

LABOR LAW REFORM AT A CRITICAL JUNCTURE: THE CASE FOR THE PROTECTING THE RIGHT TO ORGANIZE ACT

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I. INTRODUCTION

Despite increasing public support for unions over the past four decades,¹ nationwide union membership is at its lowest point since 1936, just one year after the passage of the National Labor Relations Act (“NLRA” or “Wagner Act”).²

Designed around the concept of enterprise-level bargaining—that is, collective bargaining at individual worksites or firms—the Wagner Act helped usher in a new era of organizing, which led to increased union density and bargaining power.³ With this bargaining power, unions had the ability to reach some of the most worker-friendly collective bargaining agreements in U.S. history.⁴ And although enterprise bargaining was the norm, workers in high-density sectors like the steel and auto industries were able to leverage their power to utilize a strategy called “pattern bargaining”

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¹ See Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, GALLUP (Sept. 3, 2020), <https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx> [<https://perma.cc/2ZWG-J2BW>]; Thomas Kochan, Duanyi Yang, Erin L. Kelly & Will Kimball, *Who Wants to Join a Union? A Growing Number of Americans*, THE CONVERSATION (Aug. 30, 2018), <https://theconversation.com/who-wants-to-join-a-union-a-growing-number-of-americans-102374> [<https://perma.cc/CN9X-9TQ2>]; see generally RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (2006).

² GERALD MAYER, LIBR. OF CONG., *UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23* (2004), <https://ecommons.cornell.edu/handle/1813/77776> [<https://perma.cc/4F5V-LKPM>].

³ Prior to the Wagner Act, the Norris-LaGuardia Act of 1932 similarly encouraged the collective action of workers by, among other things, prohibiting employers from requiring workers to agree not to join a union as a condition of employment (so-called “yellow dog” contracts) and preventing courts from enjoining activity stemming from a labor dispute under a variety of circumstances. See 29 U.S.C. §§ 101–15 (2018).

⁴ Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 19 (2016); see also HOUSE COMM. ON EDUC. & LAB., U.S. HOUSE OF REPRESENTATIVES, *THE FUTURE OF WORK: HOW CONGRESS CAN SUPPORT WORKERS IN THE MODERN ECONOMY* (2020), [https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20\(FINAL\).pdf](https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20(FINAL).pdf) [<https://perma.cc/2MP9-5BNB>].

to negotiate standards across entire industries, which helped build the middle class in the United States.⁵

As the years wore on, anti-worker legislation, regulatory action, and judicial decisions gave primacy to the property, financial, and political interests of employers over the rights of workers.⁶ Employers took advantage of the weakened law to wage strong anti-union campaigns designed to beat back even nascent attempts at organizing. As a result, the percentage of workers in unions, or union density, declined.⁷ Economic and technological practices shifted in favor of globalization, automation, outsourcing, and the “fissuring”⁸ of the workplace. These changes, often motivated by a desire to evade legal protections for workers and reduce labor costs, have had a staggering impact on workers and their ability to organize under current law.⁹ Private-sector union density in the United States peaked at roughly thirty-five percent in the 1940s and 1950s.¹⁰ The most recent data from 2020 shows private-sector union density is at 6.3%.¹¹ This decline in union density is not the natural result of passive macroeconomic forces, but rather reflects intentional policy choices to weaken worker power and inflate corporate profits.

But all hope is not lost. In the last three-and-a-half years, workers have shown their distaste for the status quo via record-setting collective action¹²

⁵ See Andrias, *supra* note 4, at 19–20. For a variety of examples of successful multi-employer bargaining strategies, see LYNN RHINEHART & CELINE MCNICHOLAS, ECON. POL’Y INST., COLLECTIVE BARGAINING BEYOND THE WORKSITE (2020), <https://files.epi.org/pdf/193649.pdf> [<https://perma.cc/7WUX-WLBF>].

⁶ See discussion *infra* Part II.

⁷ Andrias, *supra* note 4, at 22.

⁸ See David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. LAB. REL. REV. 33, 34 (2011) (“The employment relationship in a growing number of industries—particularly those with large concentrations of low wage workers—has become ‘fissured,’ where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services.”).

⁹ See Andrias, *supra* note 4, at 6.

¹⁰ See MAYER, *supra* note 2, at 11–12. Note that density figures before the 1960s almost exclusively represent private-sector unionism. See Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 6012, 1997). Today, however, there are more union members in the public sector than in the private sector. See BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., UNION MEMBERS SUMMARY (Jan. 22, 2021), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/LVF3-CLXZ>]. Because the PRO Act governs only private-sector labor law, I do not address public sector union data or law here.

¹¹ See BUREAU OF LAB. STATS., *supra* note 10. Although union density increased slightly from 2019 to 2020, union membership declined. The density increase may be explained by the widespread job loss caused by the COVID-19 pandemic. Union workers were either more concentrated in industries where employment was less affected (e.g., teaching and health care) or were otherwise better protected against job loss than their nonunion counterparts.

¹² See Alexia Fernández Campbell, *A Record Number of US Workers Went on Strike in 2018*, VOX (Feb. 13, 2019), <https://www.vox.com/policy-and-politics/2019/2/13/18223211/worker-teacher-strikes-2018-record> [<https://perma.cc/Q2U5-M5U6>]; see also BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., 25 MAJOR WORK STOPPAGES IN 2019 INVOLVING 425,500 WORKERS (Feb. 14, 2020), <https://www.bls.gov/opub/ted/2020/25-major-work-stoppages-in-2019-involving-425500-workers.htm> [<https://perma.cc/84XY-Z2QV>]. A new project at the Cornell School of Industrial and Labor Relations seeks to identify and track labor unrest across

leading to a renewed interest in and support for unions.¹³ Indeed, forty-eight percent of nonunion workers say they would join a union if given the opportunity.¹⁴ Furthermore, despite claims that unions are a relic of the past, unions' favorability is highest among young workers aged eighteen to thirty-four.¹⁵

However, current economic and industrial realities *are* a far cry from those present when the Wagner Act was passed in 1935. Fissuring of supply chains and the traditional employment relationship, along with the shift to a service-based (and increasingly gig-based) economy, have altered the landscape of the workplace significantly.¹⁶ Combined with open and fierce corporate hostility to unions,¹⁷ and nonexistent penalties for lawbreaking, the present labor law regime in the United States has been reduced to rights that exist largely on paper only and are ill-suited to serve workers of the current age.

It is abundantly clear that we must update U.S. labor law to meet the challenges workers face well into the twenty-first century. But more than simply improving labor-management relations at the worksite, reform is necessary to reverse the trends of income inequality and the disempowerment of millions of working people in the United States. The question, then, is how can we restore workers' voice in the workplace, build workers' power across industries, and ensure that all workers can participate in and enjoy the benefits of a just economy? Legislatively, the Protecting the Right to Organize Act of 2021 ("PRO Act") is the starting place to answer that question.¹⁸ The PRO Act—the most comprehensive pro-worker labor law reform since the Wagner Act—would overhaul labor law to eliminate loopholes, streamline and improve upon the election and collective bargaining processes, and improve remedies under the law.

This essay examines the decades-long erosion of American labor rights since the Wagner Act, why worker power and strong unions are necessary for addressing economic and political inequality, and how the PRO Act will return this power to workers.

the United States. Their tool is available at: <https://striketracker.ilr.cornell.edu>. As of this writing (Oct. 18, 2021) a search for strikes and labor protests in 2021 yields 805 results.

¹³ See Brenan, *supra* note 1.

¹⁴ See Kochan et al., *supra* note 1.

¹⁵ Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High*, GALLUP (Aug. 28, 2019), <https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx> [<https://perma.cc/AZ67-MZ7D>].

¹⁶ Andrias, *supra* note 4, at 28–30.

¹⁷ CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS (2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/> [<https://perma.cc/S33W-CVZP>]. This study also found that employers spend roughly \$340 million per year on union-busting consultants.

¹⁸ See Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (as referred in Senate, Mar. 11, 2021).

II. THE EROSION OF LABOR LAW SINCE THE WAGNER ACT

To understand the struggles of the contemporary labor movement and the areas most in need of reform, it is necessary to understand the legislative, judicial, and regulatory history that tracks the rise and fall of private-sector union density in the United States. A closer examination of this history reveals a labor movement facing tremendous odds, the inefficacy of a Congress dominated by a rapidly growing business lobby, and the determination of corporations to break unions and roll back the gains workers made during the two decades following the passage of the NLRA. By examining the historical context in which the Wagner Act arose, how the law has been eroded since, and the past failures to achieve reform, we are better able to chart a course toward successful legislative action.

A. *The Birth of Modern Labor Law: The Wagner Act of 1935*

The heart of the Wagner Act exists in its Section 7, which codified a range of core labor rights including the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of [workers’] own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”¹⁹ The bill further prohibited employers from engaging in certain unfair labor practices²⁰ and outlined the procedure for a union to achieve formal certification as the workers’ exclusive representative.²¹ In addition, the bill created the National Labor Relations Board (“NLRB” or “the Board”), an independent agency tasked with enforcing the Act and remedying unfair labor practices committed by private-sector employers.²²

A close advisor of Senator Wagner’s during the drafting of the Wagner Act argues that the bill had two primary purposes.²³ The first was to further the cause of social justice.²⁴ The second was to “channel protest and defuse potential rebellion.”²⁵ Some have argued that the latter purpose serves only to cow rank-and-file workers into a state-sponsored system of unionism and thereby decrease labor militancy.²⁶ Nevertheless, the Wagner Act repre-

¹⁹ 29 U.S.C. § 157.

²⁰ 29 U.S.C. § 158.

²¹ 29 U.S.C. § 159.

²² Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2685 (2008). For a discussion of the Act’s toothless remedies, see *infra* Section IV.C.

²³ Theodore J. St. Antoine, *How the Wagner Act Came to Be: A Prospectus*, 96 MICH. L. REV. 2201, 2205 (1998).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Andrias, *supra* note 4, at 14–15; see also Richard Hurd, *New Deal Labor Policy and the Containment of Radical Union Activity*, REV. OF RADICAL POL. ECON., Oct. 1976, at 32. (“This ‘legal organizing’ through elections conducted by the [NLRB] undoubtedly speeded the spread of unionism, but at the expense of establishing a militant tradition of economic gains won by direct worker action.”).

sented a “fundamental change in public policy” designed to alter the power structure between workers and employers such that workers would have the formal ability to share in the determination of their working conditions.²⁷

Central to the effort of such significant reform was a combination of “‘mass politics’ in the form of popular electoral realignment, populist political organization, and mass labor unrest” and “loosely interconnected networks of political-technocratic entrepreneurs driven by progressive ideological commitment and ambition.”²⁸ Understanding this dynamic is key to understanding the future of pro-worker labor law reform in the United States.

B. Amending the Act: Taft-Hartley and Landrum-Griffin

In the years following passage of the Wagner Act, union density rose substantially, and unions won over eighty percent of representation elections.²⁹ The onset of World War II increased U.S. production needs substantially and caused the federal government to intervene in labor relations to ensure industrial peace via the National War Labor Board (“NWLB”).³⁰ This, too, led to a rise in union density.³¹

But, if these two events paved the way for an unprecedented rise in unionism in the United States, they also brought with them a harsh backlash from the opposition.³² In 1947, Republicans held their first congressional majority since before the New Deal and acted quickly—over President Truman’s veto—to curb unions’ power dramatically.³³ There were many potential motivations for such stark and swift action. For example, the House of Representatives Committee Report claimed to be protecting the dignity of “the American working man” from perceived union abuses.³⁴ Others cast the industrial upheaval in the post-war strike wave of 1945–46 as a major

²⁷ James A. Gross, *Workers Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMPL. L. 479, 480–81 (2002).

²⁸ Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1389 (1993). For a discussion on the aims of the “footsoldiers in the industrial battles of the New Deal era,” see Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 290 (1978).

²⁹ John Logan, *Representatives of Their Own Choosing?: Certification, Elections, and Employer Free Speech, 1935-1959*, 23 SEATTLE U. L. REV. 549, 562 (1999–2000); Freeman, *supra* note 10, at 11.

³⁰ See ERIK LOOMIS, *A HISTORY OF AMERICA IN TEN STRIKES* 136–40 (2018). In essence, most unions agreed to a no-strike pledge while businesses accepted strong labor protections in the lucrative defense contracts of the era. *Id.*

³¹ Freeman, *supra* note 10, at 11.

³² See Andrias, *supra* note 4, at 18.

³³ JANE McALEVEY, *A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY* 58 (2020).

³⁴ Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 767–68 (1998) (quoting the House Committee Report).

catalyst for the bill.³⁵ Whatever the motivation, the results were clear: unions were stripped of many of their sharpest tools to achieve economic and political gains for workers.³⁶

The Labor Management Relations Act of 1947 (“Taft-Hartley”)³⁷ is infamous within the labor movement for altering the statutory landscape against workers. Fundamentally, it reframed the Wagner Act by inserting employer rights in what was otherwise a worker protection statute.³⁸ More specifically, it codified so-called employer free speech rights to offer opinions on unionization, provided such opinions contain “no threat of reprisal or force or promise of benefit.”³⁹ This change allows employers to “predict” the effects of workers forming a union, whether or not such statements are based in fact, and without regard for the real-world implications of such “predictions.”⁴⁰ This new right codified an employer’s ability to campaign in an election in which the employer is not on the ballot, and the false distinction between “predictions” and “threats” created a massive loophole for employers to coerce their employees into voting against a union under the guise of mere opinion.

Taft-Hartley made other changes to limit the scope of the law and proscribe important acts of labor solidarity. For example, it narrowed the bill’s scope of application by expressly excluding independent contractors and supervisors.⁴¹ It also prohibited workers of different companies from acting in solidarity with each other by picketing or boycotting employers doing business with companies in a labor dispute (known as “secondary activity”). In banning these acts of solidarity, Taft-Hartley severely restricted the tools available to workers to economically pressure companies in order to win gains at the bargaining table.⁴² In addition to negative economic impacts, these restrictions impair workers’ ability to develop a culture of collective support and action that crosses workplace boundaries and is necessary for the development of a robust labor movement.

³⁵ *Id.* at 775–79; LOOMIS, *supra* note 30, at 140–44, 150–51.

³⁶ LOOMIS, *supra* note 30, at 151 (“This law banned most of the actions the CIO had used to win their transformative victories, including wildcat strikes, secondary picketing, mass boycotts, and union donations to federal political campaigns.”).

³⁷ Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.).

³⁸ 29 U.S.C. § 141 (2018) (“It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . .”). Some argue that, rather than reorienting labor law in favor of employers, Taft-Hartley merely codified the existing legal landscape. *See* Lichtenstein, *supra* note 34, at 763.

³⁹ 29 U.S.C. § 158 (2018).

⁴⁰ *See* Midland Nat’l Life Ins. Co., 263 N.L.R.B. 127, 130 (1982). (“[We] would no longer probe into the truth or falsity of the parties’ campaign statements” and “not set elections aside on the basis of misleading campaign statements.”) (citations omitted).

⁴¹ 29 U.S.C. § 152 (2018). For further discussion of the ills of the independent contractor exclusion and resulting worker misclassification, see discussion *infra* Section IV.B.

⁴² *See* 29 U.S.C. § 158(b).

The last major change codified by Taft-Hartley was its blessing of state “right-to-freeload” laws.⁴³ Couched in terms of protecting individual liberty by guarding against “compulsory unionism,” Taft-Hartley prohibited agreements requiring union membership as a condition of employment when such agreements violate state law.⁴⁴ Because unions have a legal duty to represent all employees in a bargaining unit, regardless of whether they are union members,⁴⁵ right-to-freeload laws create a perverse incentive for workers to enjoy the benefits of union representation without paying reasonable fees, or indeed anything whatsoever, for the services provided. With an inability to recoup representational costs, unions’ financial viability, and their ability to organize new members, is significantly hampered. Furthermore, by allowing states to undermine unions, Taft-Hartley encouraged a form of domestic labor arbitrage, with business owners intentionally shifting operations to states with such right-to-freeload laws as a form of union avoidance.⁴⁶

In addition to striking at the heart of unions’ economic survival, right-to-freeload laws were initially championed as a method of preventing Black and white workers from joining together in unions.⁴⁷ Vance Muse, a man identified by his own grandson as a virulent racist and antisemite, seized on the idea and, through his Christian American Association, led or helped in the first fights to pass right-to-freeload laws in Arkansas, Florida, and California.⁴⁸ These divisive laws continued to expand throughout the South during the Jim Crow era, and have more recently expanded to other regions of the country.⁴⁹

After Taft-Hartley, there has been little in the way of legislative labor reform.⁵⁰ In 1959, Congress passed the Landrum-Griffin Act, which primarily sought to regulate internal union governance in response to union corruption scandals.⁵¹ Landrum-Griffin also altered the Taft-Hartley amendments by banning agreements prohibiting employers from handling goods from other companies⁵² and further limiting other secondary activity. The practical legacy of Landrum-Griffin exists essentially in the tug-of-war

⁴³ Otherwise known as “right-to-work” laws. This is, of course, a misnomer because there is virtually no public record of workers losing a job (and thus their “right to work”) for refusing to pay fair-share fees to cover the cost of collective bargaining.

⁴⁴ 29 U.S.C. § 164(b).

⁴⁵ 29 U.S.C. § 159(a).

⁴⁶ See Tami J. Friedman, *Capital Flight, “States’ Rights,” and the Anti-Labor Offensive After World War II*, in *THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION* 79, 91 (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2016).

⁴⁷ See Michael Pierce, *Vance Muse and the Racist Origins of Right-to-Work*, AM. CONST. SOC’Y: EXPERT FORUM (Feb. 22, 2018), <https://www.acslaw.org/expertforum/vance-muse-and-the-racist-origins-of-right-to-work>, [<https://perma.cc/6T34-H8N4>].

⁴⁸ *Id.*

⁴⁹ See *THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION* xii (Nelson Lichtenstein & Elizabeth Tandy Shermer eds., 2016).

⁵⁰ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1535 (2002).

⁵¹ 29 U.S.C. § 401.

⁵² Such agreements are so-called “hot cargo” agreements. 29 U.S.C. § 158(e).

it gave rise to over how onerous the various reporting requirements should be, including employers' obligation to report funds spent on union-busting consultants (or, "persuaders").⁵³ Since Landrum-Griffin, "the text of the NLRA has remained virtually untouched."⁵⁴

C. *Judicial and Administrative Doctrine*

Taft-Hartley and Landrum-Griffin are not the only ways in which union rights have eroded over the years. Several judicial and administrative decisions have made it harder to form unions or limited the ways in which unions can advocate for their members. Illustrative examples from several key areas will be discussed below.

The NLRB retains a substantial amount of power to set or shift federal labor policy unless expressly foreclosed by specific statutory or judicial authority.⁵⁵ And because NLRB leadership is made up of political appointees, labor law tends to shift drastically depending on which party controls the White House.⁵⁶ Thus, legislative reform is necessary to combat these types of wild swings in NLRB precedent and prevent political appointees who are hostile to workers' rights from undermining the purpose and enforcement of the NLRA.⁵⁷

One early Board decision proved crucial in developing the current framework for forming a union. In the early days of the Wagner Act, the NLRB was content to certify unions as workers' "exclusive representative" without a formal election.⁵⁸ The Board accepted a variety of objective evidence to demonstrate a majority of workers supported unionization including "signed authorization cards, membership applications, petitions, affidavits of membership, signatures of employees receiving strike benefits from a union, participation in a strike called by a union, and employee testimony at the hearing."⁵⁹ Senator Wagner conceived of union certification as "nothing

⁵³ See John Logan, *Union Financial Reporting and Disclosure under the LMRDA: A Comparison of the Bush and Obama Administrations*, in *ADVANCES IN INDUSTRIAL AND LABOR RELATIONS* 29, 30 (David Lewin & Paul J. Gollan eds., vol. 21, 2015). ("Over the past few decades, the Office of Labor-Management Standards (OLMS) has become one of the most controversial and politicized divisions of the Department of Labor (DOL).")

⁵⁴ Estlund, *supra* note 50, at 1535.

⁵⁵ Mozart G. Ratner, *Policy-Making by the New Quasi-Judicial NLRB*, 23 U. CHI. L. REV. 12, 19 (1955).

⁵⁶ See generally William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015).

⁵⁷ See, e.g., CELINE McNICHOLAS, MARGARET POYDOCK & LYNN RHINEHART, ECON. POL'Y INST., UNPRECEDENTED: THE TRUMP NLRB'S ATTACK ON WORKERS' RIGHTS (2019), <https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/>, [<https://perma.cc/96V6-T5MN>].

⁵⁸ Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 507 (1993).

⁵⁹ *Id.*

but an investigation, a factual determination of who are the representatives of employees,” and the Board appeared to agree.⁶⁰

Business, however, did not, and the Board eventually yielded to this pressure.⁶¹ In *Cudahy Packing Co.*,⁶² a decision that marked a decisive re-orientation of the law, the Board refused to certify the United Packinghouse Workers of America, CIO, Local 21 despite having membership cards signed by 147 of the 157 employees at a Denver-based meatpacking plant.⁶³ This decision presaged the shift away from union formation as the free choice of workers toward an unbalanced competition between employer and employee to win a political-style election.⁶⁴

Ultimately, the Supreme Court ruled in *Linden Lumber Div., Summer & Co. v. NLRB* that, absent unfair labor practices sufficient to make holding a fair election impossible, employers are free to ignore objective evidence of union support and demand an election be held before being required to bargain with the union.⁶⁵ Despite a stated commitment to maintain strict “laboratory conditions” under which an election is conducted,⁶⁶ experience has proven that, by favoring NLRB elections as the overwhelming preference for union certification, the Board and Court helped foster intense campaigns between employers and employees. During these campaigns, employers can, and typically do, exert extreme pressure on employees to vote against the union by sowing fear and doubt about the effects of unionization⁶⁷—so much so, that, in a 1984 congressional hearing, witnesses from the labor movement testified that the Board “no longer represents an instrument to protect the rights of the workers”⁶⁸ and is “a scar on our tradition of government and a threat to the quality of life for all Americans.”⁶⁹

In addition to erecting barriers to union formation, the Board and Court have limited the subjects over which employers may be required to bargain and allowed employers greater latitude to avoid unions in the name of “entrepreneurial control.”⁷⁰ In 1958, the Supreme Court created a distinction between subjects over which employers are required to bargain and those in which bargaining is merely permissible.⁷¹ Mandatory subjects are those out-

⁶⁰ *Id.* at 533.

⁶¹ *Id.* at 511.

⁶² 13 N.L.R.B. 526 (1939).

⁶³ See Becker, *supra* note 58, at 510–11.

⁶⁴ *Id.* at 549.

⁶⁵ 419 U.S. 301, 303 (1974).

⁶⁶ See Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

⁶⁷ See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, HARV. L. REV. 1769, 1777–78 (1983).

⁶⁸ *Oversight Hearings on the Subject “Has Labor Law Failed”: Joint Hearing Before the Subcomm. on Lab.-Mgmt. Rels. of the Comm. on Educ. & Lab., and the Manpower & Hous. Subcomm. of the Comm. on Gov't Operations*, 98th Cong. 2 (1984) (statement of Henry Nicholas, President, National Union of Hospital & Health Care Employees, AFL-CIO).

⁶⁹ *Id.* (statement of John Sweeney, International President, Service Employees International Union, AFL-CIO).

⁷⁰ *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964).

⁷¹ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

lined in Section 158(d) of the Wagner Act, specifically, “wages, hours, and other terms and conditions of employment.”⁷² Anything outside of these core terms is permissive, and a party may not insist on the inclusion of permissive terms in a collective bargaining agreement.⁷³

By creating this mandatory/permissive dichotomy, the Court invited extensive ad hoc litigation over which terms and conditions of employment are sufficient to be considered mandatory subjects. Furthermore, it began the carving-out of an ill-defined space for unilateral employer action based on amorphous concepts like “entrepreneurial control” and “unencumbered decision making.”⁷⁴ In doing so, courts exempted from the bargaining process a number of business and organizational practices that impact the conditions, and indeed the very existence, of work.

Perhaps the worst run of cases resulting from this distinction are those in which an employer exercises its entrepreneurial control to make business decisions that impact workers’ livelihoods by subcontracting, closing, or relocating operations. The first of the major cases in this line of inquiry, *Fibreboard Corp. v. NLRB*, offered some hope in finding that the decision to subcontract a portion of an employer’s work is a mandatory subject of bargaining.⁷⁵ However, the Court was careful to note that its decision did not “encompass other forms of ‘contracting out’ or ‘subcontracting’ which arise daily in our complex economy,”⁷⁶ and a concurring opinion from Justice Stewart attempted to further limit the holding.⁷⁷

The Court later addressed the question of whether the decision to close part of a business is a mandatory subject of bargaining.⁷⁸ To answer this question, the Court gave primacy to “an employer’s need for unencumbered decision-making” and attempted to balance whether “the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”⁷⁹ Thus, the Court held, “deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision,” and “that the decision itself is not part of Section 8(d)’s ‘terms and conditions,’ over which Congress has mandated bargaining.”⁸⁰

Under the related legal doctrine involving so-called “runaway shops”—that is, when an employer transfers work from a unionized facility

⁷² 29 U.S.C. § 158(d).

⁷³ *Borg-Warner*, 356 U.S. at 349.

⁷⁴ See *Fibreboard Corp.*, 379 U.S. at 203, 223; see also *infra* note 78.

⁷⁵ See *Fibreboard Corp.*, 379 U.S. at 203.

⁷⁶ *Id.* at 215.

⁷⁷ *Id.* at 217–26.

⁷⁸ *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981). The Court previously held that an employer may close an entire business, even if motivated entirely by antiunion animus. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 273–74 (1965).

⁷⁹ *First Nat’l Maint. Corp.*, 452 U.S. at 679.

⁸⁰ *Id.* at 686 (citations omitted).

to another facility resulting in layoffs of the unionized workforce⁸¹—workers receive slightly more deference, but ultimately to no avail. An employer generally may not relocate work solely to avoid its obligations to a union or labor costs associated with unionization.⁸² However, employers are free to make such relocation decisions if motivated by other economic and/or business concerns and increased labor costs as a result of unionization may appropriately be one of those concerns.⁸³ Any inquiry into employer motivation is an inherently difficult exercise, and allowing employers to mix anti-union concerns with other business justifications only makes such an exercise more difficult.

The practical effect of these cases and their progeny is to create a cloud of uncertainty whenever workers wish to unionize for fear that the employer might close down or go elsewhere. Workers cannot be truly free to form unions when faced with the potential choice between a job and no union or a union and no job.

A number of other Supreme Court rulings further limited workers' rights under the NLRA in various ways. For example, the Court blessed the permanent replacement of workers striking to win economic gains at the bargaining table;⁸⁴ permitted employers to lockout workers to pressure them during bargaining (an “offensive lockout”);⁸⁵ erased protections for undocumented workers;⁸⁶ and allowed employers to effectively preempt the NLRA by requiring employees, as a condition of employment, to sign arbitration agreements banning collective legal action.⁸⁷

D. Past Efforts for Reform

The dire need for pro-worker labor law reform is not new. A 1984 report published by the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor begins simply, “[l]abor law has

⁸¹ See Jan W. Sturmer, *An Analysis of the NLRB's “Runaway Shop” Doctrine in the Context of Mid-Term Work Relocation Based on Union Labor Costs*, 17 HOFSTRA LAB. & EMP. L.J. 289, 289–290 (2000).

⁸² *Id.* at 296.

⁸³ *Id.* at 296–298; see generally *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991).

⁸⁴ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

⁸⁵ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 313 (1965).

⁸⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

⁸⁷ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). Furthermore, outside of the Wagner Act context, the Court has limited union rights for public-sector workers and farmworkers protected by state law. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (overturning decades-old precedent and holding that public-sector union fair share fees are unconstitutional under the First Amendment); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (holding that a California regulation allowing union organizers limited, temporary access to workers on the worksite in order to effectuate state labor law is a per se taking under the Fifth and Fourteenth Amendments).

failed.”⁸⁸ Yet over the past eighty-six years and counting since the Wagner Act passed, pro-worker reform has remained elusive.

That is not to say there have not been efforts. In 1977, the House of Representatives passed the Labor Reform Act, which, among other things, would have shortened the timeline for union elections (thereby reducing employers’ opportunities to interfere), provided union organizers access to the workplace, and enhanced remedies in cases of anti-union discrimination.⁸⁹ The bill passed the House of Representatives but died in the Senate after six attempts to overcome a filibuster.⁹⁰

President Clinton threw his support behind a bill that would have protected striking workers from being replaced permanently, but that bill, too, died in the face of a Senate filibuster.⁹¹ President Clinton also created the Commission for the Future of Worker-Management Relations to examine potential reforms.⁹² Known alternatively as the Dunlop Commission after its chair, John Dunlop, the body deliberated for over a year before releasing a final report.⁹³ The report investigated and recommended new ways for institutions to enhance workplace productivity, changes in collective bargaining to enhance cooperation and reduce conflict and delay, and methods to increase the extent to which workplace problems are resolved by the parties.⁹⁴ Indeed, a version of many of these recommendations are included in the PRO Act, such as requiring the NLRB to seek injunctions in cases of discrimination during election campaigns, a dispute resolution system to ensure a first contract, and strong standards for defining “employee” and “joint employer” under the NLRA.⁹⁵ Republicans swept into power in the House after the 1994 elections, and the recommendations in the report were never taken up by Congress.

The most recent attempt at labor law reform before the PRO Act was also the closest to success. While the Employee Free Choice Act (“EFCA”)

⁸⁸ H. COMM. ON EDUC. & LAB., 98TH CONG., *THE FAILURE OF LABOR LAW—A BETRAYAL OF AMERICAN WORKERS I* (Comm. Print 1984).

⁸⁹ Labor Reform Act, H.R. 8410, 95th Cong. (1977); see also Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1163–64 (2011); Estlund, *supra* note 50, at 1540.

⁹⁰ Estlund, *supra* note 50, at 1540.

⁹¹ See Catherine S. Manegold, *Senate Republicans Deal a Major Defeat to Labor*, N.Y. TIMES (July 13, 1994), <https://www.nytimes.com/1994/07/13/us/senate-republicans-deal-a-major-defeat-to-labor.html> [<https://perma.cc/QYE2-YCV5>].

⁹² SAMUEL ESTREICHER, *THE DUNLOP REPORT AND THE FUTURE OF LABOR LAW REFORM*, 12 THE LAB. LAW. 117, 120 (1996). I served as an aid to the commission during my third year of law school and as its staff attorney after I graduated until its work was completed.

⁹³ U.S. DEP’T OF LABOR, *DUNLOP COMM’N ON THE FUTURE OF WORKER-MGMT. REL., FINAL REPORT 74* (1994), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace [<http://perma.cc/J5Z6-6ZPL>].

⁹⁴ *Id.* at 8–12.

⁹⁵ *Id.*; see also discussion *infra* Part IV.

contained a few provisions similar to those in the PRO Act,⁹⁶ the centerpiece of the legislation took a decidedly different form by codifying the “card check” procedure for union certification.⁹⁷ That is, if a union were to present signed authorization cards from the majority of workers in a proposed bargaining unit, the NLRB would be required to certify that union without forcing workers to go through the onerous election process. Although this bill passed the House in 2007, it died in the Senate after a failed vote to overcome the filibuster.⁹⁸

When President Obama took office with a House majority and, soon after, sixty Democratic votes in the Senate,⁹⁹ many hoped that the EFCA might become a reality. However, even amongst Democrats, getting sixty votes to support the bill proved difficult and ultimately led to the card check provisions being stripped from the bill.¹⁰⁰ Even then, the Senate remained tied up in the debate over the Patient Protection and Affordable Care Act. With Senator Ted Kennedy’s death in August of 2009, and a Republican winning the special election to fill his seat, a host of policy priorities, including the EFCA, were never realized.¹⁰¹

These prior attempts at labor law reform prove two interrelated points: (1) that any pro-worker labor law reform will face significant opposition and be incredibly difficult to pass; and (2) that the filibuster has been, and will continue to be, one of the biggest barriers to achieving reform. What was true in 1977, 1994, and 2007–2010 remain true today. The PRO Act has twice passed the House of Representatives but has not even come up for a vote in the Senate. While it may not guarantee passage,¹⁰² eliminating the filibuster would be a monumental step toward progress for workers.

⁹⁶ Employee Free Choice Act of 2007, H.R. 800, 110th Cong. §§ 3–4 (2007). Similar provisions included mandatory arbitration in first contract negotiations and civil penalties for unfair labor practices.

⁹⁷ *Id.* § 2.

⁹⁸ DAVID KUSNET & ROSS EISENBREY, ECON. POL’Y INST., *THE EMPLOYEE FREE CHOICE ACT: QUESTIONS AND ANSWERS* (2009), <https://www.epi.org/publication/ib249> [<https://perma.cc/HWK7-4TPT>].

⁹⁹ Senators Sanders and Lieberman were Independents but caucused with Democrats.

¹⁰⁰ Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES (July 16, 2009), <https://www.nytimes.com/2009/07/17/business/17union.html> [<https://perma.cc/MPR5-CNCL>].

¹⁰¹ Jeanne Cummings, *Labor Helps Kill Its Own Top Priority*, POLITICO (Jan. 26, 2010), <https://www.politico.com/story/2010/01/labor-helps-kill-its-own-top-priority-032041> [<https://perma.cc/SE7F-TYLP>].

¹⁰² The PRO Act currently has forty-seven Senate cosponsors. See Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. Cosponsor list available at: <https://www.congress.gov/bill/117th-congress/senate-bill/420/cosponsors?searchResultViewType=expanded> [<https://perma.cc/SR9D-PKRQ>].

III. WHY UNIONS MATTER: EFFECTS OF COLLECTIVE BARGAINING IN THE WORKPLACE AND IN SOCIETY

We know that employers will mount aggressive anti-union campaigns to intimidate (employers would undoubtedly say “persuade”) their employees into voting against forming a union.¹⁰³ Therefore, in any organizing campaign, organizers must justify this difficult and stress-inducing process by demonstrating the benefits of a union to the workers involved.¹⁰⁴ Similarly, if we are to overcome the overwhelming campaign against labor law reform in the United States, we must also show the benefits of unionization on a macroscale.

To be sure, no amount of substantive proof or intellectual argument will convince many members of the business community and their lobbyists to reverse course and support the PRO Act.¹⁰⁵ On a fundamental level, the PRO Act seeks to return power from corporations to workers, and that is itself enough to garner significant opposition.¹⁰⁶ But the change in existing power structures is what makes the PRO Act so vital. Overcoming this fierce opposition will take an upwelling of worker organizing—both in terms of forming unions and workers telling their stories—on a scale that does not currently exist. It is incumbent on those of us who support the PRO Act to demonstrate to the public at-large the benefits of collective action and workplace democracy. Helpful to this endeavor is that the many benefits of union membership are proven empirically.

A. *Individual Benefits: Protection from At-Will Employment, Increased Employee Benefits and Workplace Safety, and Higher Wages*

At the individual level, a union offers protections for workers that they rarely enjoy in the absence of a collective bargaining agreement. A hallmark example of this is protection against arbitrary discipline and termination. The predominant employment regime in the United States is at-will employ-

¹⁰³ McNICHOLAS, *supra* note 17, at 5; *see also* KATE BRONFENBRENNER, ECON. POL'Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING (2009), <https://www.epi.org/publication/bp235/> [<https://perma.cc/P4WN-PGFG>].

¹⁰⁴ Indeed, the deck is so stacked against workers that many unions have made the strategic decision to forgo the NLRB election process in favor of waging campaigns for voluntary recognition. For a discussion of the decreasing participation in NLRB elections, *see* LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS (2020), <https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/> [<https://perma.cc/QMV3-6MKW>].

¹⁰⁵ *See* Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985) (“The intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.”).

¹⁰⁶ The deceptively named “Coalition for a Democratic Workplace” led a letter signed by hundreds of its member organizations in opposition to the PRO Act. *See Letter from the Coalition for a Democratic Workplace*, COAL. FOR A DEMOCRATIC WORKPLACE (Mar. 4, 2021), http://myprivateballot.com/wp-content/uploads/2021/03/CDW-PRO-Act-Opposition-Letter_March-4_Update-1.pdf [<https://perma.cc/5CCC-ZGD3>].

ment.¹⁰⁷ This means, essentially, that an employer may fire an employee for a good reason, a bad reason, or no reason at all, with the exception of a specific set of prohibited reasons enumerated in worker protection laws.¹⁰⁸ In practical terms, however, an employer's ability to fire an employee for no reason at all effectively eviscerates statutory protections because it requires no justification for an adverse employment action. Thus, an employer is free to fire anyone they wish so long as that reason remains unsaid. Workers only stand a chance in proving discrimination where there is "smoking gun" evidence of animus based on a protected class or activity or sufficient evidence of pretext or disparate impact.¹⁰⁹

The at-will regime creates a significant power imbalance where workers labor under a perpetual state of precarity as employers control their fates and livelihoods. This precarity acts as a disincentive for workers to assert themselves on the job for fear of upsetting management and risking their livelihoods. As a result, worker power is diminished, union density is artificially suppressed, and the unequal system perpetuates itself. As in other areas, unions act to interrupt this unjust system and tilt the balance of power toward workers. A standard clause in collective bargaining agreements requires just cause for termination and creates grievance procedures allowing workers to dispute arbitrary adverse employment decisions by management.¹¹⁰

In addition to just cause protections, strong unions have a positive impact on other individual protections like access to health care, paid leave, and improved workplace safety.¹¹¹ According to the Department of Labor's Bureau of Labor Statistics, ninety-six percent of union workers have access

¹⁰⁷ Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4 (2010). Notable exceptions include Montana, which adopted a just cause standard of employment in 1987, MONT. CODE ANN. §§ 39-2-901–39-2-915 (2021), and New York City, which recently passed a law instituting just cause protections for fast food workers, see Kimiko de Freytas-Tamura, *'No One Should Get Fired on a Whim': Fast Food Workers Win More Job Security*, N.Y. TIMES, (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/nyregion/nyc-fast-food-workers-job-security.html> [<https://perma.cc/L3CQ-HLV8>].

¹⁰⁸ For example, the Wagner Act prohibits firing employees for engaging in union organizing or other protected concerted activity. 29 U.S.C. §§ 157–58. Title VII of the Civil Rights Act prohibits adverse employment decisions on the basis of race, color, sex, religion, or national origin. 42 U.S.C. § 2000e–2(a).

¹⁰⁹ Importantly, for gig workers and others classified (whether correctly or not) as independent contractors, many of these rights simply do not apply. Further, the National Labor Relations Act and Fair Labor Standards Act both exclude farmworkers and domestic workers. These ongoing exclusions are widely understood to result from the appeasement of racist Senators who refused to grant rights to Black workers. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 114, 121 (2011).

¹¹⁰ Richard Mittenenthal & M. David Vaughn, *Just Cause: An Evolving Concept*, in ARBITRATION 2006 TAKING STOCK IN A NEW CENTURY 32, 33 (Stephen F. Befort & Paul F. Gerhart eds., 2006) ("The term 'just cause' has been embedded in most collective bargaining agreements for generations.") (footnote omitted).

¹¹¹ See CELINE McNICHOLAS, LYNN RHINEHART, MARGARET POYDOCK, HEIDI SHIERHOLZ & DANIEL PEREZ, ECON. POL'Y INST., WHY UNIONS ARE GOOD FOR WORKERS—ESPECIALLY IN A CRISIS LIKE COVID-19 (2020), <https://www.epi.org/publication/why-unions-are-good-for->

to employer-provided health insurance compared to only sixty-nine percent of their nonunion counterparts.¹¹² Furthermore, the cost of this coverage is cheaper for union workers. Employers of union workers contribute seventy-nine percent of the premium for family health insurance plans; employers of nonunion workers contribute only sixty-four percent of such premiums.¹¹³ And union workers fare better when they get sick: ninety-three percent of union workers have paid sick leave whereas only seventy-five percent of nonunion workers have access to similar leave.¹¹⁴ Because employers are required to negotiate with unions over working conditions,¹¹⁵ employees have a formal role in developing appropriate workplace safety standards for their own protection. Furthermore, safety standards in union workplaces tend to be more scrutinized. One study, examining the different outcomes between close union election wins and close election losses, found a notable increase in “inspection rates, violations cited, and penalties assigned” when the union won the election.¹¹⁶

These individual benefits, when aggregated, have a massive beneficial effect on the economy as a whole. According to one estimate made prior to the passage of the Affordable Care Act, the lack of health care coverage for workers causes the United States to lose as much as \$248 billion a year.¹¹⁷ Productivity loss can derive from workers who have to take time off for their own health or a loved one’s health. It can also arise from an employee’s health condition prohibiting them from working to their fullest extent.¹¹⁸ While healthcare costs bring the U.S. economic output down significantly, there are losses for local economies as well. Uninsured workers often have

workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safe ty-and-wages [https://perma.cc/Z2DG-VUHN].

¹¹² U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020 27 (2020), <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf> [https://perma.cc/5QJ4-VFMT].

¹¹³ *Id.* at 35.

¹¹⁴ *Id.* at 119.

¹¹⁵ 29 U.S.C. § 158(d).

¹¹⁶ Aaron Sojourner & Jooyoung Yang, *Effects of Union Certification on Workplace-Safety Enforcement: Regression-Discontinuity Evidence*, INDUS. & LAB. REL. REV. 2 (2020). Studies of the effects of unions on workplace injury incidence are mixed. *Id.* The authors of this study admit they had “access only to a flawed measure of injuries” and suggest that unions may increase “reported injuries” that might otherwise go unaccounted for in official statistics. *Id.* at 27; see also David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 21 (1991); David Weil, *Building Safety: The Role of Construction Unions in the Enforcement of OSHA*, 13 J. LAB. RES. 121, 121 (1992).

¹¹⁷ PETER HARBAGE & BEN FURNAS, CTR. FOR AM. PROGRESS, THE COST OF DOING NOTHING ON HEALTH CARE (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/05/pdf/cost_doing_nothing.pdf?_ga=2.205697365.713379401.1634678556-1932745393.1634678556 [https://perma.cc/6LB8-GH8G].

¹¹⁸ See KAREN DAVIS, SARA R. COLLINS, MICHELLE M. DOTY, ALICE HO & ALYSSA L. HOLMGREN, COMMONWEALTH FUND, HEALTH AND PRODUCTIVITY AMONG U.S. WORKERS 1–4 (2005), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2005_aug_health_and_productivity_among_u_s_workers_856_da_vis_hlt_productivity_usworkers.pdf [https://perma.cc/3J6K-V87Y].

to use what would otherwise be disposable income supporting local businesses to pay for out-of-pocket medical bills.¹¹⁹

Finally, one of the most consistent individual benefits a union provides is the union wage premium. Studies have shown that, concomitant with the decline in union membership, stagnant wages persist despite record productivity and corporate profits.¹²⁰ When density was highest, wages and productivity had a strong positive correlation.¹²¹ But as density declined, a yawning gap in this trend emerged and workers' wage increases decoupled from their productivity increases.¹²²

However, union members over the last several decades have enjoyed a consistent ten to twenty percent wage premium compared to their nonunion counterparts.¹²³ In 2020, the median union worker made \$186 per week (or \$9,672 per year) more than the median nonunion worker.¹²⁴ A common theme in anti-union propaganda is the cost of union dues.¹²⁵ The varying nature in which local union dues are calculated makes it difficult to estimate median dues for workers across the United States and compare against the median union wage premium. However, we need only look to anti-union messaging for comparison. For example, in 2019, Delta Airlines campaigned against the union in part by claiming that the dues cost roughly \$700 per year and suggesting workers buy a video game console with that money instead.¹²⁶ Even assuming this is correct, the median union worker would gain almost \$9,000 per year by joining the union instead of buying the video game console.

Furthermore, nonunion workers also have higher wages in areas with high union density.¹²⁷ Somewhat curiously, studies have found that this wage

¹¹⁹ See Michael E. Chernew, *The Economics of Medicaid Expansion*, HEALTH AFFS. BLOG (Mar. 21, 2016), <https://www.healthaffairs.org/doi/10.1377/hblog20160321.054035/full> [<https://perma.cc/6DP4-5Z3J>].

¹²⁰ *The Productivity–Pay Gap*, ECON. POL'Y INST. (Aug. 2021), <https://www.epi.org/productivity-pay-gap> [<https://perma.cc/7HZH-JRB5>]; see also Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2020.

¹²¹ See *The Productivity–Pay Gap*, *supra* note 120.

¹²² *Id.*

¹²³ Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q. J. ECON. 1325, 1326 (2021).

¹²⁴ See Economic News Release, Bureau of Lab. Stat., Union Members Summary (Jan. 22, 2021), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/2MTK-NV9J>].

¹²⁵ See GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING (2020), <https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing> [<https://perma.cc/DF45-DVLY>].

¹²⁶ Eli Rosenberg, *Delta Told Workers to Spend on Video Games and Beer Instead of Union Dues. It Didn't Go Well*, WASH. POST (May 10, 2019), <https://www.washingtonpost.com/business/2019/05/10/delta-told-workers-save-up-football-beer-video-games-instead-union-it-didnt-go-well> [<https://perma.cc/63PQ-E5EN>].

¹²⁷ See DAVID MADLAND & ALEX ROWELL, CTR. FOR AM. PROGRESS, UNIONS HELP THE MIDDLE CLASS, NO MATTER THE MEASURE (2016), <https://www.americanprogressaction.org/>

premium remains consistent, even as union density increases and decreases.¹²⁸ This fact suggests perhaps that workers who choose to act collectively remain a powerful force for setting wages at their worksites, even as macro inequality and overall union membership fluctuates.

B. Systemic Benefits: Reducing Racial, Gender, Economic, and Political Inequality

But in addition to these important individual benefits, unions help level the playing field across the entire economy by fighting against racial and gender inequality, narrowing the income inequality gap, and providing workers with a collective voice in the political arena to serve as a counterbalancing power against the influence of large corporations, the wealthy elite, and the interest groups that cater to them.

Strong unions help combat systemic racism by closing racial pay and wealth gaps.¹²⁹ The union wage premium for nonwhite workers outpaces the wage premium for white workers.¹³⁰ In terms of wealth, nonwhite union members have, on average, almost five times that of nonwhite, nonunion members¹³¹ whereas the wealth gap between white union and nonunion members is much smaller.¹³² Furthermore, there is evidence to suggest that unions actually help improve racial attitudes amongst their members.¹³³ While the history of the labor movement and racial equality has not always been positive, the Civil Rights Era included a strong coalition of labor and civil rights leaders,¹³⁴ and the labor movement has become increasingly di-

issues/economy/reports/2016/06/09/139074/unions-help-the-middle-class-no-matter-the-measure/ [https://perma.cc/BY87-JUP6].

¹²⁸ Farber et al., *supra* note 123, at 1348 (“Card (2001), using CPS data, noted as a puzzle that the union wage premium was surprisingly stable between 1973 and 1993, even as private-sector union density declined by half. Our results, if anything, deepen this puzzle, as we show that the premium remains somewhere between ten and twenty log points over a nine-decade period that saw density . . . increase and then decrease.”) (citing David Card, *The Effect of Unions on Wage Inequality in the US Labor Market*, 54 *INDUS. & LAB. REL. REV.* 296 (2001)).

¹²⁹ See CHRISTIAN E. WELLER & DAVID MADLAND, CTR. FOR AM. PROGRESS, UNION MEMBERSHIP NARROWS THE RACIAL WEALTH GAP FOR FAMILIES OF COLOR (2018), <https://www.americanprogress.org/issues/economy/reports/2018/09/04/454781/union-membership-narrows-racial-wealth-gap-families-color> [https://perma.cc/2S84-VUZ4]. (“The racial wealth gap narrows when union membership increases because the wealth gap between union and nonunion members is greater among those who are nonwhite than among whites.”); see also JOSH BIVENS, LORA ENGAHL, ELISE GOULD, TERESA KROEGER, CELINE McNICHOLAS, LAWRENCE MISHEL, ZANE MOKHIBER, HEIDI SHIERHOLZ, MARNI VON WILPERT, VALERIE WILSON & BEN ZIPPERER, ECON. POL’Y INST., HOW TODAY’S UNIONS HELP WORKING PEOPLE (2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy> [https://perma.cc/U8JT-SH7R].

¹³⁰ BIVENS et al., *supra* note 129.

¹³¹ WELLER & MADLAND, *supra* note 129.

¹³² *Id.*

¹³³ See Paul Frymer & Jacob Grumbach, *Labor Unions and White Racial Politics*, 65 *AM. J. POL. SCI.* 225, 236 (2021).

¹³⁴ *Id.* at 226–27.

verse.¹³⁵ Whether driven by “coalitional incentives” to foster solidarity amongst a diverse constituency, or borne of the political information sharing unions frequently engage in, “union membership is associated with lower racial resentment among whites.”¹³⁶

In the same way that unions help close racial pay gaps, unions also help strengthen pay equity for women.¹³⁷ Women, on average, earn eighty-two percent of what their male counterparts earn.¹³⁸ This pay gap is even wider for Black, Hispanic, and Native women.¹³⁹ However, when women are union members these gaps shrink significantly. Female union members earn ninety-four percent of what their male counterparts earn, and the pay gap for Black women that are union members is even smaller.¹⁴⁰ Even when controlled for factors like education and geography, the wage gap for women union members is smaller.¹⁴¹ While Hispanic women in unions do not fare quite as well as the average, the pay gap is still smaller than their nonunion counterparts.¹⁴²

One explanation for the ability of a union to improve equity outcomes is that in many cases a collective bargaining agreement formalizes and makes transparent much of the process for determining starting pay and pay raises.¹⁴³ This information is available to all members of the bargaining unit—indeed, workers must vote to ratify the agreement before it becomes effective. By formalizing this process, much of the subjective aspect of deci-

¹³⁵ *Id.*

¹³⁶ *Id.* at 233.

¹³⁷ See Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST. (Apr. 3, 2017), <https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap> [<https://perma.cc/X9JQ-GXQ2?type=image>].

¹³⁸ *Id.*

¹³⁹ ROBIN BLEIWEIS, CTR. FOR AM. PROGRESS, QUICK FACTS ABOUT THE GENDER WAGE GAP (2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap> [<https://perma.cc/5NMR-JDD2>]. The data presented here use a binary understanding of gender and do not account separately for transgender, nonbinary, or other gender non-conforming workers. This appears to be an area in need of additional research. One study from 2008 found that trans women reported a decrease in wages of roughly one-third after transitioning, while trans men reported a slight increase in wages. See Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. ECON. ANALYSIS & POL'Y 1, 18–19 (2008).

¹⁴⁰ See Gould & McNicholas, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ This is, of course, not uniformly true and depends upon the structure of agreement workers and management choose to implement. One prominent example of this is unionized professional sports leagues. These leagues each have collective bargaining agreements that cover many terms and conditions of employment, including salary minimums, but leave open to players the ability to negotiate their individual pay based on skill, experience, performance, marketability, etc. See Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1236 (2012). Thus, even unions representing the highest paid workers have equalizing effects within their group, because they focus on ensuring minimum wages and benefits for the rank-and-file even as they allow stars to earn the stratospheric sums they would likely earn regardless of whether the larger group were unionized.

sion making can be removed and biases—whether conscious or not—may have less of an impact.

In addition, studies consistently find a strong negative correlation between union membership and economy-wide income and wealth inequality.¹⁴⁴ Simply put, the more union members, the less inequality in society. When union membership declines, inequality increases. One study from the Economic Policy Institute perfectly encapsulates this relationship.¹⁴⁵ It found that as union density rose in the early to mid-1900s, the share of wealth going to the top ten percent declined.¹⁴⁶ Then, as union density fell—starting in the 1960s and accelerating in the 1970s and 80s as the union-busting industry matured¹⁴⁷—income inequality exploded.¹⁴⁸ During the years in which density was highest, union members tended to be significantly less educated than nonunion members.¹⁴⁹ Similarly, in the same period, union members were more likely to be nonwhite.¹⁵⁰ Thus, as density increased and conferred the union wage premium on traditionally disadvantaged and/or lower-wage groups, inequality decreased.¹⁵¹

¹⁴⁴ Farber et al., *supra* note 123, at 1328–30; *see also* Stansbury & Summers, *supra* note 119, at 21; HEIDI SHIERHOLZ, ECON. POL'Y INST., WORKING PEOPLE HAVE BEEN THWARTED IN THEIR EFFORTS TO BARGAIN FOR BETTER WAGES BY ATTACKS ON UNIONS (2019), <https://www.epi.org/publication/labor-day-2019-collective-bargaining> [<https://perma.cc/5TJJ-38G6>]; Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 514 (Aug. 1, 2011). For a more fulsome review of the literature in this area, *see* David Card, Thomas Lemieux & W. Craig Riddell, *Unions and Wage Inequality*, 25 J. Lab. Rsch. 519, 526 (2004).

¹⁴⁵ *See* SHIERHOLZ, *supra* note 144; *see also infra* Figure 1, reproduced with permission from the Economic Policy Institute.

¹⁴⁶ SHIERHOLZ, *supra* note 144.

¹⁴⁷ MISHEL ET AL., *supra* note 104.

¹⁴⁸ SHIERHOLZ, *supra* note 144.

¹⁴⁹ *See* Farber et al., *supra* note 123, at 1325.

¹⁵⁰ *See id.* at 1327.

¹⁵¹ *See id.* at 1328.

FIGURE 1:

As union membership declines, income inequality rises

Union membership and share of income going to the top 10%, 1917–2017



Sources: Data on union density follows the composite series found in Historical Statistics of the United States; updated to 2017 from unionstats.com. Income inequality (share of income to top 10%) data are from Thomas Piketty and Emmanuel Saez, "Income Inequality in the United States, 1913–1998," *Quarterly Journal of Economics* 118, no. 1 (2003), and updated data from the Top Income Database, updated March 2019.

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In the recent era, however, changes in tax law incentivized CEOs and other top management to seek even higher pay by capturing a larger share of corporate profits.¹⁵² At the same time, eroding labor law weakened workers' power and enabled this rent-seeking behavior by limiting unions' ability to capture a fair share of revenues for workers.¹⁵³ Additional evidence suggests that increasing shareholder primacy is another force for inequality as it causes greater efforts to reduce labor costs and has further shifted rent sharing from workers to capital.¹⁵⁴

The positive wealth effects of union membership are intergenerational. One recent study found that children in union households see greater eco-

¹⁵² Mark Stelzner, *The New American Way—How Changes in Labour Law are Increasing Inequality*, 48 *INDUS. RELS. J.* 231, 233 (2017) (citing Thomas Piketty, Emmanuel Saez & Stefanie Stantcheva, *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 *AM. ECON. J.: ECON. POL'Y* 230, 231 (2014)).

¹⁵³ Stelzner, *supra* note 152, at 235.

¹⁵⁴ See Stansbury & Summers, *supra* note 120, at 10.

conomic mobility than those in nonunion households.¹⁵⁵ When controlling for a variety of factors like race and industry, researchers found union density to be “a significant predictor of economic mobility.”¹⁵⁶ The authors posit several potential explanations for why this may be true: that union members tend to “pass on” the union wage premium to their children,¹⁵⁷ that union jobs tend to be more stable than nonunion jobs, that union workers tend to have better access to healthcare than nonunion workers, or that unions generally advocate for policies that benefit all working people.¹⁵⁸

The effect of unions on political equality is an area of intense study.¹⁵⁹ One recent study found that in House districts with a strong union presence, legislators tend to be significantly more responsive to the needs of the working class.¹⁶⁰ Specifically, “moving from a district with median levels of union density to one at the 75th percentile increases the responsiveness of legislators to low-income preferences by almost 10 percentage points, while it decreases responsiveness to high-income preferences by about 7 points.”¹⁶¹ Another study found the wealthy elite and organized interest groups tend to have significant impacts on public policymaking, while “ordinary citizens . . . have little or no independent influence on policy at all.”¹⁶² That study further found that labor unions, in particular, tend to best represent “average citizens.”¹⁶³ This is likely because unions are democratic organizations primarily made up of middle and low-wage workers.¹⁶⁴

As discussed herein, unions and union membership convey myriad benefits on workers and our economy. That is why encouraging unionization and fostering an environment in which workers are truly free to form unions is so important. Thus, passing fundamental labor law reform represents the single most important step we can take to realign the balance of power in

¹⁵⁵ See RICHARD FREEMAN, EUNICE HAN, DAVID MADLAND & BRENDAN DUKE, CTR. FOR AM. PROGRESS, *BARGAINING FOR THE AMERICAN DREAM* (2015), <https://www.americanprogress.org/issues/economy/reports/2015/09/09/120558/bargaining-for-the-american-dream> [https://perma.cc/N9KR-NX8P].

¹⁵⁶ *Id.*

¹⁵⁷ Put another way, this reflects the fact that children often make more money when their parents make more money—this effect is called “intergenerational income elasticity.” See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ For a discussion of unions’ effect on “representational inequality,” see Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 168 (2013).

¹⁶⁰ See DANIEL STEGMUELLER, MICHAEL BECHER & KONSTANTIN KÄPPNER, *LABOR UNIONS AND UNEQUAL REPRESENTATION* 24 (2018) (“[O]n average House members are significantly less responsive to the policy preferences of low-income constituents. However, this gap in responsiveness is smaller where unions are stronger, and it decreases significantly where union members are numerous.”).

¹⁶¹ *Id.* at 14.

¹⁶² Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 572 (2014).

¹⁶³ See *id.* at 571.

¹⁶⁴ See ALEXANDRA THORNTON, CTR. FOR AM. PROGRESS, *WHY ALL WORKERS SHOULD BE ABLE TO DEDUCT UNION DUES* 5 (2019).

favor of workers and restore some measure of income and wealth equality in American society.

IV. THE PROTECTING THE RIGHT TO ORGANIZE ACT

In Congress, the PRO Act represents not only the current effort at labor law reform but also the most comprehensive approach at fixing what has befallen the Wagner Act in the last half century. The PRO Act passed in the House of Representatives during the 116th and 117th Congresses, each time on a bipartisan basis.¹⁶⁵ But, as of this writing, the bill remains stalled in the Senate with forty-seven cosponsors, all Democrats.¹⁶⁶

Despite the cries of the PRO Act's opponents that the bill seeks to save "union bosses,"¹⁶⁷ history does not show that fundamental labor law reform protects preexisting unions from change or competition. Indeed, an almost equal amount of the growth in union membership after passage of the Wagner Act was among new unions belonging to the upstart Congress of Industrial Organizations, not the older American Federation of Labor.¹⁶⁸ Similarly, the point of the PRO Act is not to assist or protect unions as they are today, but rather to free workers to organize any unions they wish that best meet their needs.

When examining the PRO Act, one can roughly divvy up its provisions into three categories: improvements to representation election and collective bargaining processes, stronger standards to eliminate loopholes, and the imposition of meaningful penalties for lawbreaking.

A. *Improving Organizing and Collective Bargaining*

"The current procedure for union certification, which involves a secret ballot election following an often-protracted representation campaign, creates a setting that elicits employer coercion of . . . employee choice [about union representation]."¹⁶⁹ The PRO Act includes many provisions to im-

¹⁶⁵ See U.S. House of Representatives, Roll Call Vote No. 50 (116th Cong., 2d Session), <https://clerk.house.gov/Votes/202050> [<https://perma.cc/5LF6-5WQ7>]; U.S. House of Representatives, Roll Call Vote No. 70 (117th Cong., 1st Session), <https://clerk.house.gov/Votes/202170> [<https://perma.cc/UF5M-HJGM>].

¹⁶⁶ Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. (cosponsor list available at: <https://www.congress.gov/bill/117th-congress/senate-bill/420/cosponsors?searchResultViewType=expanded> [<https://perma.cc/HSE5-MSF9>]). Senators Sanders and King are Independents but caucus with Democrats.

¹⁶⁷ *The PRO Act: A Radical Union Boss Wish List*, COMM. ON EDUC. & LAB. REPUBLICANS, <https://republicans-edlabor.house.gov/legislation/pro-act.htm> [<https://perma.cc/7SNJ-9ZC2>].

¹⁶⁸ Freeman, *supra* note 10, at 23 ("Between 1935 and 1942 the AFL gained 2.7 million members compared with a gain of 2.5 million for the CIO.").

¹⁶⁹ Weiler, *supra* note 67, at 1770. Weiler notes that the prior decade brought with it a better understanding of labor law's ineffectiveness. Almost forty years later there still has been no legislative reform.

prove the election process, better facilitate collective bargaining after a union has been certified or recognized, and encourage solidarity amongst workers. A brief, non-exhaustive list of these important provisions include the following:¹⁷⁰ removing the employer as a party to representation proceedings;¹⁷¹ reducing the time it takes from filing a petition to conducting an election;¹⁷² allowing workers to choose the method in which the election is conducted;¹⁷³ prohibiting employers from requiring attendance at meetings where they spread fear and anti-union propaganda;¹⁷⁴ and eliminating employers' ability to gerrymander bargaining units to dilute union support.¹⁷⁵ Furthermore, the PRO Act will do away with "right-to-free-load" laws by allowing unions to negotiate fair share agreements to recoup the costs associated with representing an entire bargaining unit.¹⁷⁶

This essay focuses on two changes to the law that, by addressing certain matters at the worksite level, also serve a larger purpose of altering the power dynamic between workers and employers across large swaths of the economy. These changes include providing mandatory arbitration in initial contract negotiations and greater protections for the right to withhold labor.

If one purpose of the Wagner Act was to encourage collective bargaining, the fact that by the 1990s nearly half of all newly unionized workers never achieve a signed collective bargaining agreement might be its greatest failure.¹⁷⁷ This occurred for a simple reason: there is no legal requirement for employers to agree to a contract. Employers must only "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder"¹⁷⁸

This standard allows employers to appear to negotiate in good faith, while never actually conceding on a single point. The end result, if employers so choose, is a system in which all of the effort workers go through to form their union never bears any fruit. This further depresses union activity, because it gives the appearance that forming a union is futile, particularly in the face of overwhelming employer opposition.

¹⁷⁰ The risk of such a list is that leaving out a particular provision may imply that it is not important. This list is for the sake of brevity, else the entire bill would be recited in the body of this paragraph.

¹⁷¹ Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. § 105(1)(A).

¹⁷² *Id.* § 105(1)(E).

¹⁷³ *Id.* § 105(1)(A).

¹⁷⁴ *Id.* § 104(3).

¹⁷⁵ *Id.* § 105(1)(A).

¹⁷⁶ *Id.* § 111.

¹⁷⁷ MISHÉL ET AL., *supra* note 104.

¹⁷⁸ 29 U.S.C. § 158(d) (2018); *see also* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952) ("And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").

The PRO Act does away with this dynamic to ensure that in all cases, a newly formed union will get a first contract in a timely manner.¹⁷⁹ Specifically, failure to reach an agreement within ninety days after the commencement of bargaining triggers an escalating system of mediation and binding arbitration to help settle disagreements and put a contract in place in about six months. By guaranteeing a first contract, the PRO Act returns power to workers at the bargaining table in the particularly sensitive time after a new union is formed.

Solidarity is the backbone of the labor movement and the strike best embodies this principle. Workers rarely choose to withhold their labor lightly, and their decision deserves respect. But more than a symbolic expression of solidarity, the strike is the strongest countervailing power workers possess¹⁸⁰ and is a crucial tactic to exert pressure on recalcitrant employers.

The PRO Act will reinvigorate the right to strike in several ways. Perhaps most importantly, it prohibits employers from permanently replacing workers who choose to engage in their right to strike.¹⁸¹ By preserving workers' livelihood when they engage in protected activity, the PRO Act allows workers to take full advantage of their rights under the law. The bill also prohibits discriminating against returning workers for supporting or engaging in strike activity¹⁸² and allows for more creative strike activity by protecting strikes regardless of their scope, duration, frequency, or intermittence.¹⁸³ It prevents employers from engaging in offensive lockouts,¹⁸⁴ which are designed to preempt strike activity and force employees to acquiesce to employers' bargaining demands.¹⁸⁵

The PRO Act will also end the ban on secondary activity that was imposed by the Taft-Hartley amendments.¹⁸⁶ By ending this ban, workers will be able to support each other in a labor dispute by picketing, striking, or boycotting an employer doing business with the employer involved in the dispute. It will also end the ban on "hot cargo" agreements, thus allowing unions to negotiate for agreements to "cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of another employer."¹⁸⁷

¹⁷⁹ Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. § 104(4).

¹⁸⁰ See MCALEVEY, *supra* note 33, at 9 ("Strikes are uniquely powerful under the capitalist system because employers need one thing, and one thing only, from workers: show up and make the employer money.").

¹⁸¹ Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. § 104(1).

¹⁸² *Id.*

¹⁸³ *Id.* § 110.

¹⁸⁴ *Id.*

¹⁸⁵ See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

¹⁸⁶ Protecting the Right to Organize Act of 2021, S. 420, 117th Cong. § 104(2). See Section II.B. for discussion of secondary activity.

¹⁸⁷ "Hot Cargo" Agreements (Section 8(e)), N.L.R.B., <https://nlrb.gov/about-nlrb/rights-we-protect/the-law/hot-cargo-agreements-section-8e> [<https://perma.cc/8E4P-K7UY>].

These are all critical tools to overcoming the power imbalance present at the bargaining table. Making it easier for workers to engage in acts of solidarity also encourages the type of movement building necessary to exert influence on the broader economy. Providing rights on paper and calling it “power” is not enough. Power is workers exercising their rights to win change. Current law prohibits workers from using their power in a variety of ways, and the PRO Act will go a long way toward reversing that fundamentally undemocratic paradigm.

B. *Protecting Workers by Closing Loopholes*

The PRO Act contains two provisions that may seem small or technical at first but are key to effective implementation of labor law reform in an economy where so many workers have been denied protection to act together altogether. These sections codify the definitions of “joint employer” and “employee” under the NLRA.¹⁸⁸ The two provisions are of vital importance because they seek to address the increasingly prevalent problems of fissuring and employee misclassification that companies often adopt to evade legal responsibility for their workers.¹⁸⁹ While these problems affect many workplace laws, the PRO Act only governs workers’ ability to form unions and bargain collectively.¹⁹⁰

A strong joint employment standard is necessary to address the increasingly fissured workplace, “where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services.”¹⁹¹

Amazon’s delivery service represents a prime example of this type of fissured work arrangement. In an at-all-costs pursuit of the ever-shorter delivery times that have in many ways come to define its core business, Amazon developed a nationwide network of drivers who are either employed by

¹⁸⁸ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 101(a)–(b) (as referred in Senate, Mar. 11, 2021).

¹⁸⁹ Weil, *supra* note 8, at 37; INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES, NAT’L EMP. L. PROJECT (2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020> [<https://perma.cc/SR4M-QGNA>].

¹⁹⁰ This appears to be a point of confusion amongst some of the PRO Act’s detractors who conflate the PRO Act with various state worker protection laws. For example, see U.S. CHAMBER KEY VOTE LETTER ON H.R. 842, THE “PRO ACT,” U.S. CHAMBER OF COM. (Mar. 8, 2021), <https://www.uschamber.com/workforce/independent-contractors/us-chamber-key-vote-letter-hr-842-the-pro-act> [<https://perma.cc/9Q8T-H72F>]; Jeong Park, *Fact Check: Did the U.S. House Just Pass a Federal Version of California’s Gig Economy Law?* SACRAMENTO BEE (Mar. 18, 2021), <https://www.sacbee.com/news/politics-government/capitol-alert/article249986144.html> [<https://perma.cc/9NRT-PCQT>] (in which the answer is no). While the test used to define “employee” may be the same in some instances, the contexts in which the definitions exist are entirely different, and thus the effects would be different as well.

¹⁹¹ Weil, *supra* note 8, at 34.

third-party subcontractors (called “Delivery Service Partners” or “DSPs”) or are misclassified by Amazon as independent contractors (dubbed Amazon “Flex Workers”).¹⁹² One effect of this arrangement is that Amazon disclaims any responsibility for these drivers’ welfare and any liability for their acts, even as drivers’ vehicles and uniforms are plastered with the Amazon logo.¹⁹³

Upon closer examination of Amazon’s contractual arrangements with its DSPs, however, one will find that Amazon uses its dominant market power to retain an extreme amount of control over the workers whom Amazon claims are not its employees.¹⁹⁴ This includes requiring Amazon-approved training, mandatory use of Amazon’s delivery app, access to drivers’ speed and location data, and in-vehicle surveillance cameras. Disturbingly, Amazon controls personal details of workers’ lives like their social media posts, grooming habits, and even body odor.¹⁹⁵ Amazon requires its DSPs to maintain an at-will employment policy so that drivers can be fired at any time.¹⁹⁶ Furthermore, Amazon retains the ability to alter any of these policies unilaterally whenever it sees fit.¹⁹⁷ Under conditions such as these, a reasonable observer can easily conclude that Amazon is a joint employer of these drivers.

Simply put, these types of arrangements severely reduce the collective power of workers and even of the small companies who are their direct employers. In Amazon’s case, the arrangement takes what is, in reality, a group of approximately 85,000 employees performing the same or similar work for one company and fragments them into roughly 1,300 individual companies¹⁹⁸ while eliminating the workers’ rights against Amazon via legal technicality. The practical effect of this system is the prevention of any type of scaled collective action amongst these employees, while “lock[ing] in place a low-wage economy, even as Amazon is incredibly profitable.”¹⁹⁹

Worker misclassification presents a similar problem of disempowering workers. However, unlike employees in a fissured workplace, who at least retain rights in a formal sense against the smaller subcontracting firm that directly employs them, employees misclassified as independent contractors are entirely without rights under the NLRA and other workplace protection laws.²⁰⁰ The Supreme Court interpreted the NLRA in its initial iteration to

¹⁹² Josh Eidelson & Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, BLOOMBERG (May 5, 2021), <https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers> [https://perma.cc/L75X-PDV5].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* Note that these numbers include Amazon’s DSP operations in five countries.

¹⁹⁹ *Id.* (quoting law professor Brishen Rogers).

²⁰⁰ NAT’L EMP. L. PROJECT, *supra* note 189. There are, of course, many other problems associated with misclassification, including limiting employees’ access to minimum wage and

cover independent contractors, arguing that such inclusion better effectuates the purposes of the Wagner Act.²⁰¹ In response, Congress included a specific exclusion of independent contractors in the Taft-Hartley amendments.²⁰²

Employee misclassification has garnered more public attention in recent years as gig work has emerged as a business model, but the problem is not new. For example, misclassification has plagued the construction industry for years and has been credited with lowering labor standards and union membership in that industry.²⁰³ The effect of misclassification in the context of the NLRA is self-evident: without the rights to organize and bargain collectively, these workers' power is severely limited. Indeed, the PRO Act makes misclassification an independent unfair labor practice because the very act of misclassification tells workers that any attempt to assert themselves collectively is futile since they don't enjoy the statute's protection in the first place.²⁰⁴ Furthermore, were independent contractors to band together to demand improved working conditions or better wages, they risk running afoul of antitrust law.²⁰⁵ As the gig model becomes pervasive in our economy, we are normalizing structures that support the utter disempowerment of workers.

The PRO Act seeks to remedy these power imbalances by allowing workers to hold accountable those who control their working lives. The joint employer standard contained in the PRO Act defines the circumstances under which more than one company should be considered the employer by codifying the standard adopted by the NLRB in *Browning-Ferris Industries of California, Inc.*²⁰⁶ In essence, the PRO Act's joint employer standard looks

overtime protections, unemployment insurance, and the protection of anti-discrimination laws. *Id.* As more and more workers become exempt from these protections, the entire system that supports them is undermined. *Id.* Because the PRO Act deals only with the rights to organize and bargain collectively, I do not address those other issues here, but they remain of vital importance.

²⁰¹ See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131–32 (1944).

²⁰² 29 U.S.C. § 152(3).

²⁰³ Mark Erlich, *Misclassification in Construction: The Original Gig Economy*, 74 *INDUS. & LAB. REL. REV.* 1202, 1202 (2020).

²⁰⁴ H.R. Rep. No. 116-347, at 32 (2019) (quoting testimony of Former NLRB General Counsel and Board Member Richard Griffin).

²⁰⁵ See generally Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 *LOY. U. CHI. L.J.* 969 (2016).

²⁰⁶ 362 N.L.R.B. 1599 (Aug. 27, 2015). Five years later, a new Republican-controlled Board overturned this standard via rulemaking. See 29 C.F.R. § 103.40. The NLRB has traditionally favored adjudication over rulemaking as the primary method of creating policy, but the Board majority during the Trump administration eschewed this approach in a number of significant instances to further tilt labor law in favor of employers. See Kean Morris, John Bolesta & James Hays, *Breaking with Tradition, The Current NLRB is on a Rulemaking Tear: Election Procedures, Recognition Bar, and 9(a) Collective Bargaining Relationships*, *SHEPARD MULLIN LAB. & EMP. L. BLOG* (Aug. 13, 2019), <https://www.laboremploymentlawblog.com/2019/08/articles/national-labor-relations-act/rulemaking-tear-election-procedures> [<https://perma.cc/H3WR-PQ4A>] (“If and when they are promulgated, these proposed changes (and the several others also apparently soon to follow) promise to materially reshape federal labor law, to substantially affect the rights, duties and opportunities of employers and to diminish the fortunes of organized labor.”).

at the circumstances of a particular employment arrangement to find which entity or entities retain and/or exercise control over the employees involved. Whether such control is direct or indirect, actually exercised or simply reserved, if multiple entities “codetermine[] or share[] control over the employee’s essential terms and conditions of employment”²⁰⁷ then they may appropriately be considered joint employers. In affirming this standard, as adopted by the Board, the D.C. Circuit Court of Appeals found that this test properly reflects long-understood principles of common law.²⁰⁸

The PRO Act’s definition of “employee,” otherwise known as the ABC test, is a clear, often-used test,²⁰⁹ designed to ensure that workers are properly classified so that they can engage in collective action to improve their working conditions. The three-prong test presumes a worker is an employee unless the following conditions are met:

(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;

(B) the service is performed outside the usual course of the business of the employer; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.²¹⁰

One could spend an entire article dissecting each of these prongs, but their overarching purpose is straightforward: to limit employers’ ability to find loopholes to evade the law and exclude workers from their rightful protections. By establishing a presumption in favor of employee status, employers will no longer get to pick and choose whether the law applies to their employees while leaving it for fractured, disempowered workers to prove otherwise.

With both the joint employer and employee definitions, the PRO Act situates power in workers at the outset and places the burden on employers to articulate why their workers should be denied the right to act collectively. By ensuring that these two groups are empowered not just to organize and bargain collectively, but also to do so with the employer(s) that control the terms and conditions of employment, the PRO Act will correct two major loopholes that are increasingly exploited by powerful corporations to entrench workers’ precarity and avoid accountability.

²⁰⁷ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 101(a) (as referred in Senate, Mar. 11, 2021).

²⁰⁸ See *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1209 (2018).

²⁰⁹ Indeed, twenty-seven states use the ABC test. Jennifer D. Thayer, Amye M. Melton & David R. Grimm, *Employment Classification in an App-Based Nation*, 39 ABA TAX TIMES 10, 13 (2020). Of course, this is outside of the context of the NLRA, but generally supports the idea that the ABC test is a well-known, reliable method for determining employee status.

²¹⁰ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 101(b) (as referred in Senate, Mar. 11, 2021).

C. *Bolstering Remedies Under the Law*

In my experience as a union organizer, it seems that there is no other federal law violated so openly and casually as the NLRA; empirical data lends credence to my personal experience. Studies have shown that in union election campaigns, employers are charged with violating the law in a staggering 41.5% of cases.²¹¹ In elections with proposed bargaining units of fifty or more workers, that number rises to 54.2%.²¹² These violations of the law stem from the fact that the NLRA contains incredibly weak remedies and lacks civil monetary penalties for unfair labor practices entirely. The typical remedies under the law are a notice posting and, if a worker was fired, reinstatement with back pay.²¹³ Workers have a duty to mitigate their losses while the case proceeds²¹⁴ and the back-pay award subtracts the employee's interim earnings.²¹⁵

In effect, this means that the only financial penalty employers incur when they fire an employee for engaging in protected activity is money they would have paid anyway had they not fired the employee illegally. Thus, employers get to strike fear in their employees and blunt any organizing effort by firing union leaders, and if they get caught—after a protracted process before the NLRB and in federal court—the worst that happens is a return to the status quo before the firing.²¹⁶ Meanwhile, the remaining workers are left to fear for their own job should they continue to organize their union. This, clearly, is not an effective deterrent, and many employers have simply factored in these de minimis penalties as a cost of doing business.²¹⁷

²¹¹ McNICHOLAS ET AL., *supra* note 17.

²¹² *Id.* at 7. This represents an increase from a study using data from 1999–2003 that produced a high-end estimate of violations in 40% of elections with fifty or more eligible workers. *Id.* at 7 (citing BRONFENBRENNER, *supra* note 103, at 7).

²¹³ See McNICHOLAS ET AL., *supra* note 111, at 12. The NLRA's remedies are so weak that an "extraordinary" remedy under current law is an employer reading the notice aloud to its employees. See *Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175, 176 (2001) (citing *Tex. Super Foods*, 303 N.L.R.B. 209 (1991)).

²¹⁴ See *NLRB v. Community Health Services*, 812 F.3d 768, 773 (10th Cir. 2016) (citing *Helphs Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941)).

²¹⁵ See *id.* at 783.

²¹⁶ An enterprising employer may be able to *make* money by exploiting this remedial scheme. See H.R. Rep. No. 116-347, at 19 (2019) ("You could possibly put the backpay owed to that individual in a low interest savings account and, by the time there is a determination that you have to pay, and you subtract the interim earnings from that, you have made money on your wrongdoing.") (quoting former NLRB Chairman Mark Gaston Pearce).

²¹⁷ LANCE COMPA, HUM. RTS. WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 14 (2000), <https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf> [<https://perma.cc/X9R4-SW94>]; see also Estlund, *supra* note 50, at 1537; Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 3 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021) ("[A] typical profit-maximizing firm, comparing the potential cost of paying back wages to the potential benefit of averting unionization, would have a compelling financial incentive to dismiss a worker for union activities—even if the firm knew *with certainty* that it would be caught and penalized by the NLRB—if this dismissal would reduce the likelihood of unionization at the firm by less than 2 percent, and perhaps by as little as 0.15 percent.").

“As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.”²¹⁸

The PRO Act will, at long last, create meaningful deterrents to employers violating the law. Workers will be entitled to full back pay, without any reduction of interim earnings. Further, they will have access to consequential damages and liquidated damages double the amount of other damages awarded.²¹⁹ Additionally, the PRO Act imposes substantial civil monetary penalties against companies that commit unfair labor practices and authorizes the Board to impose personal liability on corporate executives and officers if they participated in wrongdoing.²²⁰ The PRO Act also creates a private right of action for workers to vindicate their rights in federal court if the NLRB fails to take up their case.²²¹

Two of the most powerful remedies contained in the PRO Act expand upon existing, underused protections. First, the PRO Act requires the Board to seek an injunction against unfair labor practices that cause serious economic harm or involve an illegal discharge.²²² Returning an illegally fired worker back to the job while their case proceeds through the Board process is hugely important to offset the dampening effect on organizing efforts. The NLRB currently has the discretion to petition for such “10(j) injunctions,” but they are typically underused.²²³ In the ten-year period from 2009–2019, the highest number of petitions submitted in any year was forty-five in 2011.²²⁴ That year, the NLRB found “probable merit” in 7,588 unfair labor practice charges.²²⁵ Thus, in 2011, the NLRB submitted 10(j) petitions for just over one-half of one percent of probable merit charges. In fiscal year 2018, the NLRB submitted six 10(j) petitions²²⁶ out of 7,462 probable merit charges—a rate of .08%.²²⁷

The second powerful remedy implemented by the PRO Act is the codification of the practice of issuing a bargaining order in cases where employers commit such egregious unfair labor practices during a union campaign

²¹⁸ COMPA, *supra* note 217, at 14.

²¹⁹ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 106 (as referred in Senate, Mar. 11, 2021).

²²⁰ *Id.* § 109.

²²¹ *Id.*

²²² *Id.* § 108.

²²³ 29 U.S.C. § 160(j) (2018); *see* NAT'L LAB. REL. BD., LITIGATION – INJUNCTION: INJUNCTION ACTIVITY UNDER SECTION 10(j), <https://www.nlr.gov/reports/nlrbc-case-activity-reports/unfair-labor-practice-cases/litigation/litigation-injunction> [<https://perma.cc/MAA3-77NP>] [hereinafter ACTIVITY].

²²⁴ ACTIVITY, *supra* note 223.

²²⁵ *See* NAT'L LAB. REL. BD., UNFAIR LABOR PRACTICE CHARGES FILED EACH YEAR: CHARGES FILED/SETTLEMENTS/COMPLAINTS ISSUED, <https://www.nlr.gov/reports/nlrbc-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges> [<https://perma.cc/U2HP-RKXH>] [hereinafter CHARGES].

²²⁶ ACTIVITY, *supra* note 223.

²²⁷ CHARGES, *supra* note 225.

that a fair election is not possible.²²⁸ In *NLRB v. Gissel Packing Co.*, the Supreme Court reaffirmed the Board's ability to issue bargaining orders in such cases, saying, "[w]e have long held that the Board . . . has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status."²²⁹

The Court's opinion in *Gissel* effectively created a categorical analysis to determine when a bargaining order is appropriate: in cases with "outrageous" and "pervasive" behavior, a bargaining order is appropriate, even if the union has never shown objective proof of majority support.²³⁰ In less egregious cases that still impact the election outcome, a bargaining order may be issued if the union had demonstrated majority support, typically via signed authorization cards. In mild cases with "minimal impact on the election machinery," a bargaining order is inappropriate.²³¹

The PRO Act codifies an improved version of the *Gissel* standard by requiring bargaining orders in cases where a union has objective proof of majority support via signed authorization cards but loses an election after an employer has violated the law or otherwise interfered in a fair election.²³² To avoid such a bargaining order, an employer must prove that such interference did not affect the outcome of the election.²³³ Thus, the PRO Act places the burden of proof squarely where it belongs: on an employer who interfered with its employees' free choice.

These expansive new remedies will create caution in employers who might otherwise step out of bounds in their opposition to employees exercising their right to organize.²³⁴ As a result, election win rates will likely increase to levels seen before the current era of the professional union busting consultant.²³⁵ Furthermore, with a law that actually fulfills its promise of encouraging collective bargaining, the number of elections and workers participating in elections will likely rise dramatically. As union density increases, workers will gain power in individual firms, industries, and regions and help build a more just economy.

²²⁸ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 105 (as referred in Senate, Mar. 11, 2021).

²²⁹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969).

²³⁰ Despite the Court's blessing of issuing bargaining orders in these cases, the Reagan-era Board foreclosed non-majority bargaining orders as an appropriate remedy under the Act. *See, e.g., Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

²³¹ *See Gissel*, 395 U.S. at 613–15; *see also* Daniel M. Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 *FORDHAM L. REV.* 85, 92 (1972).

²³² Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 105 (as referred in Senate, Mar. 11, 2021).

²³³ *Id.* § 105(5)(B).

²³⁴ As of this writing, Congress is considering a budget reconciliation bill which includes the PRO Act's civil monetary penalty regime. This would represent the first change to the NLRA to make it easier for workers to form unions since the passage of the Wagner Act in 1935. For a brief explainer, *see*, Andy Levin, *Rep. Levin: Voters Strongly Support Passing the PRO Act*, DATA FOR PROGRESS BLOG (July 29, 2021), <https://www.dataforprogress.org/blog/2021/7/29/rep-andy-levin-pro-act> [<https://perma.cc/UUVU6-MHTE>].

²³⁵ *See* McNICHOLAS ET AL., *supra* note 110.

V. CONCLUSION

The animating principle of the National Labor Relations Act—unchanged since 1935, yet often ignored by critics of workers’ organizations—is spelled out in the final paragraph of its opening section. The section declares that the policy of the United States shall be to “encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”²³⁶ This is not, nor has it ever been, a neutral principle. It is an explicit endorsement of the practice of union organizing and collective bargaining. Over the past eighty-six years, this principle has been distorted if not abandoned entirely.

Taken together, the PRO Act’s provisions represent the strongest, most comprehensive attempt to overhaul our nation’s labor laws since the Wagner Act in 1935. We must never lose sight, however, of the simple fact that worker power does not derive solely from statute; it comes from the solidarity of people willing and able to demand more collectively and make the sacrifices necessary to win. After all, unions existed well before the Wagner Act and they would continue to exist were the NLRA repealed in its entirety. As a union organizer, I took this ideal to heart and tried to help workers create a level of self-organization and unity that could stand up to a great deal of employer abuse.

However, U.S. history makes clear that workers can organize on a mass scale and create enduring organizations only when their own militancy or solidarity are met with a level of encouragement or at least tolerance from the government.²³⁷ As a legislator, my job is to create laws that empower workers to demand justice for themselves—however justice might be defined at any given time.

History doesn’t repeat itself, but it echoes. The Wagner Act arose in significant part because of ongoing organizing around the country,²³⁸ and so too the PRO Act will require massive new campaigns to shift the ground in its favor. The Wagner Act’s passage, along with enforced labor peace during World War II, helped accelerate existing organizing to reach the highest levels of union membership—and the lowest level of income inequality—this country has ever seen.²³⁹ Today, the PRO Act would empower workers to organize in unpredictable ways and serve as a precondition to our ability to revitalize our society in a way that advances economic, racial, and politi-

²³⁶ 29 U.S.C. § 151 (2018).

²³⁷ See LOMIS, *supra* note 30.

²³⁸ See Barenberg, *supra* note 28.

²³⁹ Farber et al., *supra* note 123, at 1380.

cal equality. That is the true power of the PRO Act—the true power of a union.