increased the penalties available to the Board after it found employers violated the law during a union campaign. Specifically, the NLRB could seek injunctions against employers who "engaged in any other unfair labor practice"[56] that would have restrained the rights under NLRA Section 7, including, but not limited to, threatening, discharging, or discriminating against an employee who sought representation by a union. In addition, instead of the current penalty of backpay (lost wages less what the individual earned in the time period) for unlawful discharges, EFCA would have allowed for back pay plus liquidated damages in an amount equal to double the original back pay—treble damages.[57] Lastly, in addition to treble damages, the Board could fine employers who willfully or repeatedly violated the law concerning

52. *My Opinion: Gore Is the Workers' Champion – It's a Matter of Record*, COMMC'NS WORKERS OF AM. (Feb. 1, 2000), https://cwa-union.org/news/entry/in_my_opinion_gore_is_the_workers_champion__its_a_matter_of_record [https://perma.cc/Z76M-SVZF].

53. H.R. 1409, 111th Cong. (2009). *See also* Martha M. Hamilton, *Change in Control of the House Probably Dooms Any Chance of Passage*, POLITIFACT (Apr. 20, 2011), https://www.politifact.com/truth-o-meter/promises/obameter/promise/43/sign-the-employee-free-choice-act-making-it-easie/ [https://perma.cc/65HV-DY2Z].

54. H.R. 1409, 111th Cong. § 2 (2009).

55. *Id.* § 3. In theory, the employer could demand interest arbitration too, but, in reality, the employer always prefers status quo to arbitration and it would never happen.

56. *Id.* § 4(a)(1)(A)(iii).

57. *Id.* § 4(b)(1).

employees' rights in regard to organizing and first contract negotiations to organize in an amount of $20,000 per violation.[58]

EFCA overwhelmingly passed the House of Representatives in June 2007 with a vote of 241 to 185.[59] In June, however, it received only 51 votes in the Senate and thus could not overcome the filibuster.[60] The 111th Congress began in 2008 with 60 Democrats in the Senate, and thus there initially was hope that EFCA could survive the filibuster, especially since the President had co-sponsored the bill.[61] However, two Democratic Senators, Ben Nelson (CO) and Arlen Spector (PA), refused to support the bill while two others, Blanche Lincoln (AK) and Tom Carper (DE), stated that they would not vote for EFCA in its current form.[62] And Democratic Senator Diane Feinstein (CA) stated she would prefer alternative legislation. At the same time, the Obama Administration quickly pivoted to focus on economic recovery and the Affordable Care Act, leaving EFCA, like previous attempts to amend labor law, by the wayside.[63]

Notably, the Obama Administration did make real changes to labor law at the agency level. The NLRB engaged in rule making

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58. *Id.* § 4(b)(2)(b).

59. *2007 House Voting Record*, AFGE, https://www.afge.org/take-action/afge-on-capitol-hill/voting-records/2007-house-voting-record/ [https://perma.cc/Z7SN-U32M].

60. Ben Smith, *Specter Deals a Blow to EFCA*, POLITICO (Mar. 24, 2009, 2:46 PM), https://www.politico.com/blogs/ben-smith/2009/03/specter-deals-a-blow-to-efca-017047 [https://perma.cc/G3ZM-2T5F].

61. Gavin S. Appleby et al., *Obama Presidential Election Victory Could Lead to Dramatic Increase in Unionization of Employers in the U.S.*, LITTLER: INSIGHT (Nov. 5, 2008), https://www.littler.com/es/publication-press/publication/obama-presidential-election-victory-could-lead-dramatic-increase [https://perma.cc/2KTJ-FZPH]; *Obama on EFCA*, WORKPLACE PROF BLOG (Jan. 20, 2009), https://lawprofessors.typepad.com/laborprof_blog/2009/01/obama-on-efca.html [https://perma.cc/CA3G-URS7]; Jon Hyman, *Unions Should Not Bet o the EFCA as a Sure Thing*, OHIO EMP. L. BLOG (Jan. 21, 2009), https://www.ohioemployerlawblog.com/2009/01/unions-should-not-bet-on-efca-as-sure.html?m=1 [https://perma.cc/X2XN-BDZJ].

62. *See* Sam Stein, *Democrat Blanche Lincoln to Oppose Employee Free Choice Act, as Is*, HUFFPOST (May 7, 2009), https://www.huffpost.com/entry/key-democrat-blanche-linc_n_183613 [https://perma.cc/GX44-W43N].

63. David Freddoso, *Feinstein on EFCA*, NAT'L REV. (June 3, 2009, 7:11 PM), https://www.nationalreview.com/corner/feinstein-efca-david-freddoso/ [https://perma.cc/MEA3-VARD]; *see also* Mike Elk, *Abandoning EFCA Is Obama's Political Suicide: Lessons from Three Presidents on Workers' Rights*, TRUTHOUT (Jan. 6, 2010), https://truthout.org/articles/abandoning-efca-is-obamas-political-suicide-lessons-from-three-presidents-on-workers-rights/ [https://perma.cc/QX5Q-JT5R].

and issued a number of decisions and rules that organized labor had long sought to have changed.[64]

1. The "Quickie Election" Rules

Despite its broad rulemaking authority and unlike most other major federal agencies, the NLRB historically had avoided administrative rulemaking and relied almost exclusively on case-by-case adjudication to develop national labor policy. The NLRB successfully promulgated only one substantive rule during its first 75 years of existence (in 1989, relating to acute care hospital bargaining units).[65] In 2014, however, the Board implemented a significant set of rule changes related to its election procedures, often referred to as the "quickie" election rules.[66]

The quickie election rules substantially shortened the period between the date that a representation petition is filed with an NLRB regional office and the date the election would be held. Prior to the new rule, the goal was an election in 42 days, but the new rule sought to cut that time by more than half. Prior to the rule, elections could not occur until the Board resolved election issues that the parties did not agree upon through litigation (*e.g.*, the correct bargaining unit, a showing of interest by enough employees, etc.). In order to shorten time period, the rule provided that almost all election-related disputes were to be resolved after the election. In addition, the revised election rules required the production of more information in expedited fashion to unions and employees.[67]

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64. C. Thomas Davis, *Trump NLRB Modifies Obama Board's Union Election Case Regulations*, Ogletree Deakins Insights (Dec. 13, 2019), https://ogletree.com/insights/trump-nlrb-modifies-obama-boards-union-election-case-regulations/ [https://perma.cc/8XPZ-S8LS]; *Back to the Future: It's Time to Prepare for a Rollback of Employer Rights at the NLRB*, Fisher Phillips News-Insights (Nov. 16, 2020), https://www.fisherphillips.com/news-insights/back-to-the-future-it-s-time-to-prepare-for-a-rollback-of-employer-rights-at-the-nlrb.html [https://perma.cc/4BSW-979Q].

65. 29 C.F.R. § 103.30 (1989). *See* Braden Campbell, *Biden NLRB Seen as Likely to Continue Rulemaking Trend*, Law360 (Aug. 13, 2021, 8:01 PM), https://www.morganlewis.com/-/media/files/news/2021/law360_bidennlrbseenaslikelytocontinuerulemakingtrend.pdf [https://perma.cc/2Z84-ZR7H].

66. Representation–Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–03). *See also* John Raudabaugh, *NLRB Watch: With "Quickie Elections" Rule, NLRB Quick to Sell Out Workers*, Nat'l Right to Work Found.: NLRB Watch (Apr. 2012), https://www.nrtw.org/nlrb-watch-with-quickie-elections-rule-nlrb-quick-to-sell-out-workers/ [https://perma.cc/WS7U-JCYQ].

67. Raudabaugh, *supra* note 66.

2. Caselaw Under Obama (and then reversed under Trump)

While the Obama NLRB was more active than most Boards, NLRB caselaw decisions have fluctuated dramatically with changes in the administration. Board Members have five-year terms, and there is an agreement that the President's party will have a 3-2 majority. Since the terms are five years long, the party in power does not immediately secure a majority; instead, the party must wait until Members from the previous administration end their terms, at which point the President can replace the outgoing Member. Of course, if the first Member with an expired term is from the President's party, there will still no change in the majority until a Member from the opposing party "rolls off" and can be replaced. This political change results in unstable law. Former Board Member Harry Johnson, a Republican, once lamented that as a minority on the Obama Board, all he wrote were dissents. "Don't worry," Wilma Leibman, an Obama NLRB Chair, told Harry—when there is an administration change, your dissents will be adopted by the majority.[68] Wilma was prophetic. As one labor relations professional stated at a Cornell University Roundtable, "Can we just go from the 40 to the 40 instead of the goal line to the goal line?"[69] The Obama Board went all the way to the goal line and the Trump Board ran it all the way back. The following cases illustrate this phenomenon.

a. Work Rules: Lutheran Heritage

Lutheran Heritage Village-Livonia[70] holds that a work rule need not explicitly restrict Section 7 protected activity[71] to be found unlawful. Instead, a work rule will be deemed to be unlawful if: (i) employees would reasonably construe the rule's language to prohibit Section 7 activity; (ii) the rule was promulgated in response to union or other Section 7 activity; or (iii) the rule was actually applied to restrict the exercise of Section 7 activity.[72] Because (i) is so amorphous, the Obama Board used this rule to find many em-

68. Interview with Harry Johnson, former NLRB Board Member, in Big Sky, Mt. (Aug. 10, 2022).

69. 8th Annual Labor Relations Roundtable, presented by Cornell Ctr. for Innovative Hosp. Lab. and Emp. Rels. (CIHLER), in Boca Raton, Fla. (Feb. 28, 2020).

70. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004).

71. *See* 29 U.S.C. § 157. Section 7 of the NLRA provides employees with the right to engage in concerted activity for the purposes of improving wages, hours, and terms and conditions of employment. In other words, Section 7 is the portion of the statute that provides employees with the right to join unions and collectively bargain.

72. Lutheran Heritage, 343 N.L.R.B. at 647.

ployer work rules to be unlawful.[73] The Trump Board, however, in Boeing Company[74] (Boeing) articulated a new method for testing the facial validity of work rules, overturning Lutheran Heritage and holding that it would now evaluate two things when testing the facial validity of work rule language: (1) the nature and extent of the rule's potential impact on NLRA rights and (2) an employer's legitimate justification associated with the rule that may shed light on the purpose(s) served by a challenged rule or on the impact of its maintenance on Section 7 conduct.[75]

b. Joint Employer

In *Browning-Ferris*,[76] the Obama Board expressly eliminated the requirement that the employer exercise "direct and immediate control."[77] Instead, it held that "we will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work and terms of employment, either directly or through an intermediary."[78] The Trump Board, in a 2020 rule, then required that an entity possess and exercise substantial and immediate control over one or more essential terms and conditions of employment.[79] The difference between the amorphous "affects the means or manner of employees' work" as opposed to substantial and immediate control is at the heart of the joint employer debate. Franchises that have systems (*e.g.*, fast food processes for preparing food) arguably affect employee work, but they would not be considered to be substantial immediate control. Thus, the franchise model was in jeopardy after *Browning-Ferris*, but no longer an issue after the Trump rule.[80]

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73. Christine Fuqua Gay, *NLRB Flips Rule on Employment Policies*, HOLLAND & KNIGHT LEGAL NEWS (Dec. 20, 2017), https://www.jdsupra.com/legalnews/nlrb-flips-rule-on-employment-policies-38446/ [https://perma.cc/AQQ8-TYWF].

74. The Boeing Co., 365 N.L.R.B. No. 154 (2017).

75. *Id.* at 155.

76. Browning-Ferris Indus. of Cal., 362 N.L.R.B. 1599 (2015).

77. *Id.* at 1605.

78. *Id.* at 1614.

79. 29 C.F.R. § 103.40 (2020); *see also* Adam Primm, *NLRB Finalizes Joint Employer Rule to Take Effect on April 27, 2020*, BENESCH (Feb. 25, 2020), https://www.beneschlaw.com/resources/nlrb-finalizes-joint-employer-rule-to-take-effect-on-april-27-2020.html [https://perma.cc/E6WZ-2J46]. *See also* Margaret Poydock & Heidi Shierholz, *New Trump Administration Joint-Employer Rule Has $1 Billion Price Tag for Workers*, ECON. POL'Y INST.: NEWS FROM EPI (Jan. 13, 2020), https://www.epi.org/press/new-trump-administration-joint-employer-rule-has-1-billion-price-tag-for-workers/ [https://perma.cc/7UAL-QC5E].

80. It is well established fact that franchises take a percentage of the units' gross revenue and may also charge an advertising fee. The franchisee must follow

c. Independent Contractor Standards

In *FedEx Home Delivery*,[81] the Obama Board issued a decision "restating and refining" its analysis in independent contractor cases.[82] When determining whether an individual is a contractor or an employee, the Board said it will consider common law agency factors, such as: (i) the extent of the company's control over the work; (ii) whether the individual is engaged in a distinct occupation or business; (iii) whether the work is typically performed at the direction of the employer or without supervision; (iv) whether the individual supplies the work tools and place of work; and (v) whether the work is part of the employer's regular business.[83] The Board stressed that these factors are non-exclusive, and they should be viewed in totality with regard to the specific facts at hand, with no one factor being determinative.[84]

The Trump Board rejected that test, stating that it failed to properly weigh workers' ability to grow their business. Thus, in *SuperShuttle DFW, Inc.*, the Trump Board held that drivers for an airport shuttle service are not employees, because they invest in their own vans, set their own hours, and are ultimately responsible for their profit or loss.[85]

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established brand standards. The franchisor receives revenue but is not liable for employee or other business-related lawsuits. The business model is not sustainable if the franchisor must create an infrastructure to ensure legal compliance, and the franchisee, not the franchisor, is the employer. *See* FED. TRADE COMM'N, A CONSUMER'S GUIDE TO BUYING A FRANCHISE 8 (Sept. 2020), https://www.ftc.gov/business-guidance/resources/consumers-guide-buying-franchise#business-model [https://perma.cc/25JS-CQVH]. *See also What a Trump Administration Means for Franchising*, QSR MAG. (Feb. 2017), https://www.qsrmagazine.com/outside-insights/what-trump-administration-means-franchising [https://perma.cc/5ZYY-DDSY]; Peter Romeo, *'Joint Employer' Threat to Franchising Is Back*, REST. BUS. ONLINE (Sept. 9, 2020), https://www.restaurantbusinessonline.com/operations/joint-employer-threat-franchising-back [https://perma.cc/9GTY-JT2J].

81. FedEx Home Delivery, 361 N.L.R.B. 610, 610 (2014).

82. *Id.* at 619.

83. *Id.* at 611.

84. *Id.* at 610 (citing NLRB v. United Insurance Co. of America, 390 U.S. 254, 258 (1968)).

85. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 14 (Jan. 2019). "The Board majority in SuperShuttle returned to the traditional test prior to FedEx, agreeing with member Johnson. In rejecting FedEx, the majority noted that it is not necessary to apply the entrepreneurial opportunity principle to each and every common law factor in each and every case. 'Instead, consistent with Board precedent . . . the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the . . . circumstances of the case make such an evaluation appropriate." Applying this new (old) approach, the Board held that SuperShuttle's driver-franchisees were independent contractors under the traditional test." Harry

d. The Use of Company Email

In *Purple Communications*,[86] the Obama Board overturned the prior Board's precedent in *Register Guard*, which had held that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes."[87] There, the Board reasoned that an employer may impose nondiscriminatory restrictions on company email systems, because employers have a basic property right to regulate.[88] *Purple Communications* reversed *Register Guard*, but the Trump Board reversed it back in *Caesars Entertainment*.[89] Thus, employees could no longer use the company email systems for Section 7 purposes.[90]

e. Other Obama Board Rulings Overturned by the Trump Board

In *Alan Ritchey, Inc.*,[91] the Board held that when a union has been certified but has not yet entered into a collective bargaining agreement, the employer must give notice and an opportunity to bargain before imposing certain types of serious, discretionary discipline.[92] In *Oberthur*, the Trump Board effectively overturned *Alan Ritchey, Inc.*, when it held that there was no obligation to bargain over discipline if it were based on pre-existing work rules.[93]

The Obama Board held that future wage increases,[94] health and welfare payments,[95] and dues checkoffs needed to continue post contract expiration.[96] In *Valley Hospital Medical Center, Inc.*, the Trump Board overruled *Lincoln Lutheran of Racine* and held that an

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I. Johnson, III, Crystal S. Carey & Christopher A. Parlo, *NLRB Returns to Independent Contractor Fundamentals in* Supershuttle, MORGAN LEWIS (Jan. 30, 2019), https://www.morganlewis.com/pubs/2019/01/nlrb-returns-to-independent-contractor-fundamentals-in-supershuttle [https://perma.cc/75RB-MA8M] (quoting SuperShuttle, 367 N.L.R.B. at 9).

86. Purple Commc'ns, Inc., 361 N.L.R.B. 1050 (2014). Jones Day authored two of the *amicus* briefs filed in support of the employer in the case, including one on behalf of the American Hospital Association and another on behalf of the United States Chamber of Commerce.

87. The Guard Publishing Co., 351 N.L.R.B. 1110, 1110 (2007).

88. Register Guard Publishing Co., 351 N.L.R.B. 70 (2007); Purple Commc'ns, Inc., 361 N.L.R.B. at 1069.

89. Caesars Ent., 368 N.L.R.B. No. 143, 144 (2019).

90. *Id.*

91. Alan Ritchey, Inc., 359 N.L.R.B. 396 (2012).

92. *Id.* at 403.

93. *See* Oberthur Techs. of Am. Corp., 368 N.L.R.B. No. 5, 3 (2019).

94. Finley Hosp., 362 N.L.R.B. 915, 926 (2015), *aff'd*, Finley Hosp. v. NLRB, 827 F.3d 720 (8th Cir. 2016).

95. StaffCo of Brooklyn, LLC, 364 N.L.R.B. 1500, 1514 (2016).

96. Lincoln Lutheran of Racine, 362 N.L.R.B. 1655, 1656 (2015).

employer's statutory obligation to check off union dues ends upon expiration of the collective-bargaining agreement containing the checkoff provision.[97]

The Trump Board overruled other Obama Board decisions including those that: held confidentiality polices unlawful,[98] found it unlawful to permanently replace economic strikers in certain circumstances,[99] allowed so-called micro-bargaining units,[100] and protected speech critical of the company.[101]

In *Pier Sixty, LLC*,[102] two days before employees at a catering company were to vote in a representation election, a manager scolded a group of three employees to "stop chitchatting" and attend to guests.[103] One of the employees promptly used his iPhone to post on Facebook, "Bob is such a NASTY MOTHER F[ ]ER don't know how to talk to people!!!!!! F[ ] his mother and his entire f[ ]ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[104] The employee was fired for the posting about two weeks later.[105] The Board found the speech protected.[106] The Trump Board overturned *Pier Sixty* in *General Motors LLC*.[107]

D. The Biden Administration

The Biden Administration started with a pro-labor bang. President Biden, as stated above, replaced the General Counsel of the NLRB on inauguration day[108] and gained a majority on the NLRB in July of 2021.[109] Since then, the Biden Administration has worked

97. Valley Hosp. Med. Ctr., Inc., 368 N.L.R.B. No. 139, 1 (2019).

98. Banner Health Sys., 362 N.L.R.B. 1108 (2015), *overruled by* Apogee Retail LLC, 368 N.L.R.B. No. 144 (2019).

99. Am. Baptist Homes of the W., 364 N.L.R.B. 75 (2016).

100. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 2119, 2120 (2011), *overruled by* PCC Structurals, Inc., 365 N.L.R.B. No. 160 (2017).

101. Pier Sixty, LLC, 362 N.L.R.B. 505 (2015), *overruled by* General Motors LLC, 369 N.L.R.B. No. 127 (2020).

102. *Id.* at 506.

103. *Id.* at 505.

104. *Id.*

105. *Id.* at 506.

106. *Id.* at 508.

107. General Motors LLC, 369 N.L.R.B. No. 127 (2020).

108. *President Biden Ousts NLRB General Counsel; Changes NLRB Chairman*, THE NAT'L L. REV., (Jan. 21, 2021), https://www.natlawreview.com/article/president-biden-ousts-nlrb-general-counsel-changes-nlrb-chairman-us [https://perma.cc/UBM4-Y6ZG].

109. Ian Kullgren, *Tsunami of Change Forecast Once Democrats Regain NLRB Majority*, BLOOMBERG L. (Aug. 26, 2021, 7:44 PM), https://news.bloomberglaw.com/

to overturn the Trump Board in the cases that had overturned the Obama Board (which had overturned the Bush Board. . .).[110]

The Biden Administration also led with the PRO Act[111]—the most comprehensive labor law reform proposal since the Carter Administration.

The PRO Act

As a comprehensive labor law reform bill, the PRO Act:

1. Prohibits state "right to work" laws;
2. Codifies the California "ABC" law, which results in what were once independent contractors being classified as employees;[112]
3. Prohibits employers from requiring employees to attend the so-called captive audience meetings where the employer gives its side of the unionization story;
4. Codifies the so-called "persuader rule" under which employers are required to report payments for labor relations advice and services they receive from attorneys;[113]
5. Mandates that employers provide the union with employees' personal contact information (home address, home phone number, personal cell phone, and personal email address) to union organizers in advance of any election;
6. Removes the prohibition against secondary boycotts. (Thus, for example, if a union was trying to organize a Coca-Cola bottler, it could call for a boycott of the stores that sell Coke products.);
7. Increases the use of bargaining orders (the union is certified despite losing the election). Currently, bargaining orders are issued if the union had a majority support at one

daily-labor-report/tsunami-of-change-forecast-once-democrats-regain-nlrb-majority [https://perma.cc/S7WL-6X7N].

110. Arguably, the NLRB under Biden has been slow to overturn Trump Board decisions. *See* David J. Pryzbylski, *Labor Board Has Yet to Issue Significant Decisions Under Biden – Why?*, BARNES & THORNBURG LLP (Mar. 25, 2022), https://btlaw.com/insights/blogs/labor-relations/2022/labor-board-has-yet-to-issue-significant-decision-under-biden-why [https://perma.cc/BX6X-HUGQ]. General Counsel Jennifer Abruzzo announced her enforcement priorities. *See* Memorandum GC 21-04 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Directors, Officers-in-Charge, and Resident Officers, NLRB (Aug. 12, 2021).

111. H.R. 842, 117th Cong. (2021).

112. *Id.* § 101 (2021).

113. A federal district court in 2016 blocked the "persuader rule" previously implemented during the Obama presidency. *See* Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016).

time (which is almost always the case) and if the employer's conduct was so egregious that a fair election was impossible. If that were not the case, the Board would "re-run" the election. The PRO Act would eliminate the re-run elections and declare the union the employees' collective bargaining representative so long as the union can demonstrate majority support at any time. Since unions rarely, if ever, seek an election without majority support, this would apply to virtually all elections;

8. Takes away employers' standing to "intervene in any representation proceeding under this section."[114] This means employers would be unable to contest issues like voter eligibility, appropriateness of bargaining units, and where and how the ballots will be counted;
9. Codifies Specialty Healthcare, which allows for so-called "micro-units" by changing the standard of "community of interest" to an "overwhelming community of interest";[115]
10. Allows the unions to choose the type (*e.g.*, in person or mail) and location of NLRB elections (instead of the work site, a neutral site)[116] by stating: "[a]t the request of the labor organization, the Board shall direct that the election be conducted through certified mail, electronically, at the work location, or at a location other than one owned or controlled by the employer";[117]
11. Alters the definition of "supervisor" by limiting the classification to those who perform such "supervisory" duties "for a majority of the individual's worktime,"[118] and eliminates two factors that often provide the indicia of supervisory

114. H.R. 842, 117th Cong. § 105(1)(A)(1) (2021).

115. *Id.* Unions seek smaller units when they perceive that they cannot prevail in an election with a larger unit. Employers recognize this fact and thus will seek to expand the smaller unit that the union proposed. The community of interest allowed employees who were not in the exact same job category but shared commonalities (*e.g.*, similar supervisors, break rooms, and schedules) to be included. Employers could no longer use this strategy.

116. *Id.* Employers believe that pro-union employees will almost always vote and that pro-company employees will vote if convenient. Thus, employers believe that an in-person election at the job site will result in the largest turnout and seek such. This section would allow, for example, the union to hold the election off site where employees would have to travel – employers can provide transportation as long as it offered to all employees.

117. *Id.* § 105.

118. *Id.* § 101(c)(1).

status: "assigning" work and having the "responsibility to direct" work of employees;[119]

12. Obligates the parties to commence negotiations no later than 10 days after the union's initial request to bargain, unless the parties agree to a different time period;
13. After the expiration of the 90-day period, either party can demand mediation;
14. If that mediation is not successful, either party may demand interest arbitration—meaning the arbitration will determine wages, hours, and terms and conditions of employment based upon statutory factors like the geographic cost of living, "the employees' ability to sustain themselves, their families[ ], their dependents on the wages and benefits they earn from the employer,"[120] and "the employer's financial status and prospects."[121] The panel's determination of contractual terms "shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties";[122]
15. Removes employees' rights to ratify a collective bargaining agreement;
16. Brings back *Purple Communications* and provides employees the right to "use electronic communication devices and systems (including computers, laptops, tablets, internet access, email, cellular telephones, or other company equipment) of the employer," absent "a compelling business rationale for denying or limiting such use";[123]
17. Increases the damages available to employees for unfair labor practices by (1) changing the backpay calculation to no longer provide an offset for interim earnings (*e.g.*, unemployment or earnings from a new job) and to provide front pay; (2) providing liquidated damages equal to twice the amount of other damages awarded; and (3) providing the right to file a private action and receive attorney's fees;[124]

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119. *Id.* § 101(c)(2)–(3). Employers rely on front line supervisors to take the pulse of the employees' union and to relay the employers' message.

120. H.R. 842, 117th Cong. § 104(3)(C)(iv) (2021).

121. *Id.* § 104(3)(C)(i).

122. *Id.* § 104(3)(C).

123. *Id.* § 104(7)(h)(2)(i).

124. *Id.* § 109(d).

18. Provides for penalties against employers to begin at $50,000 for each failure to comply with a Board order, which could be doubled where the employer committed a similar unfair labor practice in the prior five years and could apply to individual directors and officers of the employer;
19. Restores the *Browning-Ferris* rule in the NLRA, so that a putative joint employer's reserved and indirect control could subject it to joint-employer status and liability.[125] This new standard would nullify the Board's joint employer rule. In practice it would subject franchisors to potential liability for actions taken by their franchisees, and, in conjunction with the expansive new definition of "employee," would likely also define employees of franchisees as employees of the national brand. Employers that currently contract for leased or temporary workers would also be affected and may have to reassess or change their business practices;[126] and
20. Prohibits pre-dispute mandatory arbitration agreements.[127]

The PRO Act is more comprehensive than any of the legislative reform packages previously discussed. Consequently, the PRO Act is simply too pro-union to pass. Even with Democratic House and Senate majorities, and even if the Senate were to eliminate the filibuster, the odds of 50 Democratic Senators passing such sweeping "pro-union" legislation falls somewhere between unlikely and impossible.[128] Most employers have rallied against the extreme ele-

125. Employers fear that joint-employer liability could apply to franchising.

126. Carvell & Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. U. BUS. L. REV. 5 (2017). *See also* Beth Ewen, *NLRB's Browning Ferris Ruling Could Apply in 'Crazy Ways'*, FRANCHISE TIMES (Aug. 28, 2015), https://www.franchisetimes.com/franchise_news/nlrbs-browning-ferris-ruling-could-apply-in-crazy-ways/article_ff3fc13a-9c8b-540a-9983-76df132442ca.html [https://perma.cc/4C29-LPUR]; James Shrimp, *Franchise Businesses Beware: The NLRB in Browning-Ferris Expands the Joint Employer Doctrine*, LINKEDIN (Sept. 1, 2015), https://www.linkedin.com/pulse/franchise-businesses-beware-nlrb-browning-ferris-expands-james-shrimp/ [https://perma.cc/75XG-HNU9].

127. H.R. 842, 117th Cong. § 202(b)(2) (2021).

128. Diana Furchtgott-Roth, *Democrats Can't Pass the PRO Act, So It's Buried in the Reconciliation Bill*, THE HILL (Oct. 9, 2011, 11:01 AM), https://thehill.com/opinion/white-house/575992-dems-cant-pass-the-pro-act-so-its-buried-in-the-reconciliation-bill/ [https://perma.cc/R5ZT-9G9R].

ments of the PRO Act.[129] But many employers today have voiced their concerns with the current state of labor law.[130] Does this open the door to a new version of labor law reform? Let's explore.

III.
EMPLOYERS ARE FRUSTRATED WITH LABOR LAW, TOO

While their complaints are not as visceral as those of organized labor, employers are not uniformly in favor of the labor law status quo. Many employers are frustrated by the instability of NLRB law, which, as illustrated above, fluctuates wildly from one Presidential administration to another.[131] While this instability is difficult for labor, it is arguably more disruptive for employers. For example, employers' business models rely on rules regarding joint-employer and independent-contractor status. Moreover, employers want to develop policies that support their employment culture, such as respectful interactions and social media guidelines; however, many of these policies have been deemed lawful one day and unlawful the next by a flipflopping Board. While unions can more nimbly react to the changes in their organization and administration, employers must continually alter employment policies, causing confusion and frustration in operations.

Employers also complain about the current organizing process because it limits employer speech while allowing unions to do ex-

129. *Stop The PRO Act*, U.S. CHAMBER OF COM., https://www.uschamber.com/major-initiative/stop-the-pro-act [https://perma.cc/27L5-33TD]; Mark McQueen, *Employers Beware: The Pro Act Is a Dramatic Change to Current Labor Laws*, LAB. & EMP. L. UPDATE (Mar. 11, 2021), https://www.bairdholm.com/blog/employers-beware-the-pro-act-is-a-dramatic-change-to-current-labor-laws/ [https://perma.cc/Z5CR-NQBT]. *See also New Polling Shows How Small Businesses Might React if Lawmakers Pass the PRO Act*, AMS. FOR PROSPERITY (May 4, 2021), https://americansforprosperity.org/new-polling-shows-how-small-businesses-might-react-if-lawmakers-pass-the-pro-act/ [https://perma.cc/LK3B-NPJR].

130. Jessica M. Marsh et al., *D.C. Circuit Flips NLRB; Employer's Alleged 'Baseless' Statements of Opinion Lawful*, JACKSONLEWIS: LAB. & COLLECTING BARGAINING (June 14, 2021), https://www.laborandcollectivebargaining.com/2021/06/articles/collective-bargaining/d-c-circuit-flips-nlrb-employers-alleged-baseless-statements-of-opinion-lawful/ [https://perma.cc/WYY7-UYLS]; Ruth Kraft, *NLRB Presents: Flip-Flop Nation*, LINKEDIN (May 4, 2023), https://www.linkedin.com/pulse/nlrb-presents-flip-flop-nation-ruth-kraft/ [https://perma.cc/A3TB-RRE3]; George J. Miller, *The NLRB "Flip-Flops" Again*, WYATT: EMP. L. REP. (Sept. 17, 2011), https://wyattfirm.com/the-nlrb-flip-flops-again/ [https://perma.cc/VXM3-5M4L].

131. At a Roundtable sponsored by Cornell University in February of 2019, Greg Talbot, VP of Labor Relations for Marriott stated: "I wish we could go from the 40 to 40 instead of goal line to goal line."

actly what the employer cannot. The law prohibits employers during a union campaign from engaging in the following: threats, interrogation, promises, or surveillance. This is often described by the acronym TIPS (or, more appropriately, SPIT).[132] Employers complain that no such prohibition applies to unions. Unions are permitted to mislead employees with explicit or implicit promises, negative or positive coercion to support the union efforts, and unwelcome visits to employees' homes. Unions can even ply employees with alcohol at happy hours and dinners in an effort to get them to sign authorization cards.

Even more frustrating to employers are corporate campaigns, which current labor law allows to proceed relatively unchecked. Workers United, a union formerly associated with UNITE HERE and now a division of the Service Employees International Union (SEIU), has published a well-known corporate campaign handbook. The handbook outlines how unions can pressure employers into acquiescing to union demands.[133] Using corporate campaigns is an integral part of the SEIU's strategy:

> *The SEIU, along with the American Federation of State County and Municipal Employees (AFSCME), targets, among other entities, hospitals and health care conglomerates.*
>
> *With today's corporate campaign strategy against hospitals, the unions launch, through a variety of means, a series of highly publicized attacks on target hospitals that are designed to embarrass the hospitals and to discredit the target hospitals in the minds of the public. The goal of the corporate campaign: to coerce management into agreeing to neutrality, card check, and master agreements, at which point the union will call off the dogs.*[134]

Indeed, this description of the SEIU's strategy is not simply that which is published in a law review; it is almost identical to that which the SEIU writes in its own materials. Multiple iterations of the SEIU's contract campaign manual (the Manual)[135] advise cam-

132. Celeste Purdie & Jim Rhollans, *Union Communication Guidance: TIPS and FOE*, SHRM: LAB. RELS. (Apr. 26, 2016), https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/tips-foe.aspx [https://perma.cc/S3CG-P94U].

133. *See generally* U.S. CHAMBER OF COM., EMP. POL'Y DIV., HARDBALL: THE TACTICS OF UNION CORP. CAMPAIGNS (2018), https://www.uschamber.com/assets/archived/images/023532_union_corporate_campaign_report_fin.pdf [https://perma.cc/V7B2-82TC].

134. Anthony P. Merza, *Hospital Charity Care and the Corporate Campaign: Labor Union Exploitation of Dysfunctional Tax Exemption Laws*, 11 DEPAUL J. HEALTH CARE L. 203, 235 (2008) (emphasis added).

135. *Id.* at 232–37.

paigners that violating the law is often necessary and that they are to consider whether a potential tactic will threaten to, or actually: (1) reduce productivity; (2) increase costs; (3) affect a private company's relationship with sources of income, such as customers, clients, investors, or leaders; (4) create bad publicity which would, in turn, affect the relationships described above; (5) cause the courts or regulatory agencies to enforce laws or regulations that the employer has failed to obey; (6) directly affect the careers or interests of individual management officials; and (7) embarrass management officials in front of their superiors, associates, families, neighbors, or friends in the community.[136] The Manual actually lays out the positives of extortion, harassment, and trespass.[137]

In response, several employers, including Smithfield Meat Packing,[138] Sodexo,[139] a food service company, and Care One,[140] a senior living, nursing home, and rehabilitation service provider, have filed RICO lawsuits against unions who embarked on corporate campaigns. Each of these suits survived a motion to dismiss and the Care One case is still pending. The corporate campaign against the Terranea Resort included demonstrably false accusations of rampant sexual harassment by management during the height of the Me Too movement, as well as releasing a doctored defamatory video right before the Resort's annual Thanksgiving meeting.[141] The video featured the female Resort president's head superimposed on the body of a porn actress having sex with a male porn actor, with a male employee's head superimposed on that body.[142] Unions defend this type of treachery as necessary to combat the power imbalance between employers and unions and to respond to

136. *See id.*; U.S. CHAMBER OF COM., *supra* note 133. *See also* Second Amended Complaint, Care One Mgmt., LLC v. United Healthcare Workers E., SEIU 1199, No. 2:12-cv-06371 (D. N.J. June 16, 2015), ECF No. 242, at 39–40.

137. Merza, *supra* note 134, at 232–37

138. Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union, 633 F. Supp. 2d 214 (E.D. Va. 2008).

139. *See* Complaint for Damages and Equitable Relief, Sodexo, Inc. v. Service Emps. Int'l Union, No. 1:11-CV-00276 (E.D. Va. Mar. 17, 2011), ECF No. 1.

140. Care One Mgmt., LLC v. United Healthcare Workers E., 22 F.4th 128 (3d Cir. 2021).

141. Lexy Perez, *Terranea Resort Employees Allege Years of Sexual Harassment*, THE HOLLYWOOD REP. (Oct. 18, 2018, 11:53 AM), https://www.hollywoodreporter.com/lifestyle/style/terranea-resort-employees-allege-years-sexual-harassment-1153253/ [https://perma.cc/3JTX-PPLU]. The video has neither been released or reported, but was described, in detail, to one of the authors by several different managers at the property.

142. The President of the resort relayed this story to the authors. She relayed this incident to the author in July of 2018 in a meeting at the Property.

employers' ability to violate the law (*e.g.*, by firing employees during campaigns, or threatening to close locations) during election campaigns. The reality is that both sides are correct—bad employers can manipulate the law to keep unions out or to avoid bargaining contracts, and corporate campaigns can cross the line of what is ethical and acceptable in a civilized society.

Employers' frustrations do not end with the current labor law governing elections. Employers contend that the current and proposed union contracts of today are obsolete, as they are based on an economy and workplace from a century ago.[143] Union contracts traditionally cover issues of wages, benefits, and discipline with an arbitration clause to resolve disputes. They also feature a no-strike clause in exchange for arbitration. Employers generally do not contest these articles in union contracts. Employees using collective action for higher pay and fair treatment is arguably pro-capitalist. It is an example of people using power to progress and succeed. The problem is that union contracts do not end with the wages, benefits, and fair treatment. Instead, union contracts of today are strikingly similar to contracts of the post-WWII period[144] when unions represented 35% of the private workforce and the workplace was completely different than today: (1) information flowed at a snail's pace; (2) the workplace was strife with danger as there was no occupational and health administration; (3) employers openly discriminated as there were no civil rights laws; (4) human resources was non-existent; and (5) most importantly, there was no global competition, as Europe was still recovering from the War and the developing economies had not developed at all. When there was no competition for American manufacturing, employers could pass inefficient production on to consumers. Today, with technology changing the rules of business on a seemingly daily basis, the contract, for example, between the Hotel Association of New York City and the New York Hotel and Motel Trades Counsel with 74 different articles totaling well over 100 pages, is simply not tenable.

Employees need collective action to combat the worst wage gap the United States has experienced since the 1920s.[145] To do this,

143. The author has conducted more than 70 management roundtables over the last 20 years, and this is a common theme.

144. The author just did a study examining more than 10 "first contracts" settled in the last two years. He also negotiated contracts in the 1990's and has studied union contracts.

145. Susan Dynarski, *Fresh Proof That Strong Unions Help Reduce Income Inequality*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/business/labor-unions-income-inequality.html [https://perma.cc/U9D7-F4W5].

unions need a fair election process where they can explain their benefits to employees. However, employers need the opportunity to run their business efficiently. They also need the opportunity to explain to their employees why the company believes that a union is not necessary. Both employers and unions need a system where it is unacceptable to vilify and disparage the other's entire existence. Employees need the opportunity to receive full information and to make an informed choice without pressure, without fear, and with the knowledge that voting yes or no will not endanger their ability to work with their co-workers. We contend that labor law reform is necessary, but not to simply benefit one side. Instead, it is time to blow up a 1935 statue that was drafted as rules of war. The NLRA was created on the assumption that labor and capital were at war and the only goal is peace. To get peace, both sides can use weapons. A new NLRA needs to be created. The new NLRA must accept labor and capital as two essential parts of the economy, encourage both sides to work together to ensure that America can compete in a global economy, and ensure that the workers are compensated in a manner that will allow them an objectively fair standard of living. Below, we set forth the tenets of the new NLRA.

IV.
THE NEW NLRA

The new NLRA should focus on four areas: organizing, penalties for violations, first contracts, and contractual terms. This new NLRA should not be based on the belief that capital and labor are at war, but that capital and labor are both necessary for an economy to succeed and that both have common interests.

A. Union Organizing

The central tenet of the new NLRA is that employees deserve the right to make a fully informed choice as to joining a union or not, that both unions and employers have access to employees to give their pitch, and that employees should not be manipulated or coerced during the election process. With this in mind, we propose the following:

1. Access

Employees should have access to employer computer systems to organize. Since employers own the system, it is impossible to keep the communication confidential. Communicating with employees today is not nearly as difficult as it once was. Employees can

use the company email server to set up private forums for the employees. In addition, employers must provide union organizers with email addresses and cell phone numbers of employees upon request. The first union communication must state that employees may choose to be removed from the text, call, and email list, and the union must comply. Unions can call meetings in non-workplaces and may supply food and drinks, but the food and beverage meetings cannot occur within two weeks of the election. Unions are permitted to make house calls with email or text permission only.

2. Petition for Election

Under current law, the union needs 30% of the employees to sign cards stating that they want a union before an election is set.[146] In reality, few unions petition for an election without a clear majority of cards signed. We propose increasing the requirement to 50%, but the authorization card should *not* state that the employee wishes to be represented. Instead, it should simply state that the employee requests more information and the scheduling of a secret ballot election. This allows the union to sell what employees should want to buy: information and education instead of an immediate, and often ill-informed, demand for recognition.

3. Bargaining Units

The various tests for the appropriateness of bargaining units have caused far too much litigation over the past 85 years. Ambiguity in these tests has given rise to some absurd results. Moreover, many of the factors examined by the NLRB and courts, such as sharing the same break room or bathroom, are antiquated and do not reflect the modern work environment. The test should be simplified: a bargaining unit is a group of employees who share job titles, tasks, and supervision. Also, the modern work environment includes extensive cross-utilization of employees, which should be reflected in the legal standard for appropriate bargaining units. To eliminate the gamesmanship on both sides (the union selecting micro-units to the extent of organizational strength, and the employer attempting to include dubious job titles in the voting unit to dilute the union's support), the NLRB officer should be empowered to render a pre-election decision based on the criteria above.

146. National Labor Relations Act of 1935 § 159(e); 29 U.S.C. §§ 151–69.

4. Other Pre-Election Issues

The parties should meet and confer with each other, and then meet with the NLRB to reach a stipulated election agreement. In general, elections should occur between five and six weeks from petition. In a non-remote workplace, the election should take place at the jobsite and by secret ballot. The overriding goal should be 100% turnout, with no intimidation or coercion from either side. If the parties cannot reach an agreement, the NLRB officer will decide contested matters with these goals in mind.

B. The Campaign Period

In a 2012 article, one of the authors and our good friend, Zev J. Eigen, proposed a system that we did not create but one that we studied extensively.[147] We encourage unions, management, and ultimately Congress to adopt our modified version of the *Principles for Ethical Conduct During Union Representational Campaigns* developed by the Institute for Employee Choice (the Principles).[148] The Institute for Employee Choice is the brain-child of Richard Bensinger and Dick Shubert.[149] Bensinger is a long-time union organizer whose resume includes being the first head of organizing for the AFL-CIO, as well as working with UNITE HERE, the United Auto Workers, and other unions.[150] Shubert is the former CEO of Bethlehem Steel and former Deputy Secretary of Labor under the Nixon and Ford Administrations.[151] Both grew frustrated by the current system and its perverse incentives for both unions and management.[152] Despite coming from opposite sides of a polarized issue, Bensinger and Shubert shared the core beliefs listed above.[153] Their experiences and their beliefs led Bensinger and Shubert to create an institute grounded on two principles: (1) to do what is best for employees and (2) to be governed by ethics—not law.[154]

These principles define ethical conduct for both unions and employers and are based on the premise that employees will make

147. *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695 (2012).

148. *Id.* at 734–35.

149. *Id.* at 734.

150. *Id.*

151. *Id.*

152. *Id.*; *see also* Richard Bensinger, Co-Chair, Inst. for Emp. Choice, Lecture at Cornell University (Feb. 13, 2012).

153. Eigen & Sherwyn, *supra* note 147, at 734–35.

154. *Id.* at 735.

the decision about organizing through a contested secret ballot election.

1. Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, an agreed-upon neutral will provide an opinion.
2. No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.
3. No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA, employers are prohibited, but unions are allowed, to make promises. Under these principles unions are also forbidden to make promises to gain votes.
4. Accuracy and completeness in information. The parties commit to providing truthful and complete information to the employees, and not distorting the truth by using extreme examples to support their message.
5. No corporate campaigns. If employers agree to these principles, then unions should not undertake "corporate campaign" strategies designed to pressure the employer. These principles presume that both parties engage directly with employees to present their respective arguments. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.
6. Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union's organizing committee should submit the termination to immediate arbitration. At the same time, unions and employees should not "use" the rule against discharges to put the employer in a corner by purposely violating work rules and forcing the employer's hand.

7. Equal time, equal access, equal posting rights, and all meetings voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer's campaign. A series of debates between the employer and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one-on-one meetings about the union between supervisors and employees unless union organizers are afforded the same right. The union must be granted equal space to post literature on company property. Once the petition is filed, the union can no longer have mass gatherings with food and alcohol. Small committee meetings with organizers are permissible, but mass meetings for both employers and employees need to be at the workplace with equal time for all.
8. Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.
9. No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.
10. Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to be respected. Neither party should engage in smear tactics.
11. Stacking the deck. Neither party should attempt to "stack the deck." Since employers must follow these principles, the union may not plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.
12. The Golden Rule—do unto others as you would have them do unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself.[155]

For those viewing union campaigns as a war with union and management using their weapons to win and then hope for peace, the Principles may seem like a pipe dream with rules that would be difficult to enforce. These are legitimate criticisms, to a point. If we see the election as an opportunity to inform voters, these rules

155. *Id.* at 736.

make sense. Of course, like all our proposals, these need to be fleshed out, clarified, and refined. Still, they begin the discussion for what elections should look like under the new NLRA.

C. Enforcement & Penalties

During an election, there is confusion about violation of the rules from both sides. Alleged violations and the appropriate remedies need to be resolved in a quick and fair manner. Neutral arbitrators should be assigned to each election and empowered to resolve disputes within days, not weeks or months.

Violations should be divided into two types: those committed in good faith and those constituting intentional, bad faith violations. Good faith violations will result in a rerun of an election regardless of the side that violates the rule. Employers who act in bad faith will have a bargaining order invoked against them as long as 50% +1 of the employees have signed traditional authorization cards. While request-for-election cards are necessary for filing a petition, authorization cards, which clearly state that the employee wants to be represented by the union, will be used for a bargaining order. Unions that violate the law in bad faith will not be certified regardless of the election results and will be barred from organizing that employer, at the location, for one year.

D. Contracts

When it comes to first contracts, employers have a perverse incentive to negotiate in good enough faith to satisfy the law, but not good enough to get a contract. Indeed, it takes an average of more than 400 days to get a first contract, and nearly 33% of unions fail to get a contract in the first three years.[156] Historically, the pro-union solution has been interest arbitration.[157] However, interest arbitration gives the union an incentive to make very aggressive demands, forcing the employer to polarize its offer so it looks realistic, resulting in a situation where the employer is forced to accept an economically unviable contract. Employers and unions need an incentive to bargain in good faith and to get a contract. This goal

156. Robert Combs, *ANALYSIS: Now It Takes 465 Days to Sign a Union's First Contract*, BLOOMBERG L. (Aug. 2, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-now-it-takes-465-days-to-sign-a-unions-first-contract [https://perma.cc/4WTX-RKT4].

157. Barry Winograd, *An Introduction to The History of Interest Arbitration in the United States*, LAB. L.J. (2010), https://law.missouri.edu/arbitrationinfo/wp-content/uploads/sites/2/2015/05/An-Introduction-to-The-History-of-Interest-Arbitration-in-the-United-States.pdf [https://perma.cc/6HZ9-NNWC].

could be accomplished by substantially narrowing the field of mandatory subjects of bargaining.

Collective bargaining agreements have not substantially evolved over the past 50 years. In contrast, laws protecting employee rights have proliferated, and employers have become far more progressive. Indeed, some would argue that these trends have directly led to the rapid decline in unionization over the same period of time. Because the law and employers provide a more-than-adequate safety net for employees across a range of topics, the role of the union as an employee advocate should be narrowed by narrowing the field of mandatory subjects at the bargaining table.

1. A Leaner List of Mandatory Subjects of Bargaining

1. Wages: the income gap needs to be addressed, and unions are an effective vehicle;
2. Benefits: the United States is still the only industrialized country without national health insurance. Health insurance, retirement, and paid time off should remain mandatory subjects with the following exceptions:
   a. If requested by the employer, employees should have to share no less than 10% the cost of the health insurance premium;
   b. An employer may refuse to participate in a defined benefit pension plan if the employer offers a 401k, or a similar plan, with at least a 50% match up to 3%.
3. Predictive Scheduling: this is vital to employees who need to manage family and other issues;
4. Health & Safety: the union and the employer need to work together to keep employees safe;
5. Just Cause for Discharge and Discipline: employees should not be disciplined or discharged at will, but the decades of just cause arbitration awards have established a body of law holding that poor performance is seemingly no longer a reason to terminate the employment relationship. Poor performance, with proper notice and time to correct, should constitute just cause;
6. Arbitration to resolve disputes;
7. No strike / No lockout.

2. Permissive Subjects

All other subjects than listed above should remain permissive. Thus, common topics in union negotiations, such as seniority, hours, work rules, enhanced overtime, job classifications, dues

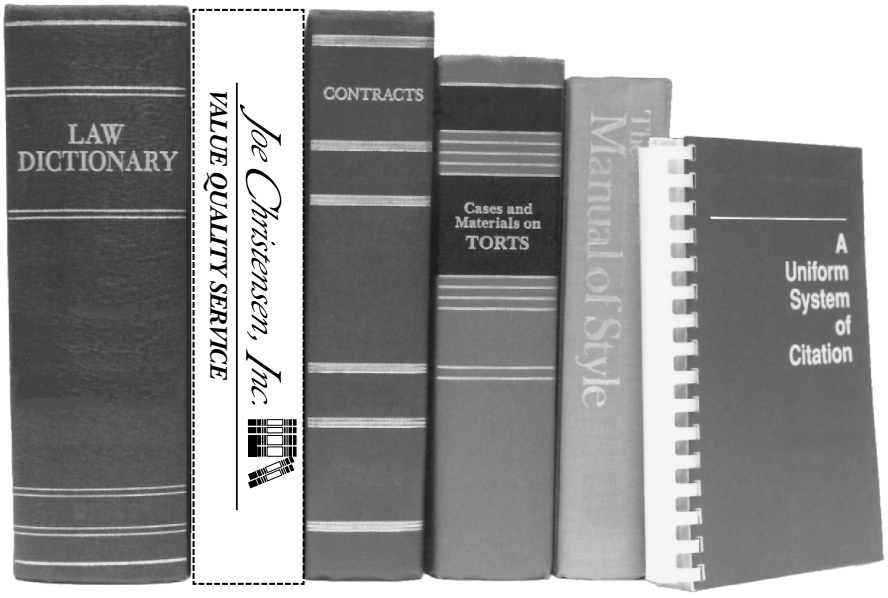
checkoff, etc., can be discussed but need not be. Further, the union would not be permitted to call a strike based on any of the topics on the expanded list of permissive subjects.

3. First Contracts

Limiting the number of mandatory subjects of bargaining as proposed above will result in fewer "no contract" situations. If no contract is reached within six months of negotiating, either party can request mediation. The mediator will attempt to get the parties to agree. If an agreement is not reached through mediation, the parties will submit to interest arbitration. However, the parties will each be fined the amount of one year's worth of bargaining unit dues for failing to reach an agreement. At interest arbitration, if the arbitrator finds bad faith, that party will be subject to punitive damages.

V.
CONCLUSION

The new NLRA needs to recognize that the war between labor and capital must be over. United States capital and labor cannot succeed with a perpetual war. Instead, the parties and the government must recognize that the United States cannot compete with foreign competition completion in a global economy when it is at war with itself. We need to seize the opportunity presented by recent union organizing trends and the highest approval ratings for unions in the last 80 years. Our proposals represent a sea change over the status quo, and they are admittedly imperfect. Nonetheless, we intend this Article to start an important conversation that may lead to a more balanced and streamlined NLRA for a modern world.



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