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WAGE COMPRESSION AS A DEMOCRATIC IDEAL

*Stephen Plass**

Wage disparity between workers in the same occupations and between senior managers and the rest of the workforce has become a defining issue for policymakers. The economic claims of capital and those of labor remain at odds. Business supporters argue that greater pay for the larger workplace will result in loss of employment, higher prices for products and services, and loss of competitive advantage in the global marketplace. Labor advocates respond that higher wages promote greater productivity, increase demand for goods and services, and facilitate the strengthening of democratic institutions. Neither side is persuaded by the other, and this has created an impasse with respect to federal intervention to moderate the effects of dramatic pay growth for senior managers and stagnant or declining wages for the larger workforce.

This Article discusses the ideas and practices that have produced large wage disparities and the regulatory environment that has accommodated it. On the labor regulation side, the Article evaluates the National Labor Relations Act's (NLRA) approach to wage contracting, including its accommodation of right-to-work laws. It shows that the free-market wage policy of the NLRA is generally embraced by unions, although its effects may be more devastating than the NLRA's tolerance for right-to-work laws that unions condemn. On the corporate governance side, it shows that shareholders' interests rather than overall stagnant wages have driven regulatory attempts to curb excessive executive pay, and say-on-pay and new CEO pay disclosure regulations are not designed to address wage disparity. The Article argues that wage compression can be achieved through unrepresented worker protest and collective bargaining practices that link the plight of workers to the overall compensation practices of their employers. It proposes a revitalization of bonus and profit-sharing practices that reduce employers' long-term risks as a more viable collective bargaining strategy to reduce wage divergence while reducing the financial risks associated with fixed increases of wages and benefits.

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INTRODUCTION

Wage policy has been the most dominant and difficult labor issue facing policymakers in recent years.¹ Senior managers have been indicted for receiving unearned lavish compensation packages² while

¹ Disagreement in Congress over raising the minimum wage has been ongoing for several years. Republicans have argued that an increase in the minimum wage will result in job losses, so this matter should be left to the states based on their own economic realities. See Chris Opfer, *Democrats Unveil \$12 Minimum Wage Bill, Despite Little Chance Congress Will Enact It*, 83 Daily Lab. Rep. (BNA) A-1 (Apr. 30, 2015). While there is evidence that increasing the minimum wage will cause some job loss, there is disagreement about whether that loss would be substantial. See *id.* Attempts to strengthen the bargaining rights of workers under the National Labor Relations Act have also stalled because of political disagreement. See Richard L. Trumka & Craig Becker, *The Future of Work: Labor Law Must Catch Up*, PAC. STANDARD (Aug. 14, 2015), <http://www.psmag.com/business-economics/the-future-of-work-labor-law-must-catch-up> (noting that labor law reform that would have guaranteed a first contract to workers who choose a union was blocked in the Senate by filibuster).

² See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 330–35 (2014) (observing that the large salaries paid to senior managers cannot be justified on productivity grounds); LUCIAN A. BEBCHUK & JESSE M. FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) (reporting that sometimes top executives reap large rewards even when they perform terribly); Lawrence Josh Bivens & Lawrence

hourly workers have been protesting for a living minimum wage of \$15 per hour.³ Republicans and Democrats have drawn clear battle lines on this issue. Republicans oppose a graduated federal minimum wage hike from \$7.25 to \$10.10 per hour⁴ and have promoted right-to-work laws that deprive unions of financial support essential to their viability.⁵ Efforts by Democrats to strengthen the legal rights and bargaining power of employees or their unions through the National Labor Relations Act (NLRA) have been blocked since 1977,⁶ and the issue of excessive execu-

Mishel, *The Pay of Corporate Executives and Financial Professionals as Evidence of Rent in the Top 1 Percent Incomes*, 27 J. ECON. PERSP. 57 (2013) (noting that executive contracts are structured to mask the fact that compensation is not tied to performance). Outlandish retirement pay has also been targeted for regulation during the 2008 recession. See Press Release, White House, Remarks by President Barack Obama on Executive Compensation with Secretary Geithner (Feb. 4, 2009) (reporting the President's statement, "[W]e're putting a stop to these kinds of massive severance packages we've all read about with disgust; we're taking the air out of the golden parachute.").

³ See Rhonda Smith, *Our Walmart Organizers, Allies Unveil Plans For Company Shareholders' Meeting June 5*, 103 Daily Lab. Rep. (BNA) A-4 (May 29, 2015); *Shareholders' Meeting to Come With Side of Protest*, 29 Lab. Rel. Wk. (BNA) 921 (May 6, 2015); Bruce Horowitz & Yamiche Alcindor, *Fast-Food Strikes Widen into Social-Justice Movement*, USA TODAY (Apr. 15, 2015), <http://www.usatoday.com/story/money/2015/04/15/fast-food-strike-fight-for-15-service-employees-international-union/25787045/>.

⁴ For example, in 2013, Democrats proposed raising the minimum wage to \$10.10 per hour over two years. See Fair Minimum Wage Act of 2013, H.R. 1010, 113th Cong. (2013). Republicans defeated this measure, and in 2015, Democrats returned with a proposal to provide graduated increases over four years to \$12 per hour. See Raise the Wage Act, H.R. 2150, 114th Cong. (2015). Given the Republican response to a \$10.10 increase, one Republican Senator suggested that the new proposal will guarantee no movement on this issue. See Chris Opfer, *Collins Working on \$9 Minimum Wage Hike, As Counter to Democrats' \$12 Per Hour Plan*, 78 Daily Lab. Rep. (BNA) A-14 (Apr. 23, 2015). Even a Republican senator's attempt to propose an increase to \$9 per hour was blocked in 2014. See *id.*

⁵ Inspired by Republican successes in enacting state right-to-work laws, Republicans in the federal legislature have introduced and reintroduced a proposal for a national law that would prohibit unions from requiring that represented employees pay union dues or fees. See National Right-to-Work Act, S. 391, 114th Cong. (2015); H.R. 612, 114th Cong. (2015). Republicans argue that union security clauses force represented workers to give unions financial support, and deny these employees the right to disassociate with unions and deal individually with employers about workplace issues. See Chris Opfer, *Republicans Reintroduce Right-to-Work Bill, but House Leadership Support Still Unclear*, 29 Lab. Rel. Wk. (BNA) 221 (Feb. 4, 2015).

⁶ See RICHARD D. KAHLENBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT: REBUILDING A MIDDLE CLASS DEMOCRACY BY ENHANCING WORKERS' VOICES 5 (2012) ("Each time that Democrats have controlled the presidency and both houses in Congress they have sought to alter labor law, and each time they have failed."). Republicans have also vigorously opposed any interpretation of the NLRA that they view as pro-union. For example, when the National Labor Relations Board (NLRB) recently invited briefs on the question of whether a union should be permitted to charge nonpaying employees a fee if they desire grievance representation, Republicans responded that this was a pro-union move to circumvent states' right-to-work laws. See Lawrence Dubé, *House Republicans Wary of NLRB Case, Citing Threat to State Right-to-Work Laws*, 73 Daily Lab. Rep. (BNA) A-1 (June 3, 2015). Longstanding NLRB law holds that unions must provide grievance representation to organized workers who are excused from giving them financial support by state right-to-work laws. See Int'l Ass'n of Machinists, Local 697, 223 N.L.R.B. 832 (1976). Even

utive compensation unrelated to performance has not been tied to the wage claims of the larger workforce.⁷ Meanwhile, wage growth for senior managers continue to outpace that of other workers thereby pushing wage divergence to a historical high mark.⁸ Labor regulations and unions have been credited with helping to stabilize the economy and helping to garner strong middle-class wages.⁹ And the decline of unions has been associated with up to a fifth of the growth in wage inequality.¹⁰ As

procedural NLRB reforms that are viewed as disadvantaging employers are subjected to multi-layered challenges. *See* Associated Builders & Contractors of Tex., Inc. v. NLRB, No. 1-15-CV-026 RP, 2015 U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015) (holding that the NLRB was not arbitrary and capricious, nor did it violate the rights of employers and employees under the NLRA, when it issued new representation proceedings rules); *see also* Chamber of Commerce v. NLRB, 118 F. Supp. 3d 171 (D.D.C. 2015) (rejecting a similar challenge). Republicans also launched a Congressional Review Act challenge to block the Board's new representation rules, but this initiative was vetoed by the president. *See* Presidential Memorandum, White House, Memorandum of Disapproval Regarding S.J. Res. 8 (Mar. 31, 2015). Republicans have even devised a plan of "board-packing" by proposing the addition of a sixth member (3 Democrats and 3 Republicans), while still requiring majority rule. *See* Chris Opfer, *McConnell, Alexander Take Another Shot at Revamping NLRB, Adding Sixth Member*, 18 Daily Lab. Rep. (BNA) A-13 (Jan. 28, 2015).

⁷ Regulatory attempts to rein in excessive executive rewards through disclosure and tax laws have been grounded in promoting shareholder value and increasing tax revenue. *See* Steven Balsam, *Taxes and Executive Compensation*, ECON. POL'Y INST. (Aug. 14, 2012) (reporting that tax laws intended to reduce excessive compensation unrelated to performance have only produced losses for shareholders and the U.S. Treasury, while allowing non-performance and non-deductible compensation to grow). There is slight optimism that a new SEC rule requiring disclosure of the ratio of annual CEO compensation to median compensation of all other employees will stir low-wage workers into action. *See* Gretchen Morgenson, *Why Putting a Number to C.E.O. Pay Might Bring Change*, N.Y. TIMES (Aug. 6, 2015), <http://www.nytimes.com/2015/08/09/business/why-putting-a-number-to-ceo-pay-might-bring-change.html>.

⁸ *See* PIKETTY, *supra* note 2, at 292–93, 321 (reporting that wage disparity is at Great Depression levels and rival European disparities of 100 years ago).

⁹ *See* KAHLBERG & MARVIT, *supra* note 6, at 16; Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 549 (2003) (acknowledging that, as a way of stimulating economic growth, the NLRA was intended to build a vibrant middle class with higher wages); *Waterloo Educ. Ass'n v. Iowa Pub. Emp't Relations Bd.*, 740 N.W.2d 418, 420 (Iowa 2007) (noting that after the NLRA was enacted, a large number of unionized private workers entered the middle class); *see also* Wilma B. Liebman, *The Revival of American Labor Law*, 34 WASH. U. J.L. & POL'Y 291, 295 (2010) (explaining that, during the "golden age of collective bargaining" following the enactment of the NLRA, millions of unionized workers began to form part of the middle class due to the fair wages and benefits obtained through collective bargaining agreements).

¹⁰ *See* Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513 (2011) (reporting that the impact of union decline on wages is similar to the impact of education). Others have suggested that wage inequality is driven by skill levels, not education or experience. *See* Chinhui Juhn et al., *Wage Inequality and the Rise in Returns to Skill*, 101 J. POL. ECON. 410 (1993). And recent reports indicate that skill level is a major driver of job growth today. *See* Victoria Stilwell & Craig Torres, *All but Richest Households Saw Drop in Incomes in 2010–2013*, *Fed Reports*, 172 Daily Lab. Rep. (BNA) A-5 (Sept. 9, 2014) ("What we have seen in recent years is the polarization of the labor market' as job growth is skewed toward the highest and lowest skill levels, hollowing out the middle . . ."); *see also* Tyrone Richardson, *Mayors Report: Post-Recession Economy Created*

a result, it is argued that policymakers should be alarmed at the precipitous decline of union membership and power which serve as a counter-vailing force to the excesses of capital.¹¹

This message is being delivered by the President and Vice President of the United States, union leaders, academics, and many others who support the goal of unions to increase the economic security of workers.¹² But these claims have not produced tangible results. Union density has declined,¹³ and legislative initiatives have failed.¹⁴ Meanwhile, the number of workers earning wages above the national median of \$17.40 per hour continues to shrink along with, it is contended, the quality of our democracy.¹⁵

Wage Inequality, Jobs Paying Less, 28 Lab. Rel. Wk. (BNA) 1894 (Sept. 3, 2014) (recommending “high quality education” as a mitigating force for wage inequality).

¹¹ See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 3–4 (1984) (concluding that unions serve as a check on arbitrary managerial decisionmaking and give workers a voice both at work and in politics); see also KAHLBERG & MARVIT, *supra* note 6, at 15 (contending that the fall of unions has led to grave income inequality and a shrinking middle class); JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 146 (1956) (observing that when the economic focus is on competition, social costs and effects are ignored); Michelle Amber & Susan R. Hobbs, *Is Collective Bargaining Headed for Crisis in 2016?*, 18 Daily Lab. Rep. (BNA) S-54 (Jan. 28, 2014) (observing that employers are demanding more concessions and are increasingly locking out their workers to enforce their demands).

¹² See Chris Opfer, *Obama Touts Middle Class Economic Plan Centered Around Income Growth Proposals*, 29 Lab. Rel. Wk. (BNA) 158 (Jan. 28, 2015) (reporting the President’s call for laws that will strengthen unions and collective bargaining); Ben Penn, *Trumka Says Labor Still in Crisis, Call For Bolder Action by Obama and Congress*, 28 Lab. Rel. Wk. (BNA) 1883 (Sept. 3, 2014) (noting the AFL-CIO president’s lament about suppressed wages and the failure of political leaders to address it).

¹³ See Chris Opfer, *Union Representation Down Last Year, Led by Drop in Membership Among Women*, 27 Lab. Rel. Wk. (BNA) 187 (Jan. 30, 2013) (reporting continuing declines in both the private and public sectors, bringing the total union represented workforce to 15.9 million); News Release, Bureau of Labor Statistics, *Union Members —2013* (Jan. 24, 2014), http://www.bls.gov/news.release/archives/union2_01242014.pdf (noting union membership is down to a low 11.3%). This contrasts sharply with the 35% of workers represented during unions’ heyday. See Jon Talton, *Heyday For Unions in the Rearview Mirror*, SEATTLE TIMES (Sept. 3, 2011), <http://www.seattletimes.com/business/economy/heyday-for-unions-in-the-rearview-mirror/>.

¹⁴ See *supra* note 6.

¹⁵ Vice President Joseph Biden has added his voice to this claim, stating that the decline in wages corresponds with the decline of unions, and this destabilizes the middle class and the economy. See Susan R. Hobbs, *Biden Credits Organized Labor for Keeping Barbarians at the Gate*, 24 Daily Lab. Rep. (BNA) A-3 (Feb. 5, 2014). Biden added that it also undermines the country’s social and political stability. *Id.* Union negotiating success has also been credited with helping to compress wages and reduce wage inequality and its associated evils. See TOKE AIDT & ZAFIRIS TZANNATOS, *UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT* 54 (2002) (concluding that unions reduce wage dispersion between similar firms, among workers, and between workers with different skills); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 21–22 (2013) (arguing that the wide disparities in income in America have moved it closer to becoming a dysfunctional society where only the wealthy have access to desirable goods).

While most workers like to think of themselves as middle class, by economic measures, a large portion of the workforce does not earn middle-class wages.¹⁶ Based on an annual income of \$23,050 for a family of four, the Census Bureau reported that 46.2 million Americans are living in poverty.¹⁷ Over 22 million workers earn between \$6 and \$10 per hour, which is well below the national median of \$17.40 per hour.¹⁸ This pay deficit is exacerbated by the fact that real wages have fallen even for those earning \$8.78 to \$10.60 per hour.¹⁹ By contrast, chief executive officers' median compensation in 2012 was \$2.5 million, \$4.7 million, and \$9.7 million, for small, mid-sized, and large companies, respectively.²⁰

Given the high cost of housing, food, goods, and services, large swaths of the workforce do not earn enough to meet their basic needs, nor do they have capital assets that provide alternative income.²¹ It is estimated that in the most affordable areas in the country, a two-parent, two-child family needs an annual income over \$49,000 to live adequately.²² This is more than double government estimates for the same size family. And the \$49,000 figure does not include reserves for items

¹⁶ Forty percent of Americans with annual incomes below \$20,000 say they are middle class. See Dan Horn, *Middle Class a Matter of Income, Attitude*, CINCINNATI ENQUIRER (Apr. 14, 2013), <http://www.usatoday.com/story/money/business/2013/04/14/middle-class-hard-to-define/2080565/>. The national median household income is \$50,054 and economists typically use the middle 20% of that number to define the middle class, i.e., between \$39,000 and \$63,000 per year. *Id.*

¹⁷ See David Francis, *Where Do You Fall in the American Economic Class System*, U.S. NEWS & WORLD REP. (Sept. 13, 2012), <http://money.usnews.com/money/personal-finance/articles/2012/09/13/where-do-you-fall-in-the-american-economic-class-system>. And for the working poor, wages are generally their only source of income.

¹⁸ See *Table 1: National Employment and Wage Data From the Occupational Employment Statistics Survey by Occupation*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/ocwage.t01.htm> (last visited Apr. 8, 2016).

¹⁹ See *Wages Fall More for Lower-Wage Workers than High Earners in 2009–2012*, *Study Says*, 131 Daily Lab. Rep. (BNA) A-9 (July 9, 2013).

²⁰ See Mary Hughes, *CEO at Smaller Companies Saw Pay Grow, Stock Awards Gain Ground*, *Survey Finds*, 144 Daily Lab. Rep. (BNA) A-5 (July 26, 2013).

²¹ See *Percentage of U.S. Workers Living Paycheck to Paycheck Reaches Recession-Era Lows, Finds Career Builders Survey*, CAREERBUILDER (Aug. 15, 2012), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=8%2F15%2F2012&id=pr711&ed=12%2F31%2F2012> (reporting survey results that show 40% of workers always live paycheck to paycheck).

²² See Elise Gould et al., *What Families Need to Get By*, ECON. POL'Y INST. 2 (Aug. 26, 2015), <http://www.epi.org/publication/what-families-need-to-get-by-epis-2015-family-budget-calculator/>.

such as savings, retirement income, or college accounts.²³ By contrast, a minimum-wage, full-time worker earns about \$15,000 per year.²⁴

While the wages of most workers have stagnated or fallen, the pay of senior managers has skyrocketed.²⁵ The result is a divergence in wages of historic proportions.²⁶ While firm managers seek to cap the average worker's pay based on the market value of their productive capacity or contribution, pay for top managers faces less stringent scrutiny for the correlation between pay and performance.²⁷ This Article explores linking executive pay to the plight of low-wage workers as a reform strategy. Its normative statement is that existing wage disparities in the same occupations and between occupations make wage compression a socially desirable goal.²⁸ By examining the foundational principles of labor regulation, the Article seeks to show the limits of law reform versus the possibilities of direct action by workers targeting compensation practices.

The Article starts by discussing the economic imperative of employers to reduce labor costs. It looks at low-wage and cost-cutting employment practices that are prevalent even when profits are high. Part I identifies the regulations governing the contracting of labor and notes the absence of legal constraints on the economic aspects of buying and selling labor. As a result, employers can drive down labor costs to market

²³ See *id.* at 1. This budget is calculated "by estimating community-specific costs of housing, food, child care, transportation, health care, other necessities, and taxes." *Id.*

²⁴ See *id.* at 8. And women dominate the low-wage category. See Ben Penn, *Women Hold Two-Thirds of Low-Wage Jobs Earning Up to \$10.10 an Hour, Study Finds*, 151 Daily Lab. Rep. (BNA) A-11 (Aug. 6, 2014).

²⁵ See PIKETTY, *supra* note 2, at 264–65 (reporting that wage inequality in the United States is at an unprecedented level, and this is primarily attributable to the astronomical growth of senior managers' pay); Bivens & Mishel, *supra* note 2, at 57 (identifying excessive pay to executives as a primary cause of declining income growth for others).

²⁶ See PIKETTY, *supra* note 2, at 321 (reporting that wage disparity is now at Great Depression levels).

²⁷ See Jay Lorsch & Rakesh Khurana, *The Pay Problem*, HARV. MAG., <http://harvardmagazine.com/2010/05/the-pay-problem#> (last visited Apr. 8, 2016) (reporting that shareholders, boards of directors and executives believe pay levels are appropriate, while institutional shareholders, the public, and politicians believe pay is excessive); see also Marc van Essen et al., *Assessing Managerial Power Theory: A Meta-Analytic Approach to Understanding the Determinants of CEO Compensation*, 41 J. MGMT. 164 (2015) (finding that executives with influence over their pay receive higher compensation than those whose boards exert more power over the pay process).

²⁸ See STIGLITZ, *supra* note 15, at 83 (observing that widely unequal societies are inefficient, unstable and unsustainable); Catherine Ruetschlin, *Fast Food Failure: How CEO-to-Worker Pay Disparity Undermines the Industry and the Overall Economy*, DEMOS (Apr. 22, 2014), <http://www.demos.org/publication/fast-food-failure-how-ceo-worker-pay-disparity-undermines-industry-and-overall-economy> ("From Davos to Wall Street to Main Street, there is a growing consensus that inequality slows economic recovery and dampens consumer demand."); see also PIKETTY, *supra* note 2, at 297 (concluding that wage inequality contributed to the 2008 financial crisis).

levels, resulting in greater worker dependence on government support.²⁹ This reality has led to protests by unorganized workers and demands for more stringent labor laws by unions.

Part II looks at the legal rules of collective bargaining that control a union's ability to get wage increases from employers. It shows that the legal empowerment of unions was conditioned on their embrace of free-market bargaining, and unions have remained faithful to this process despite its limitations.³⁰ On the issue of pay, labor laws made employer bargaining liberties preeminent. Part II evaluates the national decision to classify employers' contractual liberties as the most fundamental workplace right under the National Labor Relations Act (NLRA),³¹ while attempting to grant workers bargaining power *vis-à-vis* their employers. It highlights an employer's legal right to be efficient by isolating wage and benefit costs for trimming, even if profits are high or competitive advantage is secure. It shows that, by leaving employers with the economic option to use the market when union bargaining proposals were unattractive,³² the NLRA in effect reserved in employers a veto power over union wage and benefits demands. Now employers are increasingly ex-

²⁹ State governments have been providing substantial support to low-wage workers particularly in the area of healthcare. See Mary E. Forsberg, *Attention Shoppers: You Pay the Health Insurance Bills for Some of New Jersey's Largest Employers*, N.J. POL'Y PERSP. 1 (Aug. 9, 2005), http://www.njpp.org/assets/reports/budget-fiscal/17-rpt_familycare.pdf. One report showed Nebraska paid about \$100 million per year in Medicaid benefits to private sector workers. See Paul Hammel, *Thousands with Jobs are on Medicaid Rolls*, OMAHA WORLD-HERALD, Oct. 19, 2005, at 1B. Most of this government support is going to employees of very large corporations that report substantial profits even during the latest recession. See Dave Jamieson, *Low Wage Workers Employed Mostly by Large, Highly Profitable Corporations: Report*, HUFFINGTON POST (July 19, 2012), http://www.huffingtonpost.com/2012/07/19/low-wage-workers-_n_1687271.html.

³⁰ According to a past president of America's most iconic union, "[t]he American trade union movement—unlike any other labor movement in the world—is committed to working within the American political and economic system in order to achieve the social and economic justice promised by the Declaration of Independence and the Constitution." See John P. Moody, *Attacks by Big Business Imperils Labor—Meany*, PITTSBURGH POST-GAZETTE, Sept. 4, 1978, at 1; see also Penn, *supra* note 12 (reporting that the president of the AFL-CIO is seeking a political or legislative fix to wage suppression while acknowledging that unions are too weak to secure such changes).

³¹ 29 U.S.C. §§ 151–169 (2012).

³² See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (holding that employers can operate with non-union workers in the event of a strike to secure bargaining proposals).

exercising their broad contractual freedom to reduce their wage bill,³³ further contributing to wage divergence.³⁴

Part III looks at the forces that will incentivize employers to continue bidding down labor costs. It shows how globalization has put free market labor contracting on steroids by broadening alternative low-wage labor markets and new product markets. Employers are incentivized to cut both the mandatory and voluntary costs associated with purchasing labor³⁵ and are shifting capital and production to locales that are hospitable to profit imperatives.³⁶ Historically presumptive voluntary benefits—such as employer-provided health and retirement plans—are now routinely reduced or eliminated. Even benefits traditionally regarded as automatic perks—such as holiday, sick, and vacation pay—are threatened. Using the proxy statements from a publicly traded company as an example, Part III shows how stockholders' and senior managers' interests are pitted against workers when a labor contract is being negotiated. With senior management compensation tied to metrics that include reduced labor costs, managers are incentivized to cut pay and benefits to realize economic benefits for stockholders and themselves. Further, senior managers are allowed to take ever larger shares of profits for themselves without proof that their performance is responsible for productivity gains, thereby leaving less to be distributed to the larger workforce.

The final section of the Article looks at the small but important gains made by unorganized workers condemning wage divergence.³⁷ It summarizes the economic and political barriers unions face under the NLRA³⁸ and argues that proposed regulatory reform of the NLRA is a weak antidote for the statute's free market bargaining policy which re-

³³ See Bernard Condon & Paul Wiseman, *Recession, Tech Kill Middle Class Jobs*, MIAMI HERALD, Jan. 25, 2013 (reporting that 70% of the jobs gained since the recession ended in 2009 are low-wage); Larry Swisher, *Recovery Tilts Toward Lower-Wage Jobs, Industries, Findings by BNA, Others Show*, 231 Daily Lab. Rep. (BNA) D-1 (Nov. 30, 2012) (reporting a 54% job growth rate for low-paying jobs).

³⁴ See Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL'Y INST., Aug. 29, 2012, at 1.

³⁵ See *infra* notes 47–50 and accompanying text.

³⁶ See David Wessel, *Big U.S. Firms Shift Hiring Abroad*, WALL ST. J. (Apr. 19, 2011), <http://www.wsj.com/articles/SB10001424052748704821704576270783611823972>.

³⁷ See Smith, *supra* note 3 (reporting on workers' proposal to address wage disparity at Walmart); Mary Wisniewski, *McDonald's Employees Are Swarming Headquarters to Protest Low Wages During the Company's Annual Meeting*, BUSINESS INSIDER (May 20, 2015), <http://www.businessinsider.com/r-mcdonalds-other-fast-food-workers-protest-ahead-of-annual-meeting-2015-5> (reporting planned protest by McDonald's workers to publicize to shareholders their call for \$15 per hour wages). Unions also plan to publicize their wage disparity concerns but primarily at the bargaining table. See Michael Rose, *Unions Will Stand United to Demand Workers' Share of Profits, CWA Leader Says*, 29 Lab. Rel. Wk. (BNA) 455 (Mar. 4, 2015).

³⁸ See *infra* text accompanying notes 196–226.

mains unchallenged.³⁹ However, protest targeting corporate pay practices has shown good potential for success.⁴⁰ It shows that independent and union-backed publicity campaigns by unorganized workers can lead to wage gains and renewed support for unions that are capable of locking in those gains through collective bargaining. It also proposes a union bargaining strategy of “positive repricing,” profit sharing that supplements contractual wage rates based on profitability metrics.⁴¹

I. THE GROWTH OF LOW-WAGE LABOR

*“You guys are the only guys keeping the barbarians at the gate.”*⁴²

For many workers, selling their labor has become an enterprise in economic warfare.⁴³ Driven by product market competition, wage competition, or the imperative for larger profits, employers are devising compensation schemes and conspiring to reduce their labor costs.⁴⁴

³⁹ Despite recurring past failures, unions are still convinced that reforming the NLRA is the key to improving workers’ wages. See Ben Penn, *AFL-CIO Leaders Call for Labor Law Overhaul*, 29 Lab. Rel. Wk. (BNA) 1774 (Aug. 25, 2015) (reporting labor leaders’ claim that a weak NLRA is partly responsible for “a steep plunge in union membership and a surge in income inequality”). And planned union reform proposals appear to focus on increased penalties and broader rights under the NLRA, rather than a change in the structure of the parties’ bargaining liberties. See Chris Opfer, *AFL-CIO Congressional Democrats to Unveil Legislation Package to Overhaul Labor Law*, 91 Daily Lab. Rep. (BNA) A-3 (May 12, 2015) (reporting the AFL-CIO president’s disclosure that the union’s agenda is to strengthen the hand of collective bargaining, including giving collective bargaining to people that don’t have a union yet).

⁴⁰ Major employers such as Walmart and McDonalds have proposed wage increases in response to protests at shareholders’ meetings condemning wide wage disparities. See *supra* note 3.

⁴¹ The term “repricing” is executive compensation parlance for reducing the exercise price of stock options when stock prices fall, thereby allowing top managers to evade the risk associated with this element of compensation. See Mark A. Chen, *Executive Option Repricing, Incentives, and Retention*, 59 J. FIN. 1167 (2004) (reporting on the practice of repricing and the arguments for and against it). Positive repricing would be a contractual commitment to provide workers a bonus based on successful company performance.

⁴² Joseph Biden, Vice President of the United States, Address to the United Auto Workers Union Delegates (Feb. 5, 2014); see Hobbs, *supra* note 15.

⁴³ Food service workers, janitorial staff, temporary job agency workers and other low wage occupations have been particularly affected. See Ben Penn, *Federally Contracted Workers Strike In D.C., Demanding Obama Guarantee Living Wages*, 27 Lab. Rel. Wk. (BNA) 1000 (May 28, 2013) (reporting striking workers’ objection to being paid \$8.25 per hour); Gayle Cinquegrani, *Louisiana Staffing Agency to Pay \$1.9 Million After Misclassifying Wages As Per Diem Pay*, 87 Daily Lab. Rep. (BNA) A-8 (May 6, 2013) (reporting the improper denial of overtime compensation to a broad group of industrial services workers by an employment agency).

⁴⁴ See Joel Rosenblatt, *Apple, Google Agree to Pay \$415 Million in Settlement of Anti-trust Hiring Charges*, 29 Lab. Rel. Wk. (BNA) 107 (Jan. 21, 2015) (reporting the technology companies’ decision to pay \$415 million to settle claims that they conspired to keep wages down, after a judge had rejected a \$324.5 million settlement offer as too low); Joel Rosenblatt,

Businesses, large and small, are using their strong bargaining position and contractual liberties to avoid many of the costs traditionally associated with having full-time employees.⁴⁵ And, except for minimum wage and overtime compensation laws, employers have few legal constraints on the way they contract labor and compensate for it.⁴⁶

A. *The Art of Reducing Labor Costs*

Cutting labor costs has become an art form in response to competitive pressures, and increasingly, as a profit-maximizing tool. For their at-will employees, employers are unilaterally cutting pay, reducing hours, and reducing or eliminating holiday, vacation, health, and retirement benefits, among other things.⁴⁷ Essentially, pay and other eco-

Oracle Sued Over Antitrust Claims on Hiring that Echo 2011 Apple-Google-Intel Lawsuit, 2000 Daily Lab. Rep. (BNA) A-11 (Oct. 16, 2014) (reporting workers' claim that several technology companies illegally conspired to not hire each other's workers in order to keep wages down); Joel Rosenblatt, *Disney, Dreamworks, Others Sued Over Alleged No-Poaching Agreement*, 174 Daily Lab. Rep. (BNA) A-2 (Sept. 9, 2014) (reporting similar claim against film industry employers); see also *County Employment and Wages: Third Quarter 2012*, Bureau of Labor Statistics (Mar. 28, 2013), http://www.bls.gov/news.release/archives/cewqtr_03282013.pdf (reporting that nine of the ten largest United States counties saw decreases in average weekly earnings in 2012); Chris Isidore, *Corporate Profits Hit Record As Wages Get Squeezed*, CNN MONEY (Dec. 4, 2012), <http://money.cnn.com/2012/12/03/news/economy/record-corporate-profits/> (reporting that wages have fallen to their lowest level as a share of GDP even as corporate profits soar).

⁴⁵ By contracting labor outside of employer/employee agency rules, employers can significantly reduce labor costs. See, e.g., *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (approving employer classifying package delivery drivers as independent contractors thereby avoiding the costs associated with unionism under the NLRA). But not all non-employee classifications are successful. See *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996) (holding that Microsoft improperly classified workers as temporary agency employees to avoid paying benefits offered to permanent workers); *Herman v. Time Warner, Inc.*, 56 F. Supp. 2d 411, 417 (S.D.N.Y. 1999) (holding that employer misclassified workers as independent contractors to exclude them from benefits plan).

⁴⁶ See Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2002). In addition to minimum wage regulations, labor laws prohibit discrimination on the basis of union or concerted activity. See National Labor Relations Act, 29 U.S.C. § 157 (2012). And employment discrimination laws prohibit discrimination on the basis of race, color, religion, national origin, sex, age, and disability. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012). However, public law generally does not prohibit employers from purchasing labor on a non-employee contract basis or dictate particular compensation levels. An exception would be prevailing rates or living wage regulations that require contractors with public employers to pay their employees more than the required minimum wage. For a discussion of the origin and operation of living wage ordinances, see William Quigley, *Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 Miss. L.J. 889 (2001).

⁴⁷ See Dana Mattioli, *Salary Cuts: Ugly But It Could Be Worse*, WALL ST. J., Apr. 9, 2009, at D1; Matt Richtel, *More Companies Are Cutting Labor Costs Without Layoffs*, N.Y. TIMES, Dec. 21, 2008, at A1 (noting that Honda is offering unpaid vacation time and Dell is offering unpaid holidays); Merritt Quisumbing, *Choosing Where to Buy Groceries: The High Price of Wal-Mart's "Always Low Prices, Always."* 7 J.L. & SOC. CHALLENGES 111, 127 (2005) (noting that Wal-Mart is requiring employee contributions to health insurance premiums even though Wal-Mart workers already depend heavily on government-provided health

conomic rewards are being reserved solely for productive output. Employers are also restructuring the employment relationship to avoid regulatory costs, such as those associated with labor and employment laws, including medicare, unemployment insurance, social security payments, and workers' compensation insurance. By classifying workers as contract laborers or independent contractors, businesses are circumventing regulations designed to give workers greater compensation.⁴⁸ Additional, cost-cutting measures include layoffs with increased responsibilities for the retained staff, hiring workers part-time with no benefits, creating two-tiered compensation structures in which new employees get paid substantially less than incumbents, automating operations, and outsourcing work to low-wage locales.⁴⁹ For unionized employers with ac-

care); see also *Fewer Americans Getting Employer-Based Coverage*, 27 Lab. Rel. Wk. (BNA) 456 (Mar. 6, 2013) (reporting a decline in employer-provided health benefits from 49.2% in 2008 to 44.5% in 2012).

⁴⁸ See *DOL, Iowa Collaborate to Prevent Misclassification*, 27 Lab. Rel. Wk. (BNA) 155 (Jan. 23, 2013) (noting that “[e]mployees who are misclassified as independent contractors often are denied access to benefits and protections to which they are entitled, such as family and medical leave, overtime compensation, minimum wage pay, and unemployment insurance”); see also *Vizcaino*, 120 F.3d at 1006 (holding that workers did not waive their rights to benefits although they signed labor contracts as independent contractors). Leasing employees from staffing companies is also common. See *Contingent Workers: Firms Employed More Temps in 2012 Averaging 2.9 Million Per Day, ASA Says*, 41 Daily Lab. Rep. (BNA) A-5 (Mar. 3, 2013); see also Stephen J. Dunn & Karen B. Berkery, *Employee Leasing: The Risk for Lessees*, 84 MICH. B. J. 22 (2005) (explaining the practice of leasing workers); Henry W. Sledz, Jr. & John J. Lynch, *The Legal Ramifications of Using Independent Contractors, Temporary Agency Employee Leased Workers*, 9 CHI. B. ASS'N REC. 20 (1995) (observing that employers can avoid overhead, labor, tax, and employment regulatory costs by purchasing labor on a non-employee contingent basis); Kenneth M. Casebeer, *Of Service Workers, Contracting Out, Joint Employment, Legal Consciousness, and the University of Miami*, 56 BUFF. L. REV. 1059, 1061 (2008) (arguing that the practice of contracting workers from another employer impedes class consciousness and the prospects of organizing a union).

⁴⁹ See Shobhana Chandra, *Rise in Fourth-Quarter Productivity Helps to Restrain Business Labor Costs*, 25 Daily Lab. Rep. (BNA) D-2 (Feb. 6, 2014) (observing that companies “have been wringing efficiency gains from existing staff” to boost productivity); Karen A. Doner, *Stock Options Today, Jobless Tomorrow*, 13 VA. EMP. L. LETTER 3 (2001) (discussing massive layoffs at major companies such as Amazon, AOL Time Warner, General Electric, and DaimlerChrysler); Steven Greenhouse & Reed Abelson, *Small Employers Weigh Impact of Providing Health Insurance*, N.Y. TIMES, NOV. 30, 2012, at B1 (listing several employers that limit health benefits to full-time workers); Louis Uchitelle, *Unions Yield On Pay Scales To Keep Jobs*, N.Y. TIMES, NOV. 20, 2010, at A1 (discussing two-tiered system at GM, Chrysler, Delphi, Caterpillar, Harley-Davidson, and Kohler, and reporting that those companies plan to make this system permanent); Amy Harmon, *More Consumers Reach Out to the Touch Screen*, N.Y. TIMES, NOV. 17, 2003, at A1, A15 (discussing the implementation of automated systems by several retail giants and Delta Airlines, that eliminated cashiers and other workers' jobs); Heather Timmons, *India Feels Less Vulnerable as Outsourcing Presses On*, N.Y. TIMES, JUNE 3, 2009, at B1, B5 (discussing Hewlett-Packard and Honeywell's outsourcing of software testing and research work to India, resulting in job losses for their American workers).

tive collective bargaining contracts, reduction in labor costs is achieved through concession bargaining, and this practice is now routine.⁵⁰

Demands for lower compensation rates are not always driven by a firm's weak economic position in its product market or a desire to avoid threats to continuing operation, such as insolvency.⁵¹ Companies seek the lowest possible compensation scales even when their profits are soaring and their competitive positions are secure.⁵² And there are few legal restraints on firms bargaining for this. Minimum wage laws do not regulate an employer's broad freedom to structure the employment relationship in ways that limit the price that is paid for labor.⁵³ This has forced organized and unorganized workers to accept a smaller share of the profits derived from their productive output.⁵⁴ As a result, employees are

⁵⁰ The "concession orgy" is said to have begun in the 1980s and continues today. See Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 476 (1987); David Welch & Jeff Green, *Carmakers Consider Moving Work Abroad for Leverage*, 29 Lab. Rel. Wk. (BNA) 1743 (Aug. 26, 2015); *Union OKs Cost-Saving Deal to Keep Jobs at United*, 41 Daily Lab. Rep. (BNA) A-9 (Mar. 3, 2015) (reporting an airline union's decision to accept lower wages and the suspension of company contributions to members' 401(k) plans in order to prevent the outsourcing of jobs); Michael Bologna, *Steelworkers Accept Pact Freezing Wages for Six-Year Period and Suspending Pension*, 27 Lab. Rel. Wk. (BNA) 1144 (June 19, 2013); Susan R. Hobbs, *CWA, AT&T Negotiations Continue After Contracts for 40,000 Workers Expire*, 68 Daily Lab. Rep. (BNA) A-10 (Apr. 9, 2012) (reporting that AT&T was seeking concessions on health care, pensions, and overtime pay, among other things); see also Tiziano Treu, *General Report: Procedures and Structures of Collective Bargaining at the Enterprise and Plant Levels*, 7 COMP. LAB. L. 219, 245 (1986) (observing that concession bargaining has become common in the United States and abroad); Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J. DISP. RESOL. 1, 6 (2013) (reporting the expansion of concession bargaining to the public sector). Concession bargaining is also undertaken to enhance profits. See Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 476 (1987).

⁵¹ Firms seeking cuts in pay and benefits to avoid economic disaster is not new or alarming but is in fact expected. See, e.g., Jeff Bailey, *Northwest Attendants Agree to Concessions As Pilots Continue Talks*, N.Y. TIMES, Mar. 2, 2006, at C1 (reporting compensation reduction demands as part of a bankruptcy reorganization plan). However, demands for compensation cuts are also being made in the interest of greater profits. See Craver, *supra* note 50, at 476.

⁵² For example, the telephone company Verizon recently proposed freezing or eliminating pensions, limiting sick days to five per year, and requested worker contribution for health insurance at a time when net income for the first half of 2011 was \$6.9 billion. See Steven Greenhouse, *Citing Statements, Verizon Workers Strike*, N.Y. TIMES, Aug. 6, 2011, at A14. Despite reporting record profits in 2011 and forecasting even better results for 2012, Caterpillar demanded a wage and pension freeze plus higher employee contributions to the health care plan. See Steven Greenhouse, *At Caterpillar, Pressing Labor For Concessions*, N.Y. TIMES, July 23, 2012, at A1.

⁵³ Classifying and contracting with workers as independent contractors has long been a strategy for avoiding minimum wage and overtime compensation laws. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

⁵⁴ Unions have lost their most potent bargaining weapon, the strike, due to declining membership and globalization. See Anna Stolley Persky, *State of the Union: The Role of Labor in America's Future*, WASH. LAWYER, July–Aug. 2011, at 28. Employers can readily replace

becoming more dependent on governmental agencies for economic support.⁵⁵

B. *The Sharing of Profits as Corporate Social Responsibility*

The drive to pay less for labor has intensified the debate about corporate social responsibility and the role of unions in securing middle class wages and reducing wage inequality.⁵⁶ But because the law does

strikers, particularly when unemployment is high, and with global options to relocate it is now very difficult to disrupt or cripple business operations with a strike. *Id.* The absence of legal protection for employees striking for better wages and benefits also deters strikes because such strikers can be permanently replaced. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. NLRB*, 544 F.3d 841 (7th Cir. 2008) (holding that, after a strike, employers must not discriminate against strikers in filling vacancies). As a result, workers have no choice but to surrender to employer demands. See Steven Greenhouse, *Caterpillar Workers Ratify Deal They Dislike*, N.Y. TIMES, Aug. 18, 2012, at B1 (reporting that striking workers approved a contract that contained almost all the concessions demanded by the employer).

⁵⁵ See Rhonda Smith, *New Low-Wage Job Market Poses Challenges for Workers and the Economy, Study Finds*, 234 Daily Lab. Rep. (BNA) A-14 (Dec. 4, 2013) (reporting, for example, that one third of bank tellers rely on some form of government assistance to make ends meet, although they have a median annual income of \$24,000 per year); see also Morgan Housel, *How You Subsidize the Minimum Wage*, MOTLEY FOOL (Oct. 26, 2013), <http://www.fool.com/investing/general/2013/10/26/how-you-subsidize-the-minimum-wage.aspx> (reporting that more than half of fast-food workers rely on public assistance to get by). This problem appears to be more pronounced in right-to-work states where such policies produce jobs but also significantly reduce taxes from labor income at the state and federal levels, thereby further depleting state budgets. See *Report Says Right-to-Work States' Workers Pay Less in Taxes, Receive More in Public Aid*, 28 Lab. Rel. Wk. (BNA) 2006 (Sept. 17, 2014).

⁵⁶ But from the perspective of employers, businesses exist to profitably provide the goods and services people want, not to provide economic security to workers. Businesses also pay taxes and create employment, and they seek to limit their social responsibility to these objectives. See Cynthia A. Williams, *Corporate Social Responsibility in the Era of Globalization*, 35 U.C. DAVIS L. REV. 705, 714 (2002). Company leaders feel they are accountable only to stockholders whose money they spend and manage. See Reuven S. Avi-Yonah, *The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 769 (2005). This philosophy of stockholder primacy has not lost any ground to constituency statutes which permit company directors to consider the interests of other stakeholders such as employees, creditors, suppliers, or customers. See Katherine Van Wezel Stone, *Employees As Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 75 (1991) (noting that constituency statutes simply expand management discretion without providing employees with enforceable rights). And even when company leaders choose to be socially responsible, they tend to prefer initiatives that benefit stockholders. See Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stock in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 787 (2009). Issues of wage sufficiency and pay disparities are viewed as matters to be addressed by contractual arrangements and regulatory bodies. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441–42 (2001) (noting that non-stockholder stakeholders such as workers must look to unions and labor and employment laws to protect their interests); see also STIGLITZ, *supra* note 15, at 267–82 (observing that corporations exercise an outsized influence on economic policy which has produced welfare and excessive gains for the wealthy, stagnant wages and economic loss for the

not impose on businesses any social responsibility for the economic stability of workers, labor is generally treated as a factor of production to be bought at market rates.⁵⁷ As such, firms view a competitive wage as one the worker individually negotiates that corresponds to his productive output.⁵⁸ The economic premiums above market rates that organized labor seeks and secures are therefore in conflict with the interests of business owners.⁵⁹ In fact, business interests argue that above-market labor rates also hurt society because they drive up production costs, reduce profitability, force price increases to uncompetitive levels, cause layoffs, and stymie business development or expansion.⁶⁰

Labor supporters dispute these claims or the extent to which above-market labor rates harm businesses, society, and other workers.⁶¹ From labor's standpoint, workers have a natural or moral right to a larger share of the fruits of their productive efforts than the law recognizes.⁶² Wage

poor, and vilification of unions that function as a countervailing influence on corporate power).

⁵⁷ See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) (noting that the primary goal of corporate law is to maximize stockholder wealth); HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* (1972) (stating that maximizing stockholder wealth is the social responsibility of corporations). Of course there are statutory declarations that the purchase and sale of labor is not a purely economic transaction. See Clayton Act, 15 U.S.C. §17 (2012) (declaring that the labor of humans is not a commodity); see also N.Y. CONST. art. 1, §17 (2002) ("Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed."); see also Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205, 231 (2007) (observing that the search and competition for low labor rates are global).

⁵⁸ See Thomas T. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1004–05 (1985). This view has been affirmed in legal theory. See Michael J. Zimmer, *Unions & the Great Recession: Is Transnationalism the Answer?*, 15 EM. RTS. & EMP. POL'Y J. 123–48 (2011) ("Neoliberalism assumes that labor relations is a zero-sum game between two players, capital and labor: what one side gains, the other loses."); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1076 (1987) (noting that since the Lochner era, courts endorsed classifying labor as a commodity subject to the rules of the commercial marketplace).

⁵⁹ See Campbell, *supra* note 58, at 1014 (noting that the purpose of unions is to seek a return above the value of work performed); see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15–22 (1991) (noting that there is an implicit contract between stockholders and the company in which the company promises to maximize profits).

⁶⁰ These claims find support in neoclassical economic theory. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 422 (1992).

⁶¹ See *id.* at 468–82 (arguing that above-market premiums come from employer profits and increased productivity not at the expense of displaced employees or higher consumer prices); see also FREEMAN & MEDOFF, *supra* note 11, at 57 (arguing that the adverse economic effects of above-market rates are modest).

⁶² See KAHLBERG & MARVIT, *supra* note 6, at 90 (arguing that the United States Constitution, statutory labor law, and international conventions support unionism as a human right with its attendant democratic values and dignity); Leonard Page & Daniel W. Sherrick, *The*

and benefit packages secured by unions are credited with improving worker productivity, increasing workers' purchasing power and the demand for goods and services, and creating a stable democracy.⁶³ Congress vetted the economic claims of capital and organized labor during the New Deal era, and settled on collective bargaining as the antidote for worker vulnerability.⁶⁴ And for a while, unions were able to defy the rules of free market bargaining by using the clout they had acquired from legal support for unionism.

II. CODIFICATION OF FREE MARKET COMPENSATION PRINCIPLES

It is often noted that unions succeed in driving up labor costs, causing companies to operate inefficiently and at a competitive disadvantage.⁶⁵ This claim has deep roots because historically unions demanded and got higher wages and benefits and better working conditions for their

NLRB's Deferral Policy and Union Reform: A Union Perspective, 24 U. MICH. J.L. REFORM 647, 649–50 (1991) (concluding that unions negotiate collective bargaining agreements in order to fight for the economic security and workplace dignity of workers); Isadore Katz, Book Review, 102 U. PA. L. REV. 571 (1954) (reviewing SELWYN H. TORFF, *COLLECTIVE BARGAINING: NEGOTIATIONS AND AGREEMENTS* (1953)) (stating that it is through collective bargaining agreements that trade unions seek protection of their members by compelling the adoption of practices which will preserve the integrity of individuals and will provide economic security); see also Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1021–22 (1984).

⁶³ See Dau-Schmidt, *supra* note 60, at 431–33. The link between productivity levels and wage levels is documented in the literature on efficiency wage theory. See ROBERT L. HENEMAN, *MERIT PAY: LINKING PAY INCREASES TO PERFORMANCE RATINGS* 39–40 (1992); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 90 (1985) (asserting that positive results arising out of collective bargaining negotiations include increase in workers' morale and discipline). *But see* John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 79–81 (1989) (questioning the claim that unionized firms are more productive, and concluding that the union effect on productivity is small or negative).

⁶⁴ See generally National Labor Relations Act, 29 U.S.C. §151–169 (2012). Congress found that individual employees bargaining with corporate employers lacked any real liberty of contract so employees' right to organize unions and bargain collectively needed to be protected in order to prevent labor strife and the "diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce." *Id.* § 151.

⁶⁵ See FREEMAN & MEDOFF, *supra* note 11, at 3 (explaining the monopoly view of unions which emphasizes the wage premium unions exact and its associated negative consequences such as lower output and employment); see also Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 57 PUB. INT. 76 (1979) (noting that the cartel theory of unions posits that unions force employers to hire or retain more workers than necessary, negotiate job restrictions that limit productivity, and otherwise reduce output by requiring more capital per worker than is economically efficient); Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 922 (1993) (noting the employer's perspective that unions demand a greater share of the firm's profits by increasing labor costs, which drive up prices and reduce sales which are taken by lower cost competitors); Gifford, *supra* note 63, at 89 (asserting that management's underlying interest when in collective bargaining is minimizing total compensation costs).

members than they would otherwise obtain in the free market.⁶⁶ Thus, when collective bargaining contracts are successfully negotiated, unionized workers likely secure better compensation packages than their at-will counterparts. From a business perspective, this is a bad result because labor costs above market rates negatively impact employers, society at large, and workers generally.⁶⁷ Specifically, it is contended that higher labor costs reduce profitability and competitiveness, drive up the price for goods and services (inflation), and reduce employment with less hiring and investment.⁶⁸

A. *National Regulation of Wage Bargaining (Congress, the Courts, and the NLRB)*

The economic claims of business owners were well known when the decision was made to regulate union activity as part of the New Deal. Congress knew that unions pursued above-market pay rates and benefits while companies actively worked to reduce labor costs. The declared national policy in the NLRA sided with labor, as Congress denounced unregulated market outcomes as burdensome to commerce and harmful to workers.⁶⁹ Nonetheless, Congress did not enact a rule that guaranteed unionized workers a living wage. Instead, Congress left wage outcomes to unregulated bargaining with results dependent on the economic

⁶⁶ See David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 396 (2004) (commenting on the contracting successes of unions during the 1970s and 80s and their effects on future employment); Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 702 (2012) (“According to organized labor, unions consistently provide higher wages and greater job security.”); see also Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 17 (2007) (asserting that “the collective nature of unions empowers them to fix wages at a level higher than would be dictated by the free market”). Although at-will employees are now catching up, unionized workers continue to draw better pay and benefits. See *Nonunion Workers See Sharper Wage Gain; Pay and Benefits Still Lag Behind Unionized*, 26 Lab. Rel. Wk. (BNA) 2320 (Dec. 19, 2012) (reporting average hourly pay of \$23.51 for unionized workers and \$20.04 for their nonunion counterparts, and cost to employers for providing benefits of \$15.65 for unionized workers and \$7.86 for their nonunion counterparts).

⁶⁷ See Estlund, *supra* note 65, at 941–42 (noting that employers often relocate operations to nonunion areas or eliminate jobs because of the higher labor costs associated with collective bargaining); see also Eigen & Sherwyn, *supra* note 66, at 703–04 (noting that increased salary expenses due to union-imposed wage increases reduce employer profits and cause U.S. manufacturers to outsource their production of goods); Dau-Schmidt, *supra* note 60, at 422 (asserting that the traditional economic analysis of unions and collective bargaining argues that unions gain benefits for some workers “at the expense of consumers, other workers, and economic efficiency” because employers respond to union gains by “raising prices, cutting output, substituting capital for labor, and laying off workers”).

⁶⁸ See FREEMAN & MEDOFF, *supra* note 11, at 3.

⁶⁹ See 29 U.S.C. § 151 (2012).

strength of the parties.⁷⁰ Employers, already bargaining giants under the common law, were left free under the NLRA to bargain to impasse and continue operations without a contract or their unionized employees.⁷¹ Unions could only levy economic pressure with strikes to force employer concessions, but strikers ran the risk of being replaced permanently.⁷²

Despite congressional claims of equalizing the parties' bargaining power, the NLRA did not impose on employers any economic responsibility for their workers or grant economic rights to unions.⁷³ The NLRA simply stated that it was an unfair labor practice for an employer to refuse to bargain with the representative of its employees.⁷⁴ Congress' decision to leave all substantive post-recognition bargaining issues to market forces was an affirmation of employer common law prerogatives.⁷⁵ The NLRA did not require employers to cede or share profits with workers, and it permitted them to substitute unorganized labor if unions went on strike to enforce contract proposals.⁷⁶ Further, unionized companies could justify harsh economic positions by pointing to the lower labor costs of their unorganized competitors.⁷⁷

⁷⁰ See Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 254 (1986).

⁷¹ See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

⁷² See *id.* at 345–46 (stating that an employer has the legal right to continue operations by filling positions made vacant by striking employees and is not required to fire the striker replacements when strikers choose to return to work). Only if workers are forced to strike because of an employer's illegal practices are they guaranteed their jobs. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288–89 (1958); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 394 (1984) (arguing that striker replacement laws give employers too much power over workers); Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikers, 1935–1991*, 16 BERKELEY J. EMP. & LAB. L. 169 (1995) (noting that striker replacement law is a contentious labor law issue); JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS* 229–30 (2010) (observing that the right to strike was a power equalizer under the NLRA but the law of striker replacements has forced unions to abandon this economic weapon).

⁷³ See *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485–86 (1960) (noting that “Congress was generally not concerned with the substantive terms on which the parties contracted” and stating that the NLRB cannot function as arbiter of what concessions an employer must make).

⁷⁴ See *id.* at 483 (“The bill which became the Wagner Act included no provision specifically imposing a duty on either party to bargain collectively However, the Senate committee in charge of the bill concluded that it was desirable to include a provision making it an unfair labor practice for an employer to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of requiring an employer to recognize a union selected by his employees as their representative.”). Management's bargaining duty is therefore a corollary of its recognition obligation. *Id.* at 484–85.

⁷⁵ For example, some employers refused to meet or talk with the unions their employees selected. See *Int'l Filter Co.*, 1 N.L.R.B. 489 (1936); *Jackson Daily News, Inc.*, 9 N.L.R.B. 120 (1938).

⁷⁶ See generally 29 U.S.C. § 151 (2012).

⁷⁷ See, e.g., *CalMat Co.*, 331 N.L.R.B. 1084 (2000).

To limit the effects of the economic and bargaining imbalance that the NLRA endorsed, the National Labor Relations Board (NLRB) concluded that the parties must at least talk in good faith and in a sincere and open-minded fashion about economic matters.⁷⁸ The determination that employers must talk to unions about economic issues raised questions about the extent to which an employer's common law contractual liberties were abrogated. The NLRA's constitutionality was challenged on several grounds, including that the federal government cannot regulate labor-contracting freedoms.⁷⁹ But the Court rejected this challenge, finding that although the NLRA made an employee's statutory representative exclusive, it did not preclude employers from making individual contracts, nor did it compel employers and employees to make contracts.⁸⁰

Although the Court declared that the NLRA gave workers fundamental rights to organize and choose a bargaining representative,⁸¹ it was emphatic that employers' contracting freedoms were undisturbed.⁸² The Court ruled that "[t]he Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'"⁸³

The declaration that employers had no contracting obligation at the bargaining table reinforced concerns that the NLRB was using its good faith bargaining doctrine to interfere with the substantive aspects of labor contracting. To address this complaint, Congress amended the NLRA to specify that employers' contract-making liberties were fundamental rights. Congress added section 8(d) to the NLRA to expressly limit the parties' bargaining obligation to meeting and discussing "wages, hours, and other terms and conditions of employment."⁸⁴ Congress also made it

⁷⁸ See *Int'l Filter Co.*, 1 N.L.R.B. at 499. See also *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941); *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939); Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261 (2007) (observing that the NLRB developed the good faith doctrine "to balance the perceived inequitable bargaining status between unions and employers").

⁷⁹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25 (1937). In addition to arguing that the NLRA was labor regulation cloaked as interstate commerce regulation, the employer also made Fifth and Seventh Amendment arguments. *Id.*

⁸⁰ See *id.* at 44–45.

⁸¹ See *id.* at 33 (citing NLRA § 7). Section 7 of the NLRA gives employees the right to form, join, or assist unions, to choose a bargaining representative, and to engage in concerted activities.

⁸² See *id.* at 45; see also Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955) (noting that the NLRA did not encroach on the parties' contractual liberties).

⁸³ *Jones & Laughlin Steel Corp.*, 301 U.S. at 45.

⁸⁴ See 29 U.S.C. § 158(d) (2012).

textually clear that the NLRA did not require that an employer make any concessions, agree to any proposal, or reach an overall agreement with a union.⁸⁵ Congress did not require that employers trade reasonably or fairly at the bargaining table, only that they bargain in good faith.⁸⁶

To satisfy the obligation of good faith, employers only need to arrive at the bargaining table with a genuine desire to reach an agreement.⁸⁷ To test the employer's resolve, the NLRB can evaluate whether the employer has an open mind and is honest in its claims.⁸⁸ The NLRB can also determine whether bargaining positions must be substantiated,⁸⁹ and whether an employer is merely going through the motions, or worse, making proposals that are predictably unworkable.⁹⁰ Surface bargaining or behavior designed to inhibit contract formation is deemed an unfair labor practice.⁹¹ But the penalties for such violations are extremely weak—essentially limited to cease-and-desist orders and posting notices.⁹²

The U.S. Supreme Court has indicated that the NLRB cannot do more when an employer fails to satisfy this limited obligation. In *H.K. Porter Co. v. NLRB*,⁹³ the Court was asked to decide whether the NLRB may order an employer to accept a proposal it had rejected in bad faith.⁹⁴ The D.C. Circuit had reasoned that the NLRB could do this as part of its remedial authority, which was not expressly constrained by section 8(d)'s liberty of contract rules.⁹⁵ But the Court disagreed, holding that the NLRA's freedom of contract origin is so fundamental and compelling that the NLRB's remedial authority must defer to it.⁹⁶ Citing section

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ See *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960); see also *Altorfer Mach. Co.*, 332 N.L.R.B. 130, 148–59 (2000) (noting that surface bargaining occurs when a party's overall conduct demonstrates an intent to avoid reaching an agreement).

⁸⁸ See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

⁸⁹ See *id.* at 151–52.

⁹⁰ See *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

⁹¹ See *id.*

⁹² See *Borg-Warner Controls v. UAW Local 509*, 198 N.L.R.B. 726, 739 (1972).

⁹³ 397 U.S. 99 (1970).

⁹⁴ See *id.* at 102. The union had proposed that the company deduct union dues from union members' paychecks (dues check off). *Id.* at 100. The company rejected this proposal as purely union business with which it was not going to assist the union. *Id.* at 101. The rejection was not part of a bargaining strategy nor did the company cite any operational burdens or inconvenience the proposal would impose on it. *Id.* at 100–01. The NLRB determined that the sole purpose of the refusal was to frustrate the formation of a contract, and therefore, the refusal was bad faith conduct. *Id.* at 101.

⁹⁵ See *id.* at 107. The D.C. Circuit reasoned that the non-intervention liberty of contract commands of § 8(d) related only to the contract-making process. *Id.* Once it was determined that a bargaining violation occurred, § 8(d)'s free market rules did not prohibit the government from ordering a remedy designed to cure the violation. *Id.*

⁹⁶ See *id.* at 107–08. The Court decided that although the appellate court's interpretation of § 8(d) was sound, its remedial conclusion was wrong. *Id.* The Court held that the NLRB's

8(d)'s text and legislative history, the Court ruled that the clear purpose of this provision is to prevent the government from forcing the parties to agree on substantive contract terms.⁹⁷ Whether the parties agree to anything is to be determined by their bargaining strengths with government involvement limited to supervising the contracting process.⁹⁸ In so ruling, the Court confirmed that the employer's common law contractual liberties are secure even when they violate the law.

Armed with this powerful bargaining prerogative, companies have used section 8(d)'s free market embrace to insist on their legal right to structure compensation based on market forces. To this end, employers have demanded compensation structures that are competitive in the specific areas of wage and benefits even if overall profitability is high. Often relying on their non-union competitors as comparators, firms have insisted on labor cost proposals that brought them in line with such competition, even if this forced workers to give up vested rights.⁹⁹ This can be done simply by identifying the compensation structure of a competitor and comparing that to the company's pay and benefits structure. The following historical examples demonstrate how easily legitimate concession bargaining by a profitable employer can be accomplished when it is grounded in labor cost disadvantage.

B. Pursuing Market Rates for Labor Under the NLRA

In *Empire Terminal Warehouse Co.*, the employer proposed a reduction of wages from \$2 to \$1.60 per hour based on a survey of its non-union competitors' wage rates.¹⁰⁰ The survey showed competitors paying between \$1.40 and \$1.56 per hour.¹⁰¹ And although the company was very successful and profitable, it declared an unwillingness to pay a

remedial authority was constrained by the Act's fundamental policy of non-intervention when attempts at contracting fail. *Id.* Further, the Act's legislative history and statutory precedents made it crystal clear that the NLRB could not impose contract terms on the parties, but could only supervise the framework for negotiations. *See id.* at 103–06.

⁹⁷ *See id.* at 103–06.

⁹⁸ *Id.* at 108. Soon after the *H.K. Porter Co.* decision, the NLRB reaffirmed the Act's free market principles in *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108–10 (1970). In this case, the employer refused to engage in any bargaining with the union, and the trial examiner concluded that this conduct violated the Act. *Id.* at 108. The trial examiner issued a bargaining order, and also ordered the company to pay the workers for losses attributable to the violation. *Id.* The NLRB rejected the compensation order, noting that its broad remedial authority does not extend to compelling the parties to agree or punishing parties that fail to agree. *Id.*

⁹⁹ *See, e.g.*, *A-1 Door & Bldg. Solutions*, 356 N.L.R.B. No. 76 (Jan. 11, 2011); *Caldwell Mfg. Co.*, 346 N.L.R.B. 1159, 1160 (2006); *Media Gen. Operations, Inc.*, 345 N.L.R.B. 195, 196–97 (2005); *AMF Trucking & Warehousing, Inc.*, 342 N.L.R.B. 1125, 1126–27 (2004); *Burruss Transfer, Inc.*, 307 N.L.R.B. 226, 227–28 (1992); *Nielsen Lithographing Co.*, 305 N.L.R.B. 697, 699–701 (1991).

¹⁰⁰ 151 N.L.R.B. 1359, 1361 (1965).

¹⁰¹ *Id.* at 1368.

higher wage than its competitors.¹⁰² Analogizing labor to commodities, the company explained “that it would not pay 35 cents a gallon for gasoline if it could get it for 25 cents, nor \$5,000 for a truck which it could buy for \$4,000.”¹⁰³

When the union demanded the company’s books and financial records that substantiated it could not pay higher wages, the company noted that it was not pleading poverty or inability to pay; only that its wage scale was not competitive and this caused it to lose out on accounts.¹⁰⁴ Instead of opening its books, the company provided the union with a survey showing that unorganized competitors paid lower rates, and asked the union for a counterproposal that could make it economically competitive.¹⁰⁵ The union responded with a proposal that new employees start at a rate below \$2 per hour, but did not budge on its proposal for a twenty-five cent increase for incumbents.¹⁰⁶ However, the employer insisted on \$1.60 per hour as a maximum and implemented its wage proposal when the collective bargaining contract expired, without violating its bargaining obligation under the NLRA.¹⁰⁷

General Dynamics Corp., Electric Boat Division provides another example.¹⁰⁸ In this case, an extremely profitable defense contractor sought concessions from the union in order to align its workers’ wages with those of a competitor.¹⁰⁹ General Dynamics argued that its Electric Boat Division, which designs and builds submarines, was at a competitive disadvantage because unionized workers’ wages were about \$2 per hour higher than what was paid by their competitor Newport News.¹¹⁰ The company made this determination by comparing the wage rates in its collective bargaining contract with those of the workers at Newport News, who were also unionized.¹¹¹ Based on this comparison, the company asked for a wage freeze and other economic concessions.

The union rejected the employer’s contention that it was operating at a competitive disadvantage and requested cost projections, overhead, revenues, and profit data, among other things, to evaluate the company’s

¹⁰² *Id.* at 1376. In a letter to the union, the company explicitly stated that the company “is not pleading an inability to pay and has never done so in any bargaining session . . . This company is a profitable operation but feels it is not good business to pay excessive wages.” *Id.*

¹⁰³ *Id.* at 1367.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1368–69.

¹⁰⁶ *Id.* at 1368.

¹⁰⁷ *Id.* at 1372. The NLRB found that “Respondent did not refuse to bargain . . . by putting into effect decreased wage rates concerning which it had formerly given notice and consulted with the Union.” *Id.* at 1373.

¹⁰⁸ Nos. 39-CA-1703 & 39-CA-1734, 1984 NLRB GCM LEXIS 166 (1984).

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8. The comparison showed that Newport News had lower contract wages and less non-productive paid time off than the Electric Boat Division. *Id.*

contention.¹¹² The union also wanted information about the company's "forward pricing" estimates to be used on future bids since these were premised on possible wage increases.¹¹³ In response, the company refused the information request and clarified that it was claiming "wage disparity," rather than "cost disparity," based on a comparison of two collective bargaining contracts.¹¹⁴ From the employer's perspective, merely pointing to a competitor's low wage rates substantiated its claim of competitive disadvantage, so it did not have to provide additional information to the union.

The NLRB ruled for the employer, reasoning that the union failed to rebut the employer's contention that it was operating at a competitive disadvantage.¹¹⁵ The claim by union officials that wage costs at Newport News were higher than suggested by their labor contract was not persuasive because the union provided no documentary evidence to rebut the express disparities between the two contracts.¹¹⁶ In any event, the NLRB was persuaded that wage costs affected competitiveness because the government intended to award future contracts to the lowest bidder, and submarine design jobs were cost-plus contracts.¹¹⁷ Further, the company demonstrated that while escalating costs can be recouped, such developments reduced profitability because profits are limited to a percentage of the estimated cost originally given in the bid.¹¹⁸

*Ameron Pipe Products*¹¹⁹ provides another example. Here, the employer negotiated for wage cuts from \$12.68 to become more competitive with its primary competitor, Northwest Pipe, whose employees were represented by the same union.¹²⁰ The company claimed that it needed a wage scale that matched its competitor's to be competitive and expressly stated that it was not claiming inability to pay.¹²¹ To support the claim that it was not competitive, the company provided the union with data showing it had lost eleven jobs to Northwest Pipe and its wages of \$10

¹¹² *Id.* at 8–9.

¹¹³ *Id.* at 13–14.

¹¹⁴ *Id.* at 11.

¹¹⁵ *Id.* at 28.

¹¹⁶ *Id.* at 28 n.26.

¹¹⁷ *Id.* at 27.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Ameron Pipe Prods.*, 305 N.L.R.B. 105, 106 (1991).

¹²⁰ *Id.* at 106–08.

¹²¹ *Id.* at 106–07 (noting that the company "consistently responded that it was not pleading poverty or inability to pay and that it was claiming that the Company was not competitive").

per hour.¹²² Ameron also provided data showing a steady decline in production attributable to the lost projects.¹²³

Despite the employer's expressions to the contrary, the union interpreted the employer's position as one of inability to pay, particularly after the company stated that it needed the wage concessions to stay in business and survive.¹²⁴ The union then asked for financial data, including tax returns, to evaluate the company's "fiscal condition," but the company refused.¹²⁵ The NLRB decided that this refusal did not violate the NLRA because the company posited that it was only willing to pay prevailing rates, and in particular, the wage rate of its primary competitor, because failure to do so would lead to further loss of work.¹²⁶ Because the company was not citing its financial condition as the justification for wage cuts, the union could not demand data to evaluate the company's fiscal condition.¹²⁷

A company is also free to demand concessions based on the pay and benefit structure of its non-union competitors. In *CalMat Co. and International Union of Operating Engineers, Local 12, AFL-CIO*, the company sought reductions in its pay and pension benefits, citing a tough economic climate in the rock, sand, and gravel industry.¹²⁸ Specifically, the company wanted to remain competitive with non-union competitors who paid less than the company had agreed to in its expired collective bargaining contract.¹²⁹ CalMat provided the union with the names and pay scales of several companies that paid less, but argued that the proper

¹²² *Id.* at 110 ("The data supplied to the Union showed that 11 of the jobs that had been bid on by the Company had been awarded to Northwest Pipe and that the total value of those jobs was over \$13 million.")

¹²³ *Id.* (stating that the company supplied the union with data showing "the Company's production [levels], average number of employees, hours worked and corresponding man years for the years 1972 to 1985," in addition to "projections to cover the years 1986 and 1987").

¹²⁴ *Id.* at 108. The union claimed that the company had "crossed the threshold" by requesting concessions in order to stay competitive, which brought the company within the area which the union claimed the NLRB ruled entitled them to financial information. *Id.*

¹²⁵ *Id.* Ameron stated that the union's insistence on financial data as a pre-condition to further economic bargaining was "wholly inappropriate" due to the fact that Ameron was not claiming an inability to pay, only that it refused to pay uncompetitive rates. *Id.*

¹²⁶ *Id.* at 110. The union was fully aware of the company's situation in respect to its main competitor, Northwest Pipe, because the union was also Northwest Pipe's collective bargaining agent. *Id.*

¹²⁷ *Id.* The company claimed that its decision not to pay more than it was offering did not subject it to verification or refutation by an examination of the company's books by the union. *Id.* Additionally, the NLRB found valid the company's belief that it "could not" secure work in the future if it was not competitive, and did not subject the company to affirmation or refutation by an inquiry into its present, general financial condition. *Id.*

¹²⁸ 331 N.L.R.B. 1084, 1085-86 (2000).

¹²⁹ *Id.* The expired agreement included union-won increases in wage rates and health and welfare benefits. *Id.*

marketplace comparison should be Owl Rock, its chief non-union competitor.¹³⁰

The union also asked for financial records and reports in the company's possession or control related to competitors' productivity, labor and material cost, prices, profits and losses.¹³¹ The company refused, claiming that such financial data was irrelevant.¹³² The NLRB agreed with the employer's contention that it had satisfied its bargaining obligation in this case.¹³³ Starting from the premise that the union must prove relevance of information about competitors' operations or employees, the NLRB found that CalMat made that information relevant by alleging noncompetitiveness with non-union companies.¹³⁴ However, the union only asked for information in CalMat's possession or control, and the company did not have data "concerning its competitors' productivity, labor and material costs, prices, or profitability."¹³⁵ Since the company did not have this information and did not have a duty to obtain it under the circumstances, it satisfied its bargaining obligations.¹³⁶ The employer's market comparison was essentially limited to Owl Rock, and it provided the union with wage data for this employer.¹³⁷ Therefore, CalMat did not violate the NLRA when it unilaterally implemented its economic proposals after bargaining to impasse.¹³⁸

These historical cases show that requests for concessions by profitable firms were tied to claims of competitive disadvantage in the area of labor costs. Such claims were easily substantiated by providing data on the pay and benefits structure of competitors, union or nonunion. But the NLRA does not limit concession bargaining to situations where companies cite competitive disadvantage. Employers are free to rely on a general desire to be efficient, a drive to be more profitable, or a push to increase stockholder value as the justification for seeking concessions.

¹³⁰ *Id.* at 1089.

¹³¹ *Id.* at 1088.

¹³² *Id.* at 1088–89.

¹³³ *Id.* at 1097.

¹³⁴ *Id.* at 1096. The NLRB noted that where "an employer relies upon its alleged non-competitiveness with nonunion employers, information concerning the nonunion employers is clearly relevant." *Id.* Further, more extensive data—such as a competitor's productivity, prices, and labor and material costs—could ordinarily help the union evaluate the employer's need for concessions on wages and benefits. *Id.* at 1096–97. By evaluating broad economic data of a competitor, the union might be able to come up with economic alternatives to make the employer competitive, such as increasing productivity or reducing costs elsewhere. *Id.* at 1097.

¹³⁵ *Id.* at 1095.

¹³⁶ *Id.* at 1096 (holding that CalMat had provided all of the information it had in its possession and control to the Union and was not obligated to obtain information it did not have).

¹³⁷ *Id.* at 1095.

¹³⁸ *Id.* at 1097.

Even if the firm faces no labor cost or product competition, it could ask workers for concessions based on economic conditions or the labor market. For example, companies could rely on the abundant supply of labor at low prices to demand that incumbent employees accept less. And, increasingly, employers are doing this to further efficiency goals or stockholders' interests, proving to workers that unions can deliver little more than market rates for labor.

III. THE AGGRAVATING EFFECTS OF GLOBALIZATION

In enacting the NLRA in 1935, Congress said it was responding to the fact that individual workers had no real liberty of contract when selling their labor in a free market that was neither moral nor efficient.¹³⁹ To provide a countervailing force to powerful corporate bargainers, Congress empowered unions to bargain on behalf of worker groups or collectives.¹⁴⁰ The system of collective bargaining that was endorsed by the New Deal NLRA did not limit an employer's economic power at the bargaining table, nor did it increase the economic rights of unionized workers.¹⁴¹ This was the contextual framework within which the NLRB formulated and imposed a good faith bargaining obligation on employers.¹⁴²

But as the strength of unions grew with increasing union density, unions were able to make demands that had to be taken seriously.¹⁴³ Strikes that could cripple a business or impose significant economic losses helped to persuade companies to share their good fortunes with their workers.¹⁴⁴ Unions also secured contracts by organizing whole in-

¹³⁹ See 29 U.S.C. §§ 151–169 (2012). Specifically, Congress found that:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id. § 151.

¹⁴⁰ See *id.* § 151; see also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944) (noting that the majority rule principle of the NLRA “collectivizes the employment bargain”).

¹⁴¹ See Schwab, *supra* note 70, at 254 (noting that the NLRA is premised on capitalism, private bargaining, and the economic strength of the parties); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 589–90 (1992) (observing that market factors such as efficiency and profitability control and insulate the employer's bargaining obligation).

¹⁴² See Emmett P. O'Neill, *The Good Faith Requirement in Collective Bargaining*, 21 MONT. L. REV. 202, 202–03 (1960).

¹⁴³ See GETMAN, *supra* note 72, at 269–70.

¹⁴⁴ See *id.* at 229–30 (observing that the strike weapon was a power equalizer under the NLRA, but this weapon was neutralized by the judicial determination that employers may

dustries and negotiating standard contract terms, which eliminated wage competition between employers.¹⁴⁵ Many companies, sheltered from global competition, were able to absorb union markups or pass them on to consumers.¹⁴⁶ Union demands for higher pay than the free market rate, along with requests for health benefits and pension plans, drove up operating costs and influenced competitiveness and efficiency.¹⁴⁷ But with the advent of global wage competition, employers are unwilling or unable to absorb these labor costs.¹⁴⁸

A. *Compensation Costs for Workers Classified as Employees in a Global Economy*

Paying wages above market rates to attract, retain, and motivate workers can inflate an already significant labor bill because, by law, certain costs such as Social Security, Medicare, unemployment insurance, and workers' compensation insurance may be unavoidable.¹⁴⁹ And the cost of these benefits is usually tied to workers' salaries. For example,

permanently replace strikers); *Div. 1287 v. Missouri*, 374 U.S. 74, 82 (1963) (finding that the right to strike is at the "core" of collective bargaining); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963) (finding that the strike is "an economic weapon which in great measure implements and supports the principles of the collective bargaining system").

¹⁴⁵ See AIDT & TZANNATOS, *supra* note 15, at 56–58; Zimmer, *supra* note 58, at 154 (citing the auto industry as an example where this practice worked in the past).

¹⁴⁶ See Zimmer, *supra* note 58; see also Fried, *supra* note 62, at 1030 (noting that with government protection or regulation, employers could pass union premiums on to consumers).

¹⁴⁷ See Renae Broderick & Barry Gerhart, *Non-Wage Compensation*, in 3 *The Human Resource Management Handbook* 145–73 (David Lewin et al. eds., 1997); see also FREEMAN & MEDOFF, *supra* note 11, at 181–84 (concluding that unions lower profitability and that the benefits of unionism do not offset union costs).

¹⁴⁸ See Lucy B. Bednarek, *The Gender Wage Gap: Searching for Equality in a Global Economy*, 6 *IND. J. GLOBAL LEGAL STUD.* 213, 217 (1998) (stating that structural changes resulting from globalization usher in a more flexible workforce with reduced labor regulations and costs that ultimately devalue labor). The effects of structural changes in the economy and wage competition from foreign workers were already noticeable over a quarter of a century ago. See Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 *STAN. L. REV.* 1123, 1131–32 (1986). Global wage competition has combined with a stockholder primacy culture to put downward pressure on wages for most workers while promoting the interests of senior managers. See Susan J. Stabile, *One for A, Two for B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees*, 36 *U. MICH. J.L. REFORM* 115, 118 (2002) (identifying shareholder primacy philosophy as the cause of the dramatic disparity between executive pay and that of other workers). See also Estlund, *supra* note 65, at 950 (noting that product market competition has increased with globalization and this has encouraged employers to pursue a low-wage strategy); Fried, *supra* note 62, at 1030 (observing that the regulated or protected industries of old could pass labor costs on to consumers and thereby absorb union premiums, but this is no longer possible with global competition).

¹⁴⁹ See Federal Old-Age, Survivors, and Disability Insurance Benefits Act, 42 U.S.C. §§ 401–433 (1994 & Supp. II 1996); Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–3311 (2012). Workers' compensation insurance is governed by state law. See, e.g., FLA. STAT. § 440.01 (2015); HAW. REV. STAT. § 386-1 (2015); MO. REV. STAT. § 287.280.1 (2015).

Social Security is financed by a payroll tax shared by the employer and the worker.¹⁵⁰ It is estimated that required benefits add an additional 7.9% to labor costs in private industry.¹⁵¹ Employers also provide other economic benefits voluntarily.

Total compensation often includes additional benefits that are voluntarily provided or ceded through contract negotiations. Typically, employers provide paid holidays, paid vacation, and paid sick leave in addition to paying premiums for other benefits, such as health insurance and pension plans.¹⁵² Today in the United States, the benefits component can represent about thirty percent of total hourly compensation.¹⁵³ In September 2015, the manufacturing sector reported total hourly compensation cost of \$37.70, with average hourly wage at \$24.57 and benefits costing \$13.13 per hour.¹⁵⁴

For pay and voluntary benefits, unionized workers in September 2015 fared better than at-will employees because of the bargaining success of unions. While unionized workers received average hourly wages of \$27.87 and benefits of \$18.51, their at-will counterparts received \$21.39 in wages and \$8.65 in benefits.¹⁵⁵ And the cost for health insurance for unionized workers was more than double that of unorganized employees: \$5.77 versus \$2.11 per hour.¹⁵⁶ Because union presence has driven up the breadth and cost of discretionary benefits, unions and the workers they represent have been blamed for saddling companies with unsustainable compensation debts that have contributed to or caused business failures.¹⁵⁷

¹⁵⁰ See 42 U.S.C. §§ 401–433 (1994 & Supp. II 1996).

¹⁵¹ See News Release, Bureau of Labor Statistics, Employer Costs For Employee Compensation—September 2015 (Dec. 9, 2015), http://www.bls.gov/news.release/archives/ecc_12092015.pdf.

¹⁵² See Andrea H. Brustein, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 U. PA. J. LAB. & EMP. L. 695, 696 (2005).

¹⁵³ See News Release, *supra* note 151 (reporting that benefits accounted for 31.4% of total compensation in September 2015).

¹⁵⁴ See *id.* at 21 tbl.12.

¹⁵⁵ *Id.* at 10 tbl.5.

¹⁵⁶ *Id.*

¹⁵⁷ See generally Peter Linneman & Michael L. Wachter, *Rising Union Premiums and the Declining Boundaries Among Noncompeting Groups*, 76 AM. ECON. REV. 103 (1986); see also GETMAN, *supra* note 72, at 22 (noting that the economic woes of American auto companies were attributed to burdensome union contracts); STIGLITZ, *supra* note 15, at 229 (noting that workers' pursuit of higher wages and greater job security have been blamed for the economic woes of the country); Carey Gillam & Tanya Agrawal, *Twinkies Maker Hostess Plans to Go Out of Business*, REUTERS (Nov. 16, 2012), <http://www.reuters.com/article/2012/11/17/us-hostess-bankruptcy-idUSBRE8AF0OW20121117#WG79Y18TaVHMwpjW.97> (reporting that the 82-year-old company blamed its demise on labor troubles, including burdensome wages and pension plans, union refusal to make concessions, and strikes).

B. Employers' Response to the Wage Bill in a Global Economy with Weaker Unions

As the previous section shows, companies have consistently fought back when unions made wage and benefits demands, and the NLRA makes it easy for them to do so. But now, a more competitive world economy and low union density have combined to magnify the employer bargaining advantage under the NLRA. For over a quarter century, union membership and the ability to wage effective strikes to secure economic demands have consistently declined.¹⁵⁸ Economic realities have also changed with a decline in the manufacturing sector where unions were strong, along with the removal of trade and competition barriers which allow employers to freely move capital or production to nonunion locales.¹⁵⁹ While these developments have expanded employers' labor contracting power, unions' bargaining power has declined with the growth of right-to-work laws and worker ambivalence.¹⁶⁰

The NLRA continues to embrace employer bargaining freedoms as an indefeasible fundamental right that takes priority over worker economic security. And employers' bargaining strength has grown with greater wage competition at the national level,¹⁶¹ as well as internationally, because of the removal of trade and investment barriers which opened overseas labor markets with lower labor costs.¹⁶² Many employers have the bargaining clout to propose lower compensation or threaten

¹⁵⁸ Gerald E. Berendt et al., *The Labor Strike: Is It Still a Useful Economic Weapon for Unions?*, 35 J. MARSHALL L. REV. 255, 277 (2002) (discussing the dramatic decline of strike activity and the ramifications for unions).

¹⁵⁹ See Craver, *supra* note 50, at 466–67, 482 (observing that economic and technological shifts have blunted the strike weapon by reducing union density and providing many non-union operating alternatives for employers).

¹⁶⁰ The absence of regulatory change is compounded by public ambivalence about unions. See *Poll Finds Most Americans Favor Unions, While Even More Back Right-to-Work Laws*, 169 Daily Lab. Rep. (BNA) A-8 (Sept. 2, 2014) (reporting that a slight majority of Americans approve of unions while a larger percentage support laws that deny unions financial support); see also Steven Greenhouse, *A Challenge for Unions in Public Opinion*, N.Y. TIMES (Sept. 2, 2011), <http://economix.blogs.nytimes.com/2011/09/02/a-challenge-for-unions-in-public-opinion/> (reporting that in 2009 unions had the lowest approval rating since Gallup started tracking this issue in 1936).

¹⁶¹ See David Welch & Jeff Green, *Carmakers Consider Moving Work Abroad for Leverage*, 29 Lab. Rel. Wk. (BNA) 1743 (Aug. 26, 2015); see also Ben Penn, *Trade with Low-Wage Nations Decreases Income for Less-Educated U.S. Workers*, 27 Lab. Rel. Wk. (BNA) 641 (Apr. 3, 2013) (“Once American workers in sectors such as manufacturing are laid off, they settle for lower wages in other sectors, such as construction, causing lower wages in those sectors from the increased competition among workers.”). And manufacturing imports from less-developed countries have grown from .9% of gross domestic product in 1973 to 6.3% in 2011. *Id.*

¹⁶² In 2011, for example, the average hourly compensation cost was \$21.42 in Israel, \$11.65 in Brazil, \$8.83 in Poland, \$6.48 in Mexico, and \$2.01 in the Philippines. See News Release, Bureau of Labor Statistics, *International Comparisons of Hourly Compensation Costs in Manufacturing*, 2011 (Dec. 19, 2012); see also Penn, *supra* note 161 (noting that the grow-

to relocate work because of low-wage options overseas or domestically.¹⁶³ And for unorganized workers, companies are free to cut pay and benefits unilaterally based on market realities.

Even if a company is profitable or competitive, it still is efficient to look at the market rate of labor based on local labor competition, labor costs in other states, and labor costs in other countries. Market rates anywhere now influence what companies are willing to pay their workers. Even companies that control their product market or dominate their competitors are demanding decreases in pay and benefits as the starting point of contract renewal negotiations. The following example illustrates this practice.

1. The DPS Example

In May 2008, Cadbury Schweppes Americas Beverages spun off its beverage operations from its confectionary business to create the Dr Pepper Snapple Group (“DPS”), an independent publicly traded company.¹⁶⁴ DPS went public as a leader in the beverage business, with highly recognized brands and significant market share.¹⁶⁵ The company is an industry leader in the carbonated and non-carbonated beverage business, occupying the number one or number two spot for most of its brands.¹⁶⁶ Net income was \$503 million in 2009 and \$595 million in 2010.¹⁶⁷

In February of 2010, the company began negotiations for a new collective bargaining contract covering employees at their Williamson, New York, facility that produces Mott’s apple juice.¹⁶⁸ The company proposed a reduction in wages of \$1.50 per hour, arguing that the employees’ pay scale was not competitive with that of hourly production,

ing trade with low wage countries accounted for about \$1,800 of lost wages for a full-time worker without a college degree in 2011).

¹⁶³ See Larry Swisher, *Right-to-Work Laws Lower Nonunion Wages Along with Union Membership*, *Studies Find*, 27 Lab. Rel. Wk. (BNA) 441 (Mar. 6, 2013). In states with strong opposition to unions, compensation costs are often lower because, with little worker support, the union threat is small. See Henry S. Farber, *Nonunion Wage Rates and the Threat of Unionization*, 58 INDUS. & LAB. REL. REV. 335, 338–39 (2005) (acknowledging that unions find it more difficult to organize workers and maintain their status as bargaining representatives in states that prohibit employee financial support of unions as a condition of employment).

¹⁶⁴ See Dr Pepper Snapple Grp., Inc., Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A), at 23 (May 19, 2009) [hereinafter DPS May 19, 2009 Proxy Statement].

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* (noting that 75% of their business comes from brands that are number one or two in the categories in which they compete).

¹⁶⁷ See Dr Pepper Snapple Grp., Inc., Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A), at 23 (May 20, 2010) (detailing 2009 results); Dr Pepper Snapple Grp., Inc., Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A), at 28 (May 19, 2011) (detailing 2010 results).

¹⁶⁸ See Ari Paul, *Rotten Apples, Core Values*, NATION, Aug. 12, 2010, at 28–30.

transportation and material moving workers in the area.¹⁶⁹ The company argued that Mott's employees averaged \$21 per hour, while comparable workers in the area received \$14 per hour.¹⁷⁰ In addition to wage cuts, the company also proposed freezing pensions, ending pensions for new employees, reducing 401(k) retirement contributions, and increasing employee health care contributions to bring benefits in line with what was paid at other DPS plants.¹⁷¹

The union rejected the pay and benefits reduction, noting that the wage cut amounted to about \$3,000 per year per employee and that a reduction in pension and health benefits could have devastating effects on workers' economic security.¹⁷² Further, the union contested the employer's claim that employees averaged \$21 per hour, arguing that 70 percent of workers made \$19 per hour or less.¹⁷³ The union also claimed that food manufacturing workers in the area averaged \$25 per hour.¹⁷⁴ When the contract expired in April 2010 without an agreement, the union went on strike.¹⁷⁵ The strike was settled after sixteen weeks with the union agreeing to a wage freeze, no pension for new hires, and reduced employer contribution to 401(k) plans.¹⁷⁶

This concession bargaining strategy at the Mott's plant reflects a common practice in contract renewal negotiations. DPS did not argue that it was losing market share or profitability because of anti-competitive labor costs. Nor did the company argue that its competitors were paying less, thereby reducing its competitiveness. Rather, the company relied on its assessment that food manufacturing workers were readily available at \$14 per hour, so paying more than that would be inefficient.¹⁷⁷ The company also believed that the lowest benefit level it provided at any of its plants should be the benchmark for other plants.¹⁷⁸

The bargaining strategy and proposals advanced by DPS are all perfectly legal. Nothing in the NLRA prevents an employer from taking advantage of abundant labor supply or labor sold at prices lower than those provided in an expired bargaining contract. In fact, managerial and stockholder primacy demand that companies seize cost-cutting opportunities. DPS made this clear by stating that it has "a fiduciary responsibil-

¹⁶⁹ See *id.*

¹⁷⁰ See Steven Greenhouse, *In Mott's Strike, More Than Pay at Stake*, N.Y. TIMES, Aug. 18, 2010, at B1 [hereinafter Greenhouse, *Mott's Strike*].

¹⁷¹ See *id.*

¹⁷² *Id.*; see also Paul, *supra* note 168 (reporting a worker's claim that "reduced medical benefits would have made it impossible for him to make ends meet.").

¹⁷³ See Greenhouse, *Mott's Strike*, *supra* note 170.

¹⁷⁴ See Paul, *supra* note 168.

¹⁷⁵ *Id.*

¹⁷⁶ See Greenhouse, *Mott's Strike*, *supra* note 170.

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

ity to operate in the best interests of all its constituents, recognizing that a profitable business attracts investment, generates jobs, and builds communities.¹⁷⁹ One plant manager reportedly stated that labor was no different than commodities like oil and soybeans subject to fluctuating prices.¹⁸⁰ With no legal restraint on “efficiency bargaining,” DPS representatives deployed it with some success against the union. And the company’s proxy statements show how senior management and stockholders benefitted from the tough stance with the union.

Labor cost is an obvious target for concession bargaining because it usually represents the single biggest cost in a firm’s operating budget.¹⁸¹ For a publicly traded company like DPS, top executives are incentivized to cut labor and other costs because rewards for cost-cutting may be built into their compensation structure. In the case of DPS, executive compensation generally emphasizes rewards for results that advance stockholders’ and senior executives’ interests.¹⁸² By aligning company leaders’ compensation to profitability and stock performance, employee pay and benefits become inevitable targets.

By all accounts, DPS is a successful company. During the year of the labor dispute, the company reported net income of \$595 million.¹⁸³ Its stock price, which ranged between \$13.45 and \$17.39 in December 2008, had risen to between \$35.12 and \$38.04 in December 2010.¹⁸⁴ Since 2010, the stock price has gone up consistently, dividends have been paid every year since 2009, and profits have been consistently high despite an overall poor economy.¹⁸⁵

¹⁷⁹ See Greenhouse, *Mott’s Strike*, *supra* note 170.

¹⁸⁰ See *id.*

¹⁸¹ See News Release, Bureau of Labor Statistics, Employer Costs for Employee Compensation—December 2012 (Mar. 12, 2013) (stating that wages and salaries accounted for 70.3% of employee compensation costs in 2012); Terry Thomason, *Changes Coming in Davis-Bacon Act Wage Rate Procedures*, 4 PAC. EMP. L. LETTER 4 (2000) (noting that labor is usually the single largest cost in the public contracting process).

¹⁸² For example, the DPS proxy statement filed in 2009 reported a heavy emphasis on stock awards in its compensation scheme, noting: “The Compensation Committee believes that these awards to our key executives will focus attention on building stockholder value over the long-term, reinforce the importance of their roles as stewards of the business, and help to retain the executives.” DPS May 19, 2009 Proxy Statement, *supra* note 164, at 27. This approach to compensation is typical, and CEOs of American companies have repeatedly warned that advancing stockholders’ interests is their only responsibility. See Celeste Drake, *U.S. Trade and Economic Policy: American Workers Need More than Strong Labor Chapters*, 27 A.B.A. J. LAB. & EMP. L. 455, 465–67 (2012).

¹⁸³ Dr Pepper Snapple Grp., Inc., Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A), at 29 (Mar. 25, 2011) [hereinafter DPS Mar. 25, 2011 Proxy Statement].

¹⁸⁴ See *Dr Pepper Snapple Group, Inc Common Stock Historical Stock Prices*, NASDAQ, <http://www.nasdaq.com/symbol/dps/historical> (last visited Apr. 8, 2016).

¹⁸⁵ See *id.*

The DPS executives targeted the Mott's employees' pay and benefits structure for concessions because this would increase not only profitability and shareholder value, but also their personal compensation.¹⁸⁶ Evidence that the company ratified the concession bargaining strategy can be found in the proxy statement filed in March 2011.¹⁸⁷ The strike at the Mott's plant had caused a \$12 million decline in profits in the packaged beverage segment of the company, and this loss reduced executive compensation by 8 percent.¹⁸⁸ For fiscal year 2010, the compensation committee removed the losses associated with the strike from the financial and operating metrics in order to boost executive pay by 8 percent.¹⁸⁹

In effect, the DPS executives succeeded in gaining concessions from their workers and profited personally, although there was an operating loss. Corporate flexibility to excise labor contracting losses from management performance metrics incentivizes demands on workers' pay by executives who are well compensated. For example, for the years 2008 to 2010, total compensation for DPS's President and CEO averaged \$7,276,088 per year;¹⁹⁰ the President of packaged beverages averaged \$2,117,734 per year;¹⁹¹ the President of concentrates averaged \$2,076,527 per year;¹⁹² and the Executive Vice President of supply chain averaged \$1,883,521 per year.¹⁹³ DPS replaced its Chief Financial Officer in 2010, and his replacement's 2010 compensation was \$6,099,378.¹⁹⁴

Because worker pay and benefits represent the predominant operating cost and there are no legal restraints on employers' bargaining liberties, unions are seeing more of what transpired in the Mott's

¹⁸⁶ See DPS Mar. 25, 2011 Proxy Statement, *supra* note 183, at 29.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* (“[T]he Compensation Committee has discretion under the [Management Incentive Plan] to adjust [earnings] results if there is an unanticipated business condition that materially affected the fairness of the goals and unduly influenced the company’s ability to meet those goals. For fiscal year 2010, the Compensation Committee considered the strategic nature of this strike and concluded that event was an unanticipated business condition that materially affected the fairness of the goals and unduly influenced the company’s ability to meet these goals. Consequently, the Compensation Committee excluded those costs when considering the achievement of the goals. As a result of that exclusion, the performance against the financial and operating metrics improved and the payments to be made under the MIP for fiscal year 2010 were increased by approximately 8%.”).

¹⁹⁰ See *id.* at 35. Additional financial perks include over \$140,000 for the CEO and CFO’s private club activities, plus \$150,000 to cover the CEO’s tax bill for private use of the corporate jet. See Dr Pepper Snapple Grp., Inc., Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A), at 25 (Mar. 30, 2010).

¹⁹¹ See DPS Mar. 25, 2011 Proxy Statement, *supra* note 183, at 35.

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ *Id.*

negotiations. With senior management's and stockholders' interests in competition with those of workers, labor's claim that better compensation strengthens the economy and promotes democracy is having little impact on management practices. Workers therefore need to formulate and implement other strategies to secure a larger share of their productive efforts.

IV. NEW STRATEGIES TO COMPRESS WAGES IN LIGHT OF POLITICAL GRIDLOCK

Unions recognize that existing labor regulations place significant limits on their ability to raise wages. Under the NLRA, unions have found it difficult to grow membership to broaden the reach of their collective bargaining efforts and improve their strike clout.¹⁹⁵ Union occupational strongholds have eroded, more jobs are being outsourced, technological developments have eliminated jobs in which workers traditionally organized, employee sentiments are in flux, and the legions of low-wage service workers are proving to be very difficult to organize. These realities leave unions with fewer workers to organize or represent in a climate of fierce wage competition and employer opposition.¹⁹⁶

A. *The Problem of Declining Union Strength*

In the private sector, unions have the greatest support in four industries: construction and extraction; installation, maintenance and repair; production; and transportation and material moving.¹⁹⁷ These industries have representation rates of 20.3%, 17.6%, 14.6%, and 17.8% respec-

¹⁹⁵ The electoral process for determining the workers' representative has been condemned for giving employers too much time and opportunity to intimidate and mislead workers. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 371–72 (2002); see also Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN'S J. LEGAL COMMENT. 1, 5 (2009) (“[T]he Act’s reliance on elections to determine union representation facilitates employer opposition”); GETMAN, *supra* note 72, at 179–90, 275–87 (arguing that the NLRB’s processes are complex, and proposing amendments to the NLRA to make union selection more effective). But some relief may be in sight with more expedited representation procedures adopted by the NLRB. See generally *Associated Builders & Contractors of Tex., Inc. v. NLRB*, No. 1-15-CV-026 RP, 2015 U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015) (rejecting the contention that the NLRB’s new expedited representation rules deprive employers of a fair hearing on critical election issues and an adequate opportunity to campaign).

¹⁹⁶ See Opfer, *supra* note 5 (reporting significant Republican support for national legislation that would prevent unions from requiring financial support from the workers they represent); see also Michael Bologna, *Supporters See 2015 As ‘Tipping Point’ Year for States Passing Right-to-Work Legislation*, 29 Lab. Rel. Wk. (BNA) 119 (Jan. 21, 2015) (reporting that twenty-four states have such laws and several others are poised to follow).

¹⁹⁷ See News Release, Bureau of Labor Statistics, *Union Members—2013*, at tbl.1 (Jan. 24, 2015).

tively, but these percentages reflect continuing declines.¹⁹⁸ From 2003 to 2013 the representation rate in the construction industry declined from 22.7% to 20.3% percent, the installation industry dropped from 20% to 17.6%, production representation fell from 18.5% to 14.6%, and transportation saw a decline from 21.3% to 17.8%.¹⁹⁹ Even for job categories that can be labelled union strongholds, the raw number of workers being represented is declining. Unions have not been able to stop this slide for over thirty years,²⁰⁰ and nothing suggests the downward trajectory will change.

On the question of wages, only two of four union stronghold occupational categories report median hourly wages above the national median. The May 2014 median for construction was \$19.90 per hour, while the installation, production, and transportation industries showed medians of \$20.25, \$15.25, and \$14.20 per hour, respectively.²⁰¹ While many of the jobs in these four industries pay above the median, most of the jobs in some industries are decidedly low-wage.²⁰² For example, in construction, most non-supervisory jobs pay above the \$17.09 per hour national median with the poverty-level wages reserved for helpers.²⁰³ But in production, very few jobs pay anything close to the national median hourly rate.²⁰⁴ Transportation also has many non-supervisory occupations that pay above the national median, but these jobs require extensive education or training or both, as do most of the higher paying jobs in any industry.²⁰⁵ Pilots, flight engineers, locomotive engineers, ship or boat captains, and crane operators are examples of jobs that pay well above the median in the transportation category.²⁰⁶

B. *Other Barriers to a Collective Bargaining Strategy*

As unions try to compress wages, a number of practical and philosophical barriers also stand in their way. First, any attempt to get above-

¹⁹⁸ See News Release, Bureau of Labor Statistics, Union Members in 2003, at tbl.3 (Jan. 21, 2004).

¹⁹⁹ See *id.*

²⁰⁰ See Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 INDUS. & LAB. REL. REV. 67, 67 (2006) (noting that private sector union membership peaked in the 1950s at around 35% but has fallen gradually and consistently since then).

²⁰¹ See News Release, Bureau of Labor Statistics, Occupational Employment and Wages—May 2014, at tbl.1 (Mar. 25, 2015).

²⁰² See *id.* Helpers, assembly line workers, and food processors generally make less. *Id.*

²⁰³ See *id.* at tbl.1. Plumbers, carpenters, masons, electricians, and machine operators are examples of workers earning above the median. *Id.*

²⁰⁴ See *id.* Food processors, equipment assemblers, and machine tool setters generally earn below the median. *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *id.*

market wage premiums is vigorously opposed.²⁰⁷ Union wage premiums—which are credited with building the middle class—have also been blamed for making businesses uncompetitive, destroying jobs, and reducing union membership.²⁰⁸ Unions are constantly battling the claim that higher wages mean higher prices, fewer jobs, and a general attack on the efficiency imperatives of management.²⁰⁹ Further, technological developments and innovations have eliminated many more jobs than they have created,²¹⁰ and the replacement jobs do not generally pay median wages.²¹¹ During the 2008 economic crisis, 7.5 million mid-wage jobs were lost²¹² but only 70,000 mid-wage jobs were regained when the recession ended.²¹³ This means that there are fewer median wage workers for unions to represent for the purpose of wage acquisition, wage retention, or wage improvement.

Global wage competition has also incentivized the outsourcing of millions of jobs that are not likely to return, thereby further reducing the pool of mid-wage workers that could be represented.²¹⁴ In any event, businesses have argued that job losses to foreign locales are not simply a product of a low-wage philosophy. In the manufacturing sector, for example, it has been argued that plant closings are primarily “attributable to increased foreign outsourcing of purchases of intermediate goods and services.”²¹⁵ And multinationals have contended that they have globalized around markets or consumers, not simply in pursuit of low wages.²¹⁶

²⁰⁷ See Michael Rose, *Witnesses Again Spar Over Minimum Wage, with Focus on CBO Report Showing Job Loss*, 28 Lab. Rel. Wk. (BNA) 569 (Mar. 1, 2014) (reporting Republican opposition to a minimum wage increase, premised on its potential to reduce employment). Business groups and sympathetic legislators oppose initiatives that seek to increase union clout or worker pay. See Lawrence E. Dubé, *Business Groups Push Back on NLRB Rules with Bid for Delay, Request for Information*, 52 Lab. Rel. Wk. (BNA) A-10 (Mar. 18, 2014) (reporting on strong business interest in NLRB’s plan to make representation proceedings more efficient).

²⁰⁸ See Belman & Voos, *supra* note 200, at 67–68; Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and the Wage Premium: Past, Present, and Future?*, 22 J. Lab. Res. 487, 490–500 (2001).

²⁰⁹ See Rhonda Smith, *Low-Wage Workers’ Push for Higher Pay Could Have Negative Effects, Opponents Say*, 169 Daily Lab. Rep. (BNA) C-1 (Aug. 30, 2013).

²¹⁰ See Condon & Wiseman, *supra* note 33; Chris Arnold, *How Technology Is Eliminating Higher-Skill Jobs*, NPR (Nov. 3, 2011), <http://www.npr.org/2011/11/03/141949820/how-technology-is-eliminating-higher-skill-jobs>.

²¹¹ See Arnold, *supra* note 210.

²¹² See Condon & Wiseman, *supra* note 33.

²¹³ *Id.*

²¹⁴ See, e.g., Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 83–84 (2005) (noting that large corporations establish labor-intensive factories in low-wage nations to maximize benefits to shareholders).

²¹⁵ See Ben Penn, *‘Runaway’ Plants Not to Blame for Closings of Manufacturing Plants, According to Study*, 27 Lab. Rel. Wk. (BNA) 306 (Feb. 13, 2013).

²¹⁶ See Wessel, *supra* note 36.

This, it is argued, accounts for job losses in the United States and job growth at their foreign operations.²¹⁷ To the extent that businesses do more hiring abroad for strategic reasons, unions lose opportunities to grow membership.

Further, unions have lost significant ground with mid-wage workers in occupations that were once regarded as traditional union strongholds. Unions no longer have the ability to secure above-median wages for workers with only a high school education, as they did in the auto and steel industries.²¹⁸ These employers are now paying less or are non-union.²¹⁹ In the auto industry, for example, unions have been forced to make wage concessions and agree to two-tiered wage structures that limit the mid-wage prospects of some members.²²⁰ And mid-wage workers at foreign-owned auto plants are not choosing unions even when there is no opposition to the union by the employer.²²¹ This is partly due to the fact that some workers share the sentiment that unions are responsible for the economic problems of American auto manufacturers.²²² This pattern is being repeated in many occupations that unions historically dominated.²²³

The potential of unions to compress wages is further stunted by political opposition to improving the wages of the working poor. So far unions have not succeeded, for example, in organizing the millions of low-wage workers in retail sales, and food preparation jobs.²²⁴ And any attempt to provide ladders to median-wage pay for these workers will face crushing opposition by businesses and policymakers.²²⁵ Businesses

²¹⁷ *Id.*; see also Larry Swisher, *U.S. Multinational Firms Boosted Jobs More Overseas than at Home in 2012*, 28 Lab. Rel. Wk. (BNA) 1865 (Sept. 3, 2014).

²¹⁸ See Michael Selmi, *Unions, Education, and the Future of Low-Wage Workers*, 1 U. CHI. LEGAL F. 147, 147–48 (2009).

²¹⁹ See *id.* at 162; see also Michael Bologna, *Steelworkers Accept Pact Freezing Wages for Six-Year Period and Suspending Pension*, 27 Lab. Rel. Wk. (BNA) 1144 (June 19, 2013) (reporting on concession pressures the United Steelworkers union faced in recent contract negotiations with Caterpillar Incorporated, resulting in a wage freeze, a two-tiered wage structure, and the suspension of a defined-benefit pension plan).

²²⁰ See Bill Vlasic, *Detroit Sets Its Future on a Foundation of Two-Tier Wages*, N.Y. TIMES, Sept. 12, 2001, at A1.

²²¹ See Steven Greenhouse, *VW Vote Is Defeat for Labor in South*, N.Y. TIMES, Feb. 14, 2014, at B1 [hereinafter Greenhouse, *VW Vote*] (reporting on a union election loss at a Volkswagen assembly plant even though management remained neutral and even voiced some support for the union); see also Selmi, *supra* note 218, at 162 (noting that unions have not been able to organize foreign auto manufacturers in the United States although they pay competitive market rates).

²²² See Greenhouse, *VW Vote*, *supra* note 221, at B1.

²²³ See Selmi, *supra* note 218, at 162; Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages* 9 (Econ. Pol’y Inst., Issue Brief No. 342, 2012).

²²⁴ See Selmi, *supra* note 218, at 160–61 (discussing the practical impediments to organizing low-wage workers).

²²⁵ See *supra* notes 4–7 and accompanying text.

argue that unions are failing because workers are being compensated well and are not interested in unions.²²⁶ And the prevalence of wage theft or the failure to comply with minimum wage and overtime compensation laws suggests that employers want even more pay flexibility with low-wage workers.²²⁷

Legislative opposition to gradually increasing the minimum wage to \$10.10 per hour—despite popular and some business support for this increase²²⁸—also provides strong evidence that most businesses will oppose wage demands that are significantly above market rates or minimum wage laws.²²⁹ In any event, even if low-wage workers could be organized, it is improbable that union premiums could elevate their

²²⁶ See Michael Rose, *Unions' Decline Caused by Lack of Interest on Part of Workers, Chamber Official Says*, 27 Lab. Rel. Wk. (BNA) 1681 (Sept. 4, 2013). And non-union workers have made wage gains on unionized workers. In the third quarter of 2012, average non-union hourly pay rose 2.5% to \$20.04 per hour, while union worker pay rose by 1.1% to \$23.51 per hour. See *Nonunion Workers See Sharper Wage Gain, Pay and Benefits Still Lag Behind Unionized*, 26 Lab. Rel. Wk. (BNA) 2320 (Dec. 19, 2012).

²²⁷ See John Herzfeld, *New York Recovered Nearly \$23 Million from Wage Cases in 2013, Governor Says*, 29 Daily Lab. Rep. (BNA) A-9 (Feb. 12, 2014) (reporting 6,533 new claims for wage theft in 2013); see also Lawrence E. Dubé, *Labor Solicitor Sees Low-Wage Epidemic and Urges Employers to Take 'High Road.'* 27 Lab. Rel. Wk. (BNA) 1115 (June 12, 2013) (reporting that “minimum wage violations, unpaid hours, and off-the clock work” all contribute to a low wage epidemic).

²²⁸ See Ben Penn, *Demonstrators Nationwide, Lawmakers Push for Wage Increase; Poll Shows Public Agrees*, 142 Daily Lab. Rep. (BNA) A-5 (July 24, 2013) (reporting that 80% of Americans support a minimum wage hike from \$7.25 to \$10.10 per hour); Chris Opfer, *Business Leaders Stump for Wage Hike, Says It's Good for Economy, Won't Kill Jobs*, 29 Daily Lab. Rep. (BNA) A-12 (Feb. 12, 2014) (reporting that business leaders told Congress that a minimum wage hike would help tens of millions of workers, expand the economy, and benefit taxpayers without hurting job growth or consumers); Michael Rose, *Two-Thirds of Small Business Owners Favor Increasing Minimum Wage, According to Poll*, 79 Daily Lab. Rep. (BNA) A-6 (Apr. 24, 2013) (reporting that 67% of polled small business owners support increasing the minimum wage). Some businesses are not waiting for Congress to act and have already increased their starting wages. See Chris Opfer, *Gap Inc. to Raise Workers' Minimum Wage, Aligning It with Pay of Few National Retailers*, 34 Daily Lab. Rep. (BNA) A-10 (Feb. 20, 2014); Ben Penn, *Obama Says Congress Must Catch Up to Rest of Nation by Raising Minimum Wage*, 28 Lab. Rel. Wk. (BNA) 248 (Feb. 5, 2014) (“[F]acing an uncertain path in Congress, Obama called on business leaders to follow Costco’s lead by lifting workers’ pay voluntarily.”).

²²⁹ See, e.g., Danny Westneat, *A Do-Gooder Tells Why \$15 Wage Is a Bad Idea*, SEATTLE TIMES (Feb. 22, 2014), <http://www.seattletimes.com/seattle-news/a-do-gooder-tells-why-15-wage-is-bad-idea>; Dominic Holden, *Up for Debate in the \$15 Minimum Wage Conversation*, STRANGER (Mar. 12, 2014), <http://www.thestranger.com/seattle/up-for-debate-in-the-15-minimum-wage-conversation/Content?oid=19053597>. Off-the-clock and uncompensated overtime practices also suggest that employers want more productivity for current pay rates. See Lisa Nagele, *State High Court Affirms \$187 Million Award on Wal-Mart Employees' Wage & Hour Claims*, 241 Daily Lab. Rep. (BNA) A-2 (Dec. 16, 2014) (reporting workers’ court victory on being denied rest breaks and required to work off-the-clock); Gayle Cinquegrani, *LinkedIn to Pay \$5.8 Million in Overtime Damages to 359 Employees in Four States*, 28 Lab. Rel. Wk. (BNA) 1683 (Aug. 6, 2014) (reporting record-keeping violations that robbed employees of pay).

pay to the \$15 per hour level that food preparation and other low-wage workers are demanding.²³⁰ Because these practical limitations have combined with free market collective bargaining to limit wage growth for many workers, new strategies are necessary to improve wages.

C. Pay Disparity Worker Protest

The inability of regulators and unions to provide workers with wage stability has left them with few options. Regulations intended to curb excessive senior managers' pay have not targeted workers as their intended beneficiaries.²³¹ Instead, their focus has been on preventing shareholder losses and assuring that pay is linked to performance.²³² Even the latest regulatory device that requires disclosure of the ratio of the CEO's pay to the median compensation of all other employees is not designed to promote workers' interests,²³³ and businesses have computational flexibility that can reduce the ratio.²³⁴ But workers do not have to

²³⁰ The union wage premium for represented workers has been estimated at around 13.6%. Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL'Y INST. 1 (Aug. 29, 2012), <http://www.epi.org/files/2012/ib342-unions-inequality-middle-class-wages.pdf>. And the size of the wage premium varies by occupation and demographics. *Id.* at 4; see also George I. Long, *Differences Between Union and Nonunion Compensation, 2001–2011*, MONTHLY LAB. REV. 16, 18 (Apr. 2013), <http://www.bls.gov/opub/mlr/2013/04/art2full.pdf>. Median pay for food preparation workers is about \$9.20 per hour and the median for retail sales workers is about \$9.66 per hour. See News Release, *supra* note 201, at tbl.1.

²³¹ See Brett H. McDonnell, *Two Goals for Executive Compensation Reform*, 52 N.Y.L. SCH. L. REV. 585, 586–87 (2008) (describing reform proposals' emphasis on protecting shareholders' interest over economic inequality or other fairness concerns).

²³² See Priyanka Rajagopalan, *Reforming Executive Compensation: What Do We Know and Where Do We Go?*, J. BUS. ENTREPRENEURSHIP & L. 425, 441–42 (2011) (discussing the shareholder goals of tax and other corporate regulations of executive pay); Paul Hodgson, *Surprise Surprise: Say on Pay Appears to be Working*, FORTUNE (July 8, 2015), <http://fortune.com/2015/07/08/say-on-pay-ceos> (reporting that a comparison of total shareholder return to increases in CEO pay suggests that regulations giving shareholders a say on executive pay may be working).

²³³ See Joe Pinsker, *When Workers Know Exactly How Much More Money CEOs Make, Will Anything Change?*, ATLANTIC (Aug. 6, 2015), <http://www.theatlantic.com/business/archive/2015/08/will-the-pay-gap-between-ceos-and-workers-ever-get-smaller/400601/> (reporting that new CEO pay ratio disclosure rules will likely generate more headlines and benefits for media outlets than for shareholders, workers or consumers). But see Drew Harwell & Jenna McGregor, *This New Rule Could Reveal the Huge Gap Between CEO Pay and Worker Pay*, WASH. POST (Aug. 4, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/08/04/this-new-rule-could-reveal-the-huge-gap-between-ceo-pay-and-worker-pay/> (commenting that new CEO pay disclosure rules could become “a human resources nightmare, exposing the raw and awkward tensions of workplaces undercut by growing pay gaps”).

²³⁴ The rule leaves the methodology for identifying the median employee to the company based on their particular circumstances, and permits the use of a statistical sampling of the total employee population. See Press Release, Sec. & Exch. Comm'n, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), <http://www.sec.gov/news/pressrelease/2015-160.html>; see also Kevin McCoy, *SEC Approves 'Pay Ratio' Disclosure for CEOs*, USA TODAY (Aug. 7, 2015), <http://www.usatoday.com/story/money/2015/08/05/sec-pay-ratio-disclosure-vote/31112725/> (observing that the disclosure requirement gives companies “substantial flexibility”).

wait until the 2017 or 2018 compliance dates to find out how much the CEO of their company makes relative to the larger workforce.²³⁵ The media and other organizations already publicize this information to workers.²³⁶ Workers would be more alarmed to find out what top managers are compensated in relation to their own wages, and that information is already publicly available.²³⁷ Data showing that extreme wage disparity is caused primarily by the growth of senior managers' pay provides workers with an opportunity to claim a larger share of their productive efforts.²³⁸

Comprehensive data show that the United States is the most inegalitarian society with respect to the distribution of income from labor.²³⁹ Today wage disparity in the United States is so extreme it has reverted to 1910–1920 levels²⁴⁰ and rivals the extreme disparities seen in Europe over 100 years ago.²⁴¹ Now, the top 10% of earners claim 35% of the nation's total labor income while the bottom 50% gets only 25%.²⁴² Top managers represent 60% to 70% of the top 0.1% of the income ranks²⁴³ and their phenomenal growth in pay has been approved by their Boards of Directors and stockholders.²⁴⁴ Should current pay practices continue,

²³⁵ See McCoy, *supra* note 234 (reporting the earliest compliance date for some companies as January 2017 and for others, the following year).

²³⁶ See Pinsker, *supra* note 233 (“In an annual rite, newspapers compile lists of the previous year’s highest-earning executives, think tanks compute just how much more CEOs make than the average worker, and then both sides of the debate use those standalone figures to serve their purposes.”); Lawrence Mishel & Alyssa Davis, *Top CEOs Make 300 Times More Than Typical Workers*, ECON. POL’Y INST. 1 (June 21, 2015), <http://www.epi.org/files/2015/top-ceos-make-300-times-more-than-typical-workers.pdf> (reporting that over the past 30 years, CEO pay has outpaced wage growth for all other workers); Kathryn Dill, *Report: CEOs Earn 331 Times As Much As Average Workers, 774 Times As Much As Minimum Wage Earners*, FORBES (Apr. 15, 2014), <http://www.forbes.com/sites/kathryndill/2014/04/15/report-ceos-earn-331-times-as-much-as-average-workers-774-times-as-much-as-minimum-wage-earners/> (reporting union-computed CEO compensation ratios).

²³⁷ See McCoy, *supra* note 230 (“Publicly traded U.S. firms already disclose compensation of their CEOs and other top executives in proxy filings submitted to the SEC before annual stockholder meetings.”).

²³⁸ See PIKETTY, *supra* note 2, at 298–99; see also Smith, *supra* note 3 (reporting employee complaints to shareholders that Walmart’s CEO received compensation in fiscal year 2015 that was 811 times greater than the average hourly pay of store employees); Michael Rose, *CEO Made 373 Times What Average Worker Did in 2014, Annual AFL-CIO Analysis Finds*, 29 Lab. Rel. Wk. (BNA) 1055 (May 13, 2015) (reporting average CEO pay at \$13.5 million per year while the average for production and non-supervisory employees was \$36,134 during 2014). One CEO made \$156 million in 2014, and Walmart’s CEO was paid \$9,323 per hour while the store’s retail workers starting pay was \$9 per hour. See *id.*

²³⁹ See PIKETTY, *supra* note 2, at 256.

²⁴⁰ See *id.* at 321.

²⁴¹ See *id.* at 292–93.

²⁴² See *id.* at 256.

²⁴³ See *id.* at 302.

²⁴⁴ See *id.* at 332; see also Nelson D. Schwartz, *Bank of America Investors Complain, but Approve Chief’s Pay*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/business/bank-of-america-shareholders-protest-but-approve-pay.html?_r=0 (reporting shareholder

the share held by the bottom 50% could drop to less than 18% by 2030.²⁴⁵ By contrast, in the most egalitarian countries, the top 10% of earners claim only 20% of total labor income.²⁴⁶

Worker protest highlighting wage disparities has demonstrated its potential to improve wages. Unorganized workers have been protesting low pay by pointing to pay disparities, calling for a starting wage of \$15 per hour.²⁴⁷ Walmart has responded by announcing that it will raise employees' wages, which the company said would cost \$1.5 billion and a drop in profits.²⁴⁸ Outside of the collective bargaining process, Walmart has spent \$1 billion in raises in 2015 and will spend more on salary increases through 2016.²⁴⁹ McDonald's workers fighting for a \$15 hourly wage have also garnered some success by targeting shareholders. Repeated protests likely influenced McDonald's decision to raise wages by \$1 at ten percent of company stores, despite overall declining sales and profits.²⁵⁰

Senior managers' pay continues to grow in spite of regulatory attempts to curb it.²⁵¹ Workers can emphasize the unfairness of large salaries unhinged from performance because productive performance has not produced wage gains at the lower end of the pay scale.²⁵² Although

approval for a \$7 million pay package for the CEO despite his poor management of the company).

²⁴⁵ See PIKETTY, *supra* note 2, at 256.

²⁴⁶ See *id.* at 246, 253–55; see also Alistair Bruce et al., *Top Executive Remuneration: A View from Europe*, 42 J. MGMT. STUD. 1493, 1498 (2005) (noting that European CEO to hourly worker pay ratios are dramatically lower than in the United States).

²⁴⁷ See Robert B. Reich, *Organizing McDonalds and Walmart, and Why Austerity Economics Hurts Low-Wage Workers the Most*, ROBERT REICH (Nov. 30, 2012), <http://robertreich.org/post/36892075499> (discussing the protest activities of low wage workers and their link to large executive pay packages).

²⁴⁸ See Shannon Pettypiece & Rhonda Smith, *Wal-Mart Plans to Give Raises to 1.1 Million U.S. Workers*, 12 Daily Lab. Rep. (BNA) (Jan. 20, 2016) (reporting the view that worker protest and public pressure forced Walmart to increase the pay of low-wage workers).

²⁴⁹ See *id.*

²⁵⁰ See Wisniewski, *supra* note 37.

²⁵¹ Despite large existing compensation disparities, executive pay continues to outpace that of low-wage workers. See Mary Hughes, *CEOs at Smaller Companies Saw Pay Grow, Stock Awards Gain Ground, Survey Finds*, 144 Daily Lab. Rep. (BNA) A-5 (July 26, 2013) (reporting pay increases of 5.7% and 6.5% for heads of mid-sized and large companies respectively in 2012). These increases translated into median annual pay of \$4.7 and \$9.7 million respectively. *Id.* Meanwhile the compensation increases for union represented workers averaged 4.4% from 2010 to 2011, while nonunion workers saw an increase of only .8%. See *Growth in Union Workers' Pay in 2012 Outpaced that of Nonunion Workers*, 27 Lab. Rel. Wk. (BNA) 542 (Mar. 20, 2013).

²⁵² At the outset, measuring executive performance is a difficult if not impossible proposition. See PIKETTY, *supra* note 2, at 330–32 (observing that particularly in the case of senior managers, individual marginal productivity is hard to define or measure, so pay is arbitrarily determined by the relationships and bargaining strengths of the individuals involved); STRIGLITZ, *supra* note 15, at 42, 78–79 (stating that incentive pay is just a label to justify abusive pay practices that are not tied to performance). And there is evidence that compensation com-

CEOs in particular have been lionized by some as star athletes whose great talents are in limited supply, thereby driving their prices sky high,²⁵³ there is evidence that these positions are not receiving market compensation rates.²⁵⁴ The astronomical payouts that some CEOs receive at retirement also provide a basis for complaints because of the payouts' redistributive potential.²⁵⁵ While critics have specifically targeted CEO pay because of its extreme disparity to the earnings of average workers,²⁵⁶ the broader problem is with large compensation packages for top executives or senior managers. As a group, these employees take home an outsized share of their companies' output, and there is no evidence that top executives or senior managers are in short supply or that their skills are primarily responsible for their companies' success.²⁵⁷ In fact, the 2008 recession revealed many instances where performance was poor and destructive to both the company and the economy, yet rewards to top managers remained high.²⁵⁸ Payouts to Bear Stearns and Lehman Brothers executives prior to their firms' collapse provide a rich example of astronomical pay for poor performance.²⁵⁹ In

mittees lack the tools that are needed to measure performance. See Paul Vigna, *What's a CEO Really Worth? Too Many Companies Simply Don't Know*, WALL ST. J. (Nov. 21, 2014), <http://blogs.wsj.com/moneybeat/2014/11/21/whats-a-ceo-really-worth-too-many-companies-simply-dont-know/>.

²⁵³ See ROBERT B. REICH, *SUPERCAPITALISM* 108 (2007) [hereinafter REICH, *SUPERCAPITALISM*].

²⁵⁴ See Bivens & Mishel, *supra* note 2, at 63 (“[T]he rise in income for the top 1 percent was not necessary to entice the people in that group to seek those jobs nor to provide effort in those jobs.”); see also Katie Johnston, *Efforts to Regulate CEO Pay Gain Traction*, BOS. GLOBE (Oct. 26, 2014), <https://www.bostonglobe.com/business/2014/10/25/growing-effort-limit-ceo-pay/1VKKZCuZMkXJvaQRmUb4RN/story.html> (reporting on research which shows that money is not a work motivator for people who are well compensated).

²⁵⁵ See REICH, *SUPERCAPITALISM*, *supra* note 253, at 111 (justifying a \$398 million retirement package for one CEO based on the ten-year success of the company's stock under his leadership); see also Robert B. Reich, *CEOs Deserve Their Pay*, WALL ST. J. (Sept. 14, 2007), <http://www.wsj.com/articles/SB118972669806427090> [hereinafter Reich, *CEOs Deserve Their Pay*] (arguing that an almost \$400 million retirement package to one CEO is justifiable on stock performance grounds); Jesse Drucker et al., *Retirement Savings of Top 100 CEOs Approaches \$5B*, 208 DAILY LAB. REP. (BNA) A-6 (Oct. 28, 2015) (“The retirement savings accumulated by just 100 chief executives are equal to the entire retirement accounts of 41 percent of U.S. families or more than 116 million people.”).

²⁵⁶ See Reich, *CEOs Deserve Their Pay*, *supra* note 255 (noting that forty years ago, CEOs earned twenty to thirty times the average worker, while today they receive 364 times average worker pay).

²⁵⁷ See Susan Adams, *The Highest-Paid CEOs Are the Worst Performers*, *New Study Says*, FORBES (June 6, 2014), <http://www.forbes.com/sites/susanadams/2014/06/16/the-highest-paid-ceos-are-the-worst-performers-new-study-says/> (reporting research that shows that the highest paid executives perform the worst).

²⁵⁸ See Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman, 2000–2008*, 27 YALE J. ON REG. 257, 259 (2010).

²⁵⁹ See *id.* (“[T]he top executive teams of Bear Stearns and Lehman Brothers derived cash flows of about \$1.4 billion and \$1 billion, respectively from cash bonuses and equity sales during 2000–2008.”); see also Halah Touryalai, *Citi's Pandit Sued Over Excessive Compensa-*

addition, the desire for high pay is so arbitrary that failed senior managers at several banks could cite talent as a justification for pocketing \$32.6 billion in bonuses while accepting \$175 billion in bailout funds.²⁶⁰

D. Combining Workers' Protest Gains with Union Representation

Workers, with the support of unions, can hammer away at the pay disparity issue to coerce their companies into restructuring pay practices. Pay increases gained through protest can be consolidated through union affiliation. With increased membership rolls, unions will have more bargaining power to cement the gains secured through protest.²⁶¹ With union representation, continuing protests that target lavish pay schemes can force corporate boards to be responsive to workers while simultaneously reducing the risk of compromised performance metrics and self-serving evaluations of performance to justify high pay.²⁶² More attention to this issue will assure shareholders that compensation metrics align with positive company performance.²⁶³ It may also force senior manag-

tion, FORBES (Apr. 20, 2012), <http://www.forbes.com/sites/halahtouryalai/2012/04/20/citigroup-sued-for-excessive-compensation/> (reporting shareholder lawsuit challenging high executive pay awards despite the bank's dismal performance).

²⁶⁰ See Karen Freifeld, *Banks Paid \$32.6 Billion in Bonuses Amid U.S. Bailout*, BLOOMBERG (July 30, 2009), http://www.bloomberg.com/apps/news%3Fpid%3Demail_en%26sid%3DaHURVoSUqpho. At six of the nine banks involved, bonuses exceeded profits. See Susanne Craig & Deborah Solomon, *Bank Bonus Tab: \$33 Billion*, WALL ST. J. (July 31, 2009), <http://www.wsj.com/articles/SB124896891815094085>.

²⁶¹ Without contractual commitments, employees remain vulnerable to employers' discretion with respect to any benefits granted. See *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (discussing the conditional nature of benefits voluntarily conferred by an employer to unorganized workers). Employers may also seek to cut benefits in some areas after granting benefits in others. See Shannon Pettypiece, *Wal-Mart Cuts Some Workers' Hours After Pay Raise Boosts Costs*, 168 Daily Lab. Rep. (BNA) A-5 (Aug. 31, 2015), <http://www.bloomber.com/news/articles/2015-08-31/wal-mart-cuts-some-workers-hours-after-pay-raise-boosts-costs> (reporting Walmart's decision to cut employees' work time after giving them a pay raise).

²⁶² For example, at Verizon Communications, top managers' compensation is tied to performance at the fiftieth percentile of peer companies. See Verizon Commc'ns, Inc., *Definitive Proxy Statement for Annual Meeting of Stockholders (Form DEF 14A)*, at 31–32, 41 (May 5, 2011). This means that senior managers can be rewarded well for average or poor company performance and receive astronomical payouts if the company does well. See *id.*

²⁶³ See *id.* at 41. As one Verizon shareholder noted, based on the existing performance metrics, Verizon's performance would have to rank below the twentieth percentile of peers for executives to get no equity rewards, while performance at the twenty-sixth percentile level gets executives 50% of targeted awards, and performance at the eighty-eighth percentile level or better results in a 200% award for the CEO, valued at \$22 million. *Id.*; see also Schwartz, *supra* note 244 (reporting that shareholders voted against the proposed compensation plan for top executives at Citigroup); Mike Esterl & Joann S. Lublin, *Coke Scales Back Executive Equity Compensation, Bowing to Pressure*, WALL ST. J. (Oct. 1, 2014), <http://www.wsj.com/articles/coca-cola-tweaks-executive-compensation-plan-1412170448>. Although investor concerns about excessive pay are generally tied to poor or declining company performance, rather than its redistributive potential, their success at checking this practice reveals an opportunity for unions. See Gregory J. Millman, *Say-on-Pay Performance Spurs Engagement*, WALL ST.

ers to look for non-wage cost-cutting strategies such as restructuring liberal return policies in the retail sales market that cost companies billions of dollars every year.²⁶⁴

Beyond securing and locking in wage increases, unions need a bargaining strategy to share in business success. The rationale for high managerial pay is its link to performance and corporate success.²⁶⁵ This rationale should be equally applicable to low-wage workers. When companies encounter business downturns, average workers are expected and required to make concessions that will ensure the company's survival and success.²⁶⁶ Reciprocally, employers should be willing to share business success with all workers. During contract negotiations, unions can propose a yearly bonus pay provision tied to company performance, or a profit-sharing plan that provides employer contributions to a savings account. Such a one-time payment has the advantage of not placing an economic burden on the company during periods of austerity.²⁶⁷ This strategy provides a viable option to compress wages in a competitive economic climate.

J. (Jan. 15, 2015), <http://blogs.wsj.com/riskandcompliance/2015/01/15/the-morning-risk-report-poor-say-on-pay-performance-spurs-engagement/> (reporting that companies are more engaged and transparent when they do poorly on say-on-pay votes).

²⁶⁴ See Cotten Timberlake, *Don't Even Think About Returning that Dress*, BLOOMBERG (Sept. 26, 2013), <http://www.bloomberg.com/bw/articles/2013-09-26/return-fraud-clothing-and-electronics-retailers-fight-back> (discussing the steps some companies have taken to combat return-fraud); see also Jennifer C. Kerr, *Retailers Tracking What Customers Return*, USA TODAY (Aug. 12, 2013), <http://www.usatoday.com/story/money/business/2013/08/12/retailers-tracking-customers-returns/2642607/> (reporting on the use of a return tracking service to combat fraud and customers' privacy concerns). Manufacturers are also heavily impacted by liberal return policies and the fraud associated with it. See William Sherrard et al., *Manufacturers' Dilemma: Managing a Growing Volume of Returned Merchandise*, MFG. & TECH. NEWS, <http://www.manufacturingnews.com/news/editorials/sherrard.html>.

²⁶⁵ See Lucian A. Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 766 (2002).

²⁶⁶ See Mike Colias et al., *Is High-Paying Tier 1 At Risk in UAW Talks?*, AUTOMOTIVE NEWS (Mar. 22, 2015), <http://www.autonews.com/article/20150322/OEM/303239958/is-high-paying-tier-1-at-risk-in-uaw-talks?> (reporting that top-paid Detroit auto workers have not received a wage increase in ten years, and newer workers doing the same job (Tier 2) are being paid about half the wages of long-term employees as part of the carmakers' recovery plan); see also Tom Walsh, *UAW Talks to be Tough, but No Need for Drama*, DETROIT FREE PRESS (Mar. 21, 2015), <http://www.freep.com/story/money/business/columnists/tom-walsh/2015/03/21/uaw-bargaining-drama/25081063/> (discussing concerns about changing autoworkers' wage structure in upcoming contract negotiations).

²⁶⁷ See Michael Wayland, *Toyota's Per-Car Profits Lap Detroit's Big 3 Automakers*, DETROIT NEWS (Feb. 22, 2015), <http://www.detroitnews.com/story/business/autos/2015/02/22/toyota-per-car-profits-beat-ford-gm-chrysler/23852189/> (reporting on the competitive disadvantage of American car manufacturers attributable to higher wage and pension costs); Eduardo Porter, *Japanese Cars, American Retirees*, N.Y. TIMES (May 19, 2006), <http://www.nytimes.com/2006/05/19/automobiles/19auto.html?pagewanted=all&r=0> (reporting on the competitive burdens of high costs of retiree benefits of American car manufacturers in relation to their Japanese counterparts).

Although profit sharing is not a new idea, it has taken on renewed importance in an economy characterized by large wage disparities. One presidential candidate is proposing tax credits for employers that share their profits with average workers,²⁶⁸ and some businesses have expressed their preference for profit sharing over fixed wage increases.²⁶⁹ Worker advocates note that even President George Washington supported profit sharing and point to its economic benefits for businesses, workers and the economy.²⁷⁰ At the same time, some well-known companies have demonstrated that sharing a portion of their profits with workers does not destroy their competitive advantage.²⁷¹ Southwest Airlines' record-breaking 2014 payout of \$355 million, which translated into a 9.6% bonus per eligible employee, provides a good example of a more egalitarian pay structure.²⁷²

Workers cannot wait for “show the ratio” regulations to kick in because it tells them too little about actual pay disparities in the company to have any real impact on their attitude about pay.²⁷³ A comparison of each worker's pay to that of each top manager will be far more alarming and likely to trigger a more aggressive response.²⁷⁴ Large wage dispari-

²⁶⁸ See Martin Sullivan, *Can Hillary's Plan for Profit Sharing Lift the Economy?*, FORBES (July 20, 2015), <http://www.forbes.com/sites/taxanalysts/2015/07/20/can-hillarys-plan-for-profit-sharing-lift-the-economy/> (describing presidential candidate Hillary Clinton's proposal for a profit sharing tax credit and how economists view such proposals).

²⁶⁹ See Wayland, *supra* note 267 (noting that Detroit automakers favor profit-sharing).

²⁷⁰ See Joseph Blasi & Richard Freeman, *Southwest Airlines' Profit-Sharing Payout: What Capitalism Should Be*, FORTUNE (Apr. 17, 2014), <http://fortune.com/2014/04/17/southwest-airlines-profit-sharing-payout-what-capitalism-should-be/> (reporting on President George Washington's support for tax credit legislation intended to revitalize the codfish industry that was destroyed by the British).

²⁷¹ See *Southwest Airlines' 41st-Consecutive Profit Sharing Payment is Record Dollar Amount—\$355 Million*, SOUTHWEST AIRLINES (Feb. 4, 2015), <http://www.prnewswire.com/news-releases/southwest-airlines-41st-consecutive-profit-sharing-payment-is-record-dollar-amount—355-million-300031213.html> (reporting that Southwest has been able to grow its business, improve customer service, and increase profits while increasing the economic rewards it provides to its workers) [hereinafter *Southwest Airlines*]; see also *Employees Earn More Than \$1 Billion in Profit Sharing for 2014 Performance*, DELTA AIRLINES (Feb. 13, 2015), <http://news.delta.com/employees-earn-more-1-billion-profit-sharing-2014-performance> (reporting Delta Airlines' profit sharing payout to workers based on the company's record-breaking financial success); Terry Maxon, *American Airlines Employees to Split \$85 Million in Profit-Sharing; US Airways Employees to Divvy Up \$124 Million*, DALLAS MORNING NEWS (Feb. 26, 2014), <http://aviationblog.dallasnews.com/2014/02/american-airlines-employees-to-split-85-million-in-profit-sharing-us-airways-employees-to-divvy-up-124-million.html/> (reporting other airlines' profit sharing announcements); Chris Isidore, *Ford Workers to Get Record \$8,800 Profit Share Checks*, CNN MONEY (Jan. 28, 2014), <http://money.cnn.com/2014/01/28/news/companies/ford-profit/> (reporting Ford's profit sharing payout based on record company profits).

²⁷² *Southwest Airlines*, *supra* note 271.

²⁷³ See Pinsker, *supra* note 233.

²⁷⁴ For example, a comparison that shows Walmart's CEO making \$9,323 per hour—compared to a retail worker's \$9 per hour—may promote more worker discontent and protest. See Rose, *supra* note 238.

ties can buttress union proposals for profit sharing because top executives also profit from such success. This approach is more likely to be embraced by corporate managers because it eliminates the long-term risks associated with contractual wages, benefits, and retirement plans.²⁷⁵

CONCLUSION

The national decision to regulate the sale of labor on the same free market terms as goods and services always held the potential to undermine collective bargaining as a source of wage growth for the larger workforce. In a fully integrated global economy, labor costs must be competitive across the globe.²⁷⁶ But labor costs differ dramatically around the country and the world.²⁷⁷ Further, right-to-work laws approved by the NLRA, and free trade policies not contemplated by the NLRA, encourage businesses to shift capital and operate in localities with the lowest labor costs.²⁷⁸

Employers can comply with their wage-bargaining obligations under the NLRA while refusing union demands at the bargaining table. Now that global wage competition has devalued labor, employers' demand for wage flexibility is much more legitimate and defensible.²⁷⁹ It is now more compelling when company officials say they are at a competitive disadvantage simply because labor is available at a cheaper rate somewhere else in the national or international market. As a result, unions have few options when companies demand significant wage and benefits concessions from their workers, despite posting huge profits.²⁸⁰

Labor supporters continue to focus on reforming the NLRA by proposing stronger penalties for violations and by expanding the base of workers who could be organized.²⁸¹ But more modest proposals have

²⁷⁵ See Colias et al., *supra* note 266 (reporting that the CEO of Fiat Chrysler Automobiles is amenable to pay increases for lower paid workers based on a profit metric); Wayland, *supra* note 267 (reporting that a profit sharing wage system has given General Motors more financial flexibility than a fixed pay-raise system).

²⁷⁶ See STIGLITZ, *supra* note 15, at 63.

²⁷⁷ See News Release, Bureau of Labor Statistics, International Comparisons of Hourly Compensation Costs in Manufacturing, 2011 (Dec. 19, 2012).

²⁷⁸ See generally Craver, *supra* note 50; see also Lucy B. Bednarek, *The Gender Wage Gap: Searching for Equality in a Global Economy*, 6 IND. J. GLOBAL LEGAL STUD. 213, 215–16 (1998) (noting that with globalization and increased economic competition among nations, companies search for the most profitable opportunities around the globe).

²⁷⁹ See Susan R. Hobbs, *Moderation Likely to Prevail in Active Year of 2012 Collective Bargaining*, 15 Daily Lab. Rep. (BNA) S-47 (Jan. 24, 2012) (discussing the limited success unions are likely to have at the bargaining table in the face of foreign competition, continuing high levels of unemployment, and a weak economy).

²⁸⁰ See Greenhouse, *Mott's Strike*, *supra* note 170; see also Steven Greenhouse, *Citing Stalemate, Verizon Workers Strike*, N.Y. TIMES, Aug. 7, 2011, at A8.

²⁸¹ See Michael Rose, *Trumka: First Labor Law Overhaul Bill to Deal with Remedies*, 169 Daily Lab. Rep. (BNA) A-10 (Sept. 9, 2015) (reporting one labor leader's efforts with

failed in the past, and the current political climate is not sympathetic to the economic claims of workers even as productivity, profits, and wage inequality have increased.²⁸² With globalization, the egalitarian claims of labor have become harder to make. Business leaders argue that they have a fiduciary obligation to move capital and jobs to locales that give them the greatest business advantage.²⁸³ As such, they have a fundamental right to utilize any venue or strategy that increases profits, irrespective of the effects on workers.²⁸⁴

Corporate regulations to rein in excessive pay have also failed to incorporate the interests of the larger workforce so median and low-wage workers have been left in the competitive labor marketplace.²⁸⁵ But worker protest outside of the collective bargaining process has shown some promise to improve wages. However, without contractual commitments, any pay increase voluntarily given can be retracted in the future or minimized by reduction in other job benefits. Unions can support pay disparity protests and play a role in guaranteeing wage gains from worker protests using their collective bargaining skills. Unions should also revive profit sharing as a core bargaining strategy because profit sharing is more palatable to employers than fixed wage and benefit plans that magnify long-term financial commitments.

legislators to introduce a bill that would provide for treble damages in cases where workers are unlawfully terminated for union activities).

²⁸² See Chris Opfer, *Congress Returns for Showdown on Labor Initiatives*, 172 Daily Lab. Rep. (BNA) CC-1 (Sept. 4, 2015) (reporting the agenda of Republicans to challenge recent decisions or regulations of the NLRB and the Department of Labor that are viewed as anti-employer).

²⁸³ See, e.g., Joe Weisenthal, *Ballmer Threatens Obama, Says He'll Move Jobs Overseas*, BUS. INSIDER (June 3, 2009), <http://www.businessinsider.com/ballmer-threatens-obama-says-hell-move-jobs-overseas-2009-6>.

²⁸⁴ See Larry Swisher, *U.S. Multinational Firms Added More Jobs at Foreign Affiliates Than at Home in 2011*, 228 Daily Lab. Rep. (BNA) A-9 (Nov. 25, 2013) (reporting a 4.2% boost of employment abroad versus a 4% increase at home).

²⁸⁵ See *Wages Fell More for Lower-Wage Workers Than High Earners in 2009–2012, Study Says*, 131 Daily Lab. Rep. (BNA) A-9 (July 9, 2013) (reporting that from 2009–2012, median and low-wage workers saw drops in wages as high as 4.1%, although worker productivity has increased).

