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## Permanent Replacements: Organized Labor's Fall, Employment Law's (Incomplete) Rise, and the Way Forward

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# PERMANENT REPLACEMENTS: ORGANIZED LABOR’S FALL, EMPLOYMENT LAW’S (INCOMPLETE) RISE, AND THE WAY FORWARD

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Unions are dead, and they aren’t coming back. Over the second half of the twentieth century and into the beginning of the twenty-first, organized labor steadily lost its grip on the American workplace, declining in reach, import, and influence.<sup>1</sup> This decline has been the subject of close academic scrutiny.<sup>2</sup> Scholars have offered a variety of explanations, including employer recalcitrance, political defeats, and labor’s own failure to invest in organizing new members.<sup>3</sup>

This Article is less concerned with those causes than with what has sprouted in the wake of labor’s decline. The same decades that bore witness to labor’s collapse saw the flowering of modern employment law—a patchwork of regulations, statutes, and court-made rules that govern the modern workplace.<sup>4</sup> As labor unions receded, employment law grew up through its cracks, offering workers protection from discrimination, guaranteeing them certain minimum benefits, and shielding them against some of the worst forms of employer abuse.<sup>5</sup>

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1. Bruce Western & Jake Rosenfeld, *Workers of the World Divide*, HUFFINGTONPOST (Apr. 18, 2012, 5:35 PM), [http://www.huffingtonpost.com/bruce-western/decline-of-unions\\_b\\_1435750.html](http://www.huffingtonpost.com/bruce-western/decline-of-unions_b_1435750.html).

2. See, e.g., Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685 (2003).

3. See, e.g., Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133 (1998); Dave Hagaman, *Dave’s in Box: Musings on the State of Unions*, 18 NO. 12 GA. EMP. L. LETTER 3 (2006).

4. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 261 (2002) [hereinafter Corbett, *Labor Law*].

5. See *id.* at 261.

Although employment law and labor law cover much of the same ground, the former is not merely the latter with a new coat of paint.<sup>6</sup> Rather, employment law approaches workplace regulation in a fundamentally different way than its predecessor.<sup>7</sup> Whereas labor law empowered employees by facilitating collective solutions, employment law does so by creating individual rights and remedies.<sup>8</sup> And in part because of this difference in approach, employment law provides many of the same benefits as the old collective-bargaining model, while avoiding some of that model's worst aspects.<sup>9</sup> It provides a degree of stability and certainty, but does not cripple employers with uncompetitive labor costs.<sup>10</sup> It provides workers with certain universal employment rights, while not fostering unjustified distinctions between unionized and nonunionized employers and employees.<sup>11</sup>

The transition from labor law to employment law, however, is far from complete.<sup>12</sup> Employment law currently falls well short of protecting employees in the way that unions once did.<sup>13</sup> While employment law gives employees certain narrow workplace rights, most of the terms and conditions of employment are still determined by bargaining.<sup>14</sup> And as unions have declined, that bargaining has increasingly taken place between employers and individual employees.<sup>15</sup> But employees cannot, on their own, demand the type of concessions unions were once able to extract.<sup>16</sup> As a result, today most nonunion employees cannot resist declining wages, cannot object to certain forms of discrimination, and cannot push back against wholly arbitrary discharges.<sup>17</sup>

This vulnerability, along with some potential solutions, is the subject of this Article. First, in Part I, I track organized labor's decline and show how it coincided with employment law's rise. I conclude that whether there is a causal relationship between these two divergent trends is ultimately irrelevant, because the transition is unlikely to reverse itself.<sup>18</sup> Employment law is here to stay, and we must deal with it on its own terms.<sup>19</sup>

In Part II, I examine some of the transition's theoretical implications and conclude that the employment-law approach can improve upon the collective-bargaining model in a number of ways.<sup>20</sup> For instance, while collective bargaining has been criticized for saddling employers with uncompetitive labor costs, employment law imposes those costs in a uniform, nondiscriminatory manner.<sup>21</sup> In this

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6. *See id.* at 263.

7. *See id.* at 263.

8. *See id.* at 274.

9. *See id.* at 263–77.

10. *See Corbett, Labor Law, supra* note 4, at 263–77.

11. *See id.* at 263–77.

12. *See id.* at 272–99.

13. *See id.* at 269–78.

14. *See id.* at 272.

15. *See* Brian D. Shonk, Case Note, *Individual Employee Rights Versus the Rights of Employers as a Group: NLRB v. City Disposal Systems, Inc.*, 27 B.C.L. REV. 453, 458–59 (1986).

16. *See id.*

17. *See id.*

18. *See infra* Part I.

19. *See infra* Part I, pp. 11–12.

20. *See infra* Part II, pp. 13–16.

21. *See* Morgan O. Reynolds, *Labor Unions*, LIBR. OF ECON. & LIBERTY (2008), <http://www.econlib.org/library/Enc/LaborUnions.html>.

way, employment law levels the playing field among employers.<sup>22</sup> Moreover, employment law extends certain rights to all workers, regardless of their membership in a union or willingness to bargain collectively.<sup>23</sup> Thus, employment law is more efficient and egalitarian.<sup>24</sup>

Equality, however, is cold comfort to those employees left without meaningful legal protections against still-prevalent forms of employer abuse.<sup>25</sup> Thus, in Part III, I argue that employment law currently falls well short of filling the role unions once played in counterbalancing employers' near-unilateral power over the employment relationship. And if employment law is ever to do so, lawmakers must strengthen it—preferably at the national level.<sup>26</sup> As a starting point, I propose three specific steps: 1) raising the minimum wage and indexing it to inflation; 2) adopting antidiscrimination legislation to protect working parents and other primary caregivers; and 3) enacting a national good-cause discharge law.<sup>27</sup> I argue that each of these steps would provide workers with the legal protections they need, but can no longer effectively bargain for, while avoiding imposing untenable burdens on employers.

Labor unions and the old collective-bargaining model are dead and gone.<sup>28</sup> Now, we must deal with their replacements: employment law and individual workplace rights. These replacements are not perfect, but they are what we have, and they have their own strengths.<sup>29</sup> Lawmakers' task going forward is to build on these strengths, while avoiding collective bargaining's pitfalls.<sup>30</sup> This Article proposes a few ways to do so.

## I

Organized labor's decline in the United States has been long in the making, its strength withering like grapes withering on the vine.<sup>31</sup> Unionization rates peaked in the early 1950s, with labor unions representing roughly one-third of the nonagricultural private labor force.<sup>32</sup> Since that peak, the unionization rate has fallen, with the decline accelerating in the 1970s.<sup>33</sup> Between 1974 and 1985, the percentage of American workers covered by a union-negotiated collective bargaining agreement ("CBA") fell from 29.9% to 20.5%.<sup>34</sup> And despite some initial success in slowing

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22. *See generally id.*

23. *See Corbett, Labor Law, supra note 4, at 263–65; see also Shonk, supra note 15, at 458–59.*

24. *See generally Shonk, supra note 15, at 454–62.*

25. *See generally id.*

26. *See infra Part III, pp. 24–26.*

27. *See infra Part III, pp. 26.*

28. *See Corbett, Labor Law, supra note 4, at 269–77.*

29. *See id.* at 270–79.

30. *Id.*

31. *See generally Paul Berks, Social Change and Judicial Response: the Handbook Exception to Employment-at-Will, 4 EMP. RTS. & EMP. POL'Y J. 231 (2000).*

32. *Id.* at 256.

33. *Id.* at 256–57.

34. *Id.* at 255.

this erosion by organizing public-sector workers,<sup>35</sup> unions ultimately failed to stop the bleeding.<sup>36</sup> By 2002, unions represented only 13.5% of all workers, including only 9% of private-sector employees.<sup>37</sup> By 2012, those numbers had fallen to 11.3% and 6.6%, respectively.<sup>38</sup> Ominously for labor's proponents, unionization rates are now lowest among the youngest workers.<sup>39</sup> Although 14.9% of workers aged fifty-five to sixty-four are union members, the unionization rate is only 4.2% among those aged sixteen to twenty-four.<sup>40</sup> Moreover, unions have failed to make up their losses by organizing in new industries, and have even lost strength in sectors that were once labor strongholds, such as the automotive industry.<sup>41</sup>

Flailing against the current, some scholars have called for labor-law reforms, typically focusing on strengthening unions' bargaining positions by enhancing their ability to organize.<sup>42</sup> But in the contemporary political climate, such proposals are more wishful thinking than viable policy solutions. The 2010 elections swept conservative Republicans into office across the country, and these freshly minted lawmakers wasted no time in launching full-scale offensives against organized labor.<sup>43</sup> In the most visible example, Wisconsin Governor Scott Walker stripped the state's public unions of their right to collectively bargain on any topic but wages.<sup>44</sup> Conservative lawmakers also moved against labor unions in Ohio<sup>45</sup> and Indiana,<sup>46</sup> with

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35. *Id.* at 256 (noting that "union membership among public sector workers rose from barely 10% in 1960 to over 40% in 1976.").

36. *Id.*

37. See U.S. Dep't of Labor, *Union Members in 2002*, BUREAU OF LAB. STAT. (Feb. 25, 2003, 10:00 AM), [http://www.bls.gov/news.release/history/union2\\_02252003.txt](http://www.bls.gov/news.release/history/union2_02252003.txt).

38. U.S. Dep't of Labor, *Economic News Release: Union Member Summary*, BUREAU OF LAB. STAT. (Jan. 23, 2013, 10:00 AM), <http://www.bls.gov/news.release/union2.nr0.htm> [hereinafter *BLS: Union Members*].

39. *Id.*

40. *Id.*

41. See *Let's go German*, THE ECONOMIST (Aug. 3, 2013), <http://www.economist.com/news/business/21582517-americas-car-workers-union-seeks-foot-door-vws-plant-lets-go-german>

(reporting that membership in the United Auto Workers has fallen from a peak of 1.5 million to 400,000, and that the union has struggled to organize foreign car manufacturers' employees in the United States).

42. E.g., Cynthia Estlund, *Labor Law Reform Again? Reframing Labor Law as a Regulatory Project*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 383, 385 (2013); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 370–71 (2001); Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 99–100 (2009).

43. Scott Neuman, *What Wisconsin's Recall Means for Labor Unions*, NPR (June 06, 2012, 3:42 PM), <http://www.npr.org/2012/06/06/154448777/what-wisconsins-recall-means-for-labor-unions>.

44. See 2011 Wisconsin Act 10, Jan. 2011 Spec. Sess. (Wis. 2011) (codified as amended in scattered sections of WIS. STAT. § 13 et seq.); see also Ian Saleh, *Wisconsin Gov. Scott Walker signs collective bargaining bill, bypasses Senate Democrats*, WASHINGTON POST, Mar. 11, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/11/AR2011031103966.html>.

45. See Meghan Barr & Thomas J. Sheeran, *Ohio Governor Signs Collective Bargaining Limits*, AOLNEWS.COM (Mar. 31, 2011, 8:15 PM), <http://www.aolnews.com/2011/03/31/ohio-governor-john-kasich-signs-collective-bargaining-limits/>. Ohio's voters later repealed the measure. See also Rachel Weiner, *Issue 2 Falls, Ohio Collective Bargaining Law Repealed*, WASHINGTON POST, Nov. 8, 2011, [http://www.washingtonpost.com/blogs/the-fix/post/issue-2-falls-ohio-collective-bargaining-law-repealed/2011/11/08/gIQAyZ0U3M\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/issue-2-falls-ohio-collective-bargaining-law-repealed/2011/11/08/gIQAyZ0U3M_blog.html); *Ohio Repeals Measure to Limit Bargaining Rights*, NPR (Nov. 9, 2011, 3:00 PM), <http://www.npr.org/2011/11/09/142184380/ohio-voters-repeal-measure-to-limit-bargaining-rights>.

the latter being the first state to enact a “right-to-work” law in a decade.<sup>47</sup> And as dire as unions’ prospects have been in the states, they have been no brighter at the federal level. Even when it has had ostensible Democratic Party allies in control of both the White House and Congress, organized labor has been unable to push through its legislative agenda.<sup>48</sup> During and after the 2008 elections, labor unions lobbied heavily for the Employee Free Choice Act, which would have required employers to recognize unions based solely on signed authorization cards, as opposed to the standard election process.<sup>49</sup> Although the newly elected President Obama reiterated his support for the Act shortly after taking office, he quickly abandoned it following electoral setbacks that cost his party its filibuster-proof majority in the Senate.<sup>50</sup> This disappointment echoed organized labor’s unsuccessful advocacy in the early 1990s in favor of the Workplace Fairness Act, which likewise failed to pass under similarly favorable political conditions.<sup>51</sup>

Nor can unions expect a groundswell of public support to help them change lawmakers’ minds. Far from lamenting organized labor’s collapse, more and more Americans seem inclined to celebrate it. The public’s approval of unions crested in the mid-twentieth century—the same period during which labor unions’ representation rates reached their peak.<sup>52</sup> In January 1957, 75% of respondents told Gallup pollsters that they approved of labor unions.<sup>53</sup> That percentage fell to 60% by 1991<sup>54</sup> and hit an all-time low in 2009, with only 48% saying they approved of unions.<sup>55</sup> And while unions’ approval rates have marginally recovered in the few years since then, they remain remarkably low by historical standards.<sup>56</sup>

Both declines—in labor’s representation rates and in its public approval—neatly coincided with the rise of what we now call “employment law.” Generally,

46. See IND. CODE § 22-6-6-8 (West 2013).

47. *Indiana enacts right-to-work law*, CBSNEWS (Feb. 1, 2012, 5:27 PM), [http://www.cbsnews.com/8301-250\\_162-57369868/indiana-enacts-right-to-work-law/](http://www.cbsnews.com/8301-250_162-57369868/indiana-enacts-right-to-work-law/). Indiana was also the site of another recent union defeat, when in 2005 the state terminated its public employees’ collective-bargaining rights. See Ind. Exec. Order No. 05-14 (Jan. 11, 2005), available at [http://www.in.gov/governorhistory/mitchdaniels/files/EO\\_05-14\\_Complaint\\_State\\_Employees.pdf](http://www.in.gov/governorhistory/mitchdaniels/files/EO_05-14_Complaint_State_Employees.pdf) (rescinding prior executive order establishing collective-bargaining rights); see also Todd C. Dvorak, *Heeding “The Best of Prophets”: Historical Perspective and Potential Reform of Public Sector Collective Bargaining in Indiana*, 85 IND. L.J. 701, 715 (2010).

48. William R. Corbett, “*The More Things Change, . . .*”: *Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 230–31 (2011) [hereinafter Corbett, *The More Things Change*].

49. *Id.* at 230.

50. *Id.* at 230–31.

51. *Id.* at 228–29.

52. See Berks, *supra* note 31.

53. Jeffrey M. Jones, *In U.S., Labor Union Approval Steady at 52%*, GALLUP (Aug. 31, 2012), <http://www.gallup.com/poll/157025/labor-union-approval-steady.aspx>.

54. *Id.*

55. *Favorability Ratings of Labor Unions Fall Sharply*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS (Feb. 23, 2010), <http://www.people-press.org/2010/02/23/favorability-ratings-of-labor-unions-fall-sharply/> (reporting that only 41% of respondents expressed a favorable opinion toward unions).

56. Jones, *supra* note 53; see also Norimitsu Onishi, *Changing Attitudes on Labor Color Bay Area Transit Dispute*, N.Y. TIMES, Aug. 10, 2013, [http://www.nytimes.com/2013/08/11/us/changing-attitudes-on-labor-color-bay-area-transit-dispute.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/11/us/changing-attitudes-on-labor-color-bay-area-transit-dispute.html?pagewanted=all&_r=0) (describing negative sentiment among working-class commuters toward striking public transit workers).

when legal commentators use that term, they are referring to a patchwork of laws—federal, state, and local statutes and regulations, as well as court-made common law—that regulate the nonunionized workplace.<sup>57</sup> Employment law is distinguishable from “labor law,” which principally concerns unions and their activities.<sup>58</sup> As unions (and, accordingly, labor law) have waned in importance, employment law has stepped to the fore.<sup>59</sup> The year 1963 saw the passage of the Equal Pay Act,<sup>60</sup> the nation’s “first modern employment discrimination statute.”<sup>61</sup> The next year, Congress enacted the landmark Civil Rights Act of 1964,<sup>62</sup> which, among other things, prohibited certain forms of invidious employment discrimination. Other major federal employment statutes followed, such as the Age Discrimination in Employment Act (1967),<sup>63</sup> the Employee Retirement Income Securities Act (1974),<sup>64</sup> the Americans with Disabilities Act (1990),<sup>65</sup> the Family Medical Leave Act (1993),<sup>66</sup> the Occupational Health and Safety Act (1994),<sup>67</sup> and, more recently, the Lilly Ledbetter Fair Pay Act (2009).<sup>68</sup> State legislatures were also active during this period.<sup>69</sup> At minimum, most enacted their own anti-discrimination statutes, which often offered broader protections than federal law.<sup>70</sup> State courts also contributed to employment law’s expansion, abrogating the traditional employment-at-will doctrine with such

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57. See, e.g., Corbett, *Labor Law*, supra note 4, at 263 (“‘Labor and employment law’ is what we in the United States call the area of law dealing with legal regulation of the employment relationship. Labor law is the name given to the law governing labor-management relations, primarily in unionized workplaces. Employment law, on the other hand, is thought of as the body of law regulating principally non-unionized workplaces.”) (footnotes omitted); see also Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183, 184 (2003) (“Employment law, on the other hand, describes those statutes, regulations, or common law doctrines which cover employees individually.”).

58. Corbett, *Labor Law*, supra note 4, at 263.

59. See 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, 584 (1992) (“The past decade has witnessed a shift from a legal system that protects collective employee rights to one that protects individual employment rights. In this shift, labor relations have been deregulated and then reregulated in an individualized and decentralized fashion.”).

60. 29 U.S.C. § 206(d) (2006).

61. 1 MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 437 (2d ed. 1999).

62. 42 U.S.C. §§ 2000e–e17 (2006).

63. 29 U.S.C. §§ 621–31 (2006).

64. 29 U.S.C. §§ 1001–191c (2006).

65. 42 U.S.C. §§ 12101–213 (2006).

66. 29 U.S.C. §§ 2601–54 (2006).

67. 29 U.S.C. §§ 651–78 (2006).

68. 42 U.S.C.A. § 2000e-5(e)(3)(A) (West 2013).

69. Berks, supra note 31, at 250 (“Beginning in the 1960s, . . . state lawmakers imposed restrictions on an employer’s right to discharge based on an employee’s race, gender, religion, age, and, most recently, disability.”) (footnotes omitted).

70. Jarod S. Gonzales, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116 (2007) (“Some state antidiscrimination statutes expand the categories of protected groups.” (citing N.H. REV. STAT. ANN. §§ 354-A:1-25 (LexisNexis 1995 & Supp. 2006))); Stone, supra note 59, at 592 (“Some states have adopted more stringent protection for the employment rights of minorities than has the federal government . . .”). Some states also enhanced their protections for whistleblowers. ARIZ. REV. STAT. ANN. § 23-1501(A)(3)(c)(ii) (West 2013); Stone, supra note 59, at 592 (noting that at least thirty-four states protect whistleblowers from retaliation from their employer).

doctrines as the handbook exception,<sup>71</sup> the good-faith exception,<sup>72</sup> and the public-policy exception.<sup>73</sup>

The causal relationship, if any, between employment law's rise and labor law's fall is difficult to identify.<sup>74</sup> On one hand, it seems logical that federal and state lawmakers, in adopting these new legal protections, were reacting directly to organized labor's weakness.<sup>75</sup> At one time, labor unions were seen as the primary route through which employees could improve their wages, secure minimally acceptable working conditions, and protect themselves from arbitrary employer action.<sup>76</sup> Early employment legislation throughout the nation reflected this understanding by aiming to expand and protect employees' collective bargaining rights.<sup>77</sup> But as unions declined, these rights hollowed out; workers were left exposed to the whims of the market—and of their employers.<sup>78</sup> Thus, it may be that courts and

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71. See *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 282 (Iowa 1995) (explaining that courts adopted doctrines such as the handbook exception to ameliorate the “perceived . . . harshness of the employment-at-will doctrine”); Berks, *supra* note 31, at 234 (noting “a direct link among employer handbooks, declining unionism and the new wrongful termination cause of action”).

72. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 391 n.26 (Cal. 1988) (citing cases).

73. See, e.g., *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 505 (N.J. 1980); *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974); see also ARIZ. REV. STAT. ANN. § 23-1501(A)(3)(c) (West 2013) (codifying public-policy cause of action); Berks, *supra* note 31 at 251 (“Simultaneously, common law courts developed a ‘public policy exception’ to the at-will rule.”); Stone, *supra* note 59, at 591 (observing that at least thirty-nine states have enacted “some form of common law employee protection against unjust dismissal”).

74. See Berks, *supra* note 31, at 260–61 (“The causes of union decline are numerous, multifaceted and the subject of extended scholarly debate.”).

75. See Corbett, *The More Things Change*, *supra* note 48, at 238 (arguing that “politicians of both parties long ago gave up on labor law and opted for a regime of individual employment rights laws”); Stone, *supra* note 59, at 576 (“There is a plausible argument that the newly emerging individual employment rights are an evolution of the pre-existing system of collective bargaining.”).

76. See John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces*, 66 INDUS. & LAB. REL. REV. 142, 143 (2013) (“In the United States, labor unions have been widely viewed as the primary means by which workers can collectively achieve democratic rights and protections within the employment relation . . . .”); see also Berks, *supra* note 31, at 259 (“The primary strategy for securing these benefits was direct negotiation and, when necessary, direct action at the local level.”).

77. See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (now codified at 29 U.S.C.A. § 151 (West 2013)) (passed in 1935, and finding that “protection by law of the right of employees to organize and bargain collectively . . . encourage[es] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and . . . restor[es] equality of bargaining power between employers and employees”); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965) (“[A] primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management . . . by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers.”); Berks, *supra* note 31, at 245 (arguing that “[t]he passage of the NLRA was, in short, a ‘response’ by the legal system to widespread discomfort with the at-will doctrine”); Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 686–687 (1993) (explaining that Congress adopted the NLRA to “actively promote collective bargaining as a method of addressing the needs of workers”) [hereinafter Dau-Schmidt, *Meeting the Demands*].

78. See, e.g., ARIZ. REV. STAT. ANN. § 23-1501(A)(2) (West 2013) (providing that, absent a signed written contract, “[t]he employment relationship is severable at the pleasure of either the employee or the employer”); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 282 (Iowa 1995) (noting the “universal acceptance of the employment-at-will doctrine”); Berks, *supra* note 31, at 234–35, 255 (arguing

legislatures, recognizing the gap left by organized labor's implosion, stepped in to fill the void, acting to protect American workers as it became apparent that unions could no longer do so.<sup>79</sup>

It is just as possible, however, that causation ran in the opposite direction; perhaps new employment laws actually undermined labor unions by rendering them redundant.<sup>80</sup> After all, the initial wave of federal employment legislation preceded the worst of organized labor's decline.<sup>81</sup> Congress passed the Civil Rights Act over a decade before labor's disastrous 1975–85 span, when unionization rates plummeted by almost a third.<sup>82</sup> And, piece-by-piece, the legislative wave that followed began to afford all workers certain minimum protections, regardless of union status.<sup>83</sup> Workers no longer needed unions to combat certain discriminatory discharges, secure safe working conditions, obtain emergency medical leave, or protect their pension funds.<sup>84</sup> State tort law also increasingly gave workers recourses outside of the labor contract.<sup>85</sup> Indeed, due to strong federal labor-law preemption, non-union workers often had *greater* state employment-law rights than their unionized counterparts.<sup>86</sup> In sum, unions no longer occupied an exclusive position in

that “the unprecedented decline in union density and influence at the end of the 1970s and beginning of the 1980s effectively eliminated collective bargaining as a genuine alternative to the at-will regime” and that “this loss of union power created a due process void in the work place that was filled by the creation of a common law cause of action for wrongful discharge within the framework of existing contract law”).

79. See Berks, *supra* note 31, at 253 (“Only when collective bargaining ceased to provide a viable alternative to the individualized employment contract did courts review and revise the employment-at-will rule.”).

80. See Godard & Frege, *supra* note 76, at 145 (arguing that “[i]t is . . . possible that a general increase in legal employment rights has lessened the difference between union and nonunion workplaces and hence the extent to which unions can be said to have democratization effects, regardless of whether a management-established system is in place”); Stone, *supra* note 59, at 577 (observing that, despite the ways in which individual-rights legislation might bolster unions’ bargaining position, they are at bottom in “tension” with “the New Deal system of collective bargaining”); Bodie, *supra* note 57, at 184 (“Many of these statutes were passed in part due to strong support from unions. Some have argued, however, that these successes in turn reduced the importance of unions to workers.”) (footnote omitted).

81. See Berks, *supra* note 31, at 255 (noting that union rates “fell from 29.9% in 1974 to 20.5% in 1985”); see also 29 U.S.C. § 206(d) (2006) (Equal Pay Act passed in 1963); 42 U.S.C. §§ 2000e–e17 (2006) (Civil Rights Act of 1964).

82. Berks, *supra* note 31, at 255; 42 U.S.C. §§ 2000e–e17 (2006) (Civil Rights Act of 1964).

83. See Godard & Frege, *supra* note 76, at 145 (reviewing scholarship that suggests that “a proliferation of employment legislation at the state and local levels (e.g., living wage laws) have led employers to adopt standard personnel policies and practices and a new strategy centered on private arbitration procedures”).

84. See Berks, *supra* note 31, at 250 (“In one sense, therefore, the harshness of the employment-at-will rule served the institutional interest of organized labor. The legal recognition of collective bargaining thereby reduced the likelihood that the at-will rule itself would face abolition.”) (footnote omitted).

85. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219–20 (1985) (holding that in Wisconsin a complaint in tort for breach of duty of good faith was preempted by § 301 of the NLRA and the applicable collective bargaining agreement).

86. ABA SEC. LAB. & EMP. L., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* (Patrick Hardin et al. eds., 4th ed. 2001) (observing that “[s]ince *Allis-Chalmers*, lower courts applying the standard in that case have held that Section 301 preempts claims for fraud and misrepresentation, invasion of privacy, defamation, intentional infliction of emotional distress, negligence, tortious drug testing, tortious interference with contract, violation of an implied covenant of good faith and fair dealing, fraud, violation of a worker compensation law, race and sex discrimination under state law, breach of a trust agreement, breach of contract, and wages due.”) (footnotes omitted); Stone, *supra* note 59, at 578 (“As a result [of federal labor-law preemption], unionized workers now have, in many respects, fewer employment rights than do their nonunion brothers and sisters.”).

regard to securing workplace rights; new employment laws had eroded their claim to an essential role in the American workplace.

And as unions began to lose their grip on that claim, it should be no surprise that employees abandoned in droves.<sup>87</sup> Many employees tend to believe, not wholly irrationally, that inviting a union into their workplace brings with it certain costs.<sup>88</sup> For instance, many imagine (perhaps in response to management's urgings) that unionizing would put their employer's very existence in jeopardy.<sup>89</sup> Moreover, given the National Labor Relations Board's notorious inability to quickly police unfair labor practices,<sup>90</sup> many employees legitimately fear retaliation for supporting a union.<sup>91</sup> Such fears sharpen in times of economic scarcity, which may explain why the public takes a dimmer view of unions during recessions.<sup>92</sup> And, as noted, federal preemption forces unionized workers to forgo certain state law protections—a cost that employers make sure to inform their employees of.<sup>93</sup> In light of these considerations, it is plausible that the rise of employment law as an alternative source of rights contributed to organized labor's decline.<sup>94</sup> As employees had less need for union representation, they simply grew less inclined to accept its costs.<sup>95</sup>

But which of these causal theories is closer to the truth is ultimately less important than the end result, which is that the modern American workplace is in-

87. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 378 (2007) ("In response to these deep flaws in the traditional regime, both unions and employers have begun to abandon the NLRA and the NLRB.")

88. See Richard B. Freeman & Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 INDUS. & LAB. REL. REV. 510, 511 (1999).

89. See *id.* (noting that "[a] 1988 Gallup Poll found that 35% of the population believed that union establishments are 'much more likely to go out of business than nonunion establishments' while 51% disagreed. Among those who disapproved of unions, 45% reported that they believed unionized workplaces are more likely to go out of business, a belief that may color their attitudes.") (citation omitted); *Let's Go German*, *supra* note 41 (reporting on American carmakers' higher labor costs and pension liabilities, which were a factor in GM and Chrysler's 2008 bankruptcy filings).

90. See, e.g., Sachs, *supra* note 87, at 375–77 (arguing that the NLRB's inability to quickly redress violations is a factor driving employees and unions to abandon traditional enforcement avenues); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795–96 (1983) (noting that, despite a rise in the occurrence of employer unfair labor practices, the average delay in obtaining an enforceable order from the NLRB was 1000 days dating back as far as 1980).

91. See Yungsohn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN L.J. 67, 88 (2005) (noting that "[i]t is common for employers to fire workers who support unionization, threaten to shutdown plants upon unionization, force workers to attend anti-union presentations, and hire outside consultants to conduct anti-union campaigns.") (footnote omitted).

92. See David Madland & Karla Walter, *Why is the Public Suddenly Down on Unions? The Bad Economy's to Blame—Support Should Recover When the Economy Does*, CENTER FOR AM. PROGRESS ACTION FUND (July 20, 2010), <http://www.americanprogressaction.org/issues/labor/report/2010/07/20/8046/why-is-the-public-suddenly-down-on-unions/> (predicting that "public support for labor unions should recover when the economy improves.").

93. Stone, *supra* note 59, at 643.

94. See Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1176 (1989) (noting that one of the arguments against unjust-discharge legislation is that "[w]orkers will be less inclined to join labor organizations if they are provided with the same protection under a statute that unions offer under collective bargaining agreements.") (footnote omitted).

95. See *id.*

creasingly governed by employment law, not labor law.<sup>96</sup> With every passing day, unions seem more irrelevant, while employment law grows in importance.<sup>97</sup>

Indeed, employees have already begun adjusting to this reality, creatively using employment law as a labor law substitute.<sup>98</sup> For instance, in 2001, garment workers at Danmar Finishing in New York protested their employer's failure to pay accrued overtime wages.<sup>99</sup> When Danmar retaliated by terminating one of the lead advocates, the employees did not, as might be expected, seek an unfair-labor-practice injunction from the National Labor Relations Board.<sup>100</sup> Instead, using the Fair Labor Standards Act's anti-retaliation provisions, they obtained a temporary restraining order in federal court.<sup>101</sup> As a result, the terminated employee was reinstated, and the lobbying efforts continued uninterrupted.<sup>102</sup> These tactics ultimately succeeded with the employees extracting more than \$400,000 in unpaid overtime.<sup>103</sup>

State and local regulators have also turned to employment law as an organized-labor substitute.<sup>104</sup> One such example occurred in 2002 when, in response to widespread wage-law violations, New York City adopted the Greengrocer Code of Conduct.<sup>105</sup> The Code was a voluntary settlement agreement between the city and local greengrocers, establishing certain minimum terms of employment.<sup>106</sup> These terms included minimum standards for wages, overtime, and sick leave.<sup>107</sup> The Code has been described as "an off-the-rack collective bargaining agreement that provides a state seal of approval," and has been held out as a model for other states and localities.<sup>108</sup>

But these successes, however encouraging, do not suggest that the transition from labor law to employment law has been well planned, or even coherent.<sup>109</sup> Rather, modern employment law is not the product of a single national policy, but of federal, state, and local actors moving with often overlapping or contradictory purposes.<sup>110</sup> Whereas one consequence of the federal preemption doctrine in the labor-

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96. See Stone, *supra* note 59, at 593 ("[T]he emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights, but rather its replacement.").

97. Bodie, *supra* note 57, at 184 (arguing that, in the wake of labor unions' decline, "the importance of employment law has only increased, and the aspects of the employment relationship covered by such individually-oriented provisions have continued to climb.") (footnote omitted).

98. See Sachs, *supra* note 87, at 391–92.

99. *Id.* (citing Rosemary Feitelberg, *N.Y. Senator Criticizes Dept. of Labor Efforts*, WOMEN'S WEAR DAILY, May 13, 2002, at 23; Bob Port, *Schumer Rips Sweatshops: B'klyn Case Sparks Call for Fed Probe of City Factories*, N.Y. DAILY NEWS, May 10, 2002, at 10).

100. *Id.* at 392.

101. *Id.*

102. *Id.*

103. *Id.* at 393.

104. See Bodie, *supra* note 57, at 185–86.

105. *Id.*; see also *Summary of Greengrocer Code of Conduct*, OFF. OF THE ATT'Y GEN., ST. OF N.Y., [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/labor/final\\_ggcode\\_english\\_short.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/labor/final_ggcode_english_short.pdf) (last visited Nov. 17, 2013).

106. Bodie, *supra* note 57, at 194–95.

107. *Id.* at 195.

108. *Id.* at 186.

109. See Drummonds, *supra* note 42, at 99.

110. See Sachs, *supra* note 87, at 377.

law field was the creation of a single, monolithic body of law,<sup>111</sup> no such national policy yet exists in the employment-law field. Rather, employment law has grown in fits and starts, with legislatures and courts approaching workplace regulation in a piecemeal fashion.<sup>112</sup> As a result, wide variations can be seen in the rights that employees enjoy in different states.<sup>113</sup> Compare, for example, Montana, where employers may not terminate their employees but for good cause,<sup>114</sup> and Texas, where employers can fire with impunity,<sup>115</sup> and are not even required to carry workers' compensation insurance.<sup>116</sup>

Yet despite the transition's lack of direction, there are reasons to believe that the new employment law regime can improve upon its labor law predecessor. Theoretically, by focusing more on individual rights than collective remedies, employment law may better fit the modern workplace. These potential benefits are the subject of this Article's next section.

## II

Unions have lost their sway over the American workplace.<sup>117</sup> As detailed in Part I, Americans increasingly no longer look to collective bargaining agreements as the primary source of their employment rights, but rather to a patchwork of federal, state, and local employment laws.<sup>118</sup> Particularly in the private sector, employees are increasingly less beholden to collective resolutions, but increasingly more reliant on external legal rights.<sup>119</sup> Theoretically, this could be a positive development. While the employment-law approach is not perfect, its focus on individual rights over collective solutions promises substantial advantages—for both workers and employers.<sup>120</sup> Those potential advantages are the subject of this section.

To begin, the employment-law approach is potentially cheaper than collective bargaining.<sup>121</sup> It saves all parties involved at least one obvious cost: bargaining-associated expenses.<sup>122</sup> Electing a union and negotiating a collective bargaining agreement can be expensive endeavors, for both employers and employees.<sup>123</sup> But

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111. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 972 (2002) (arguing that federal preemption of state common law promotes "doctrinal clarity"); *but see* Drummonds, *supra* note 42, at 99 (arguing that, although "federal labor relations preemption doctrines ensnarl all states in a stifling and exclusive . . . federal labor law regime," that regime is itself "strikingly inconsistent") (footnote omitted).

112. *See* Sachs, *supra* note 87, at 377 ("No longer a regime defined by a single federal statute administered by a single federal agency, American labor law is increasingly constituted by private processes, by state and local regulation, and by multiple federal statutes enforced by multiple actors.")

113. *See* MONT. CODE ANN. § 39-2-904(1)(b) (West 2013); *see also* TEX. LAB. CODE ANN. § 406.002 (West 2013).

114. MONT. CODE ANN. § 39-2-904(1)(b) (West 2013).

115. *See, e.g.*, *E. Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888).

116. TEX. LAB. CODE ANN. § 406.002 (West 2013).

117. *See supra* Part I.

118. *See supra* Part I.

119. *See supra* Part I.

120. *See infra* Part II.

121. *See* Dau-Schmidt, *Meeting the Demands*, *supra* note 77, at 693–94.

122. *See id.*

123. *Id.* at 694.

under the employment-law approach, minimum wages, overtime pay, sick and annual leave, workplace safety, and various other terms are dictated uniformly by statute.<sup>124</sup> Accordingly, the parties need not employ bargaining proxies, nor need they incur union-election and CBA-enforcement expenses.<sup>125</sup> While they still need to negotiate the remaining employment terms on a case-by-case basis, these individual negotiations are usually more informal and efficient than collective ones.<sup>126</sup> Thus, under the employment-law approach, employees still enjoy certain CBA-like rights, while both parties are freed from the costs traditionally associated with bargaining for and implementing a CBA.<sup>127</sup>

The employment-law approach may also be more stable and predictable. For employers, uniform employment standards—applicable across employers, industries, and regions—establish a baseline.<sup>128</sup> When this baseline is set by legislation, as opposed to collective bargaining, employers can more accurately forecast their labor costs in any given region of the country. For example, employers know that in any state in the country, they will have to pay their employees at least \$7.25 an hour.<sup>129</sup> They also know that they must allow their employees a certain amount of emergency medical leave,<sup>130</sup> pay them time and a half for overtime,<sup>131</sup> and accommodate their disabilities.<sup>132</sup> Employers can account for these expenses in advance without needing to consult or bargain with a local union. Of course, many states provide employees with greater rights than they enjoy under federal law.<sup>133</sup> For example, a number of states set their minimum wages higher than the federal rate.<sup>134</sup> Nevertheless, while baseline costs may vary between jurisdictions, those costs are predictable; no local negotiation is necessary.

Employees also benefit from this predictability. When moving between employers, regions, or industries, employees carry their baseline rights with them.<sup>135</sup> For example, under the FMLA, a mail clerk in Texas has the same right to emergency medical leave as a sales representative in New Jersey.<sup>136</sup> In theory, this predictability should make it easier for employees to shift between jobs and regions,

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124. *See id.* at 686–88.

125. *See id.* at 696.

126. *See id.* at 688–89 (explaining that “individual bargaining allows the parties to achieve a customized or personalized solution to individual desires or problems” and may “result in the maximization of total wealth”).

127. *See Stone, supra* note 59, at 636 (“If the emerging system of individual employment rights does in fact provide universal employment rights, then it is plausible that most workers would benefit by dispensing with collective bargaining altogether.”).

128. KENNETH G. DAU-SCHMIDT ET AL., *LABOR AND EMPLOYMENT LAW AND ECONOMICS* 708 (2009).

129. 29 U.S.C. § 206(a)(1)(C) (2006).

130. 29 U.S.C. § 2612(a)(1)(D) (2006).

131. 29 U.S.C. § 207(a)(1) (2006).

132. 42 U.S.C. § 12112(b)(5)(A) (2006).

133. Ken LaMance, *State vs. Federal Laws for Employment Discrimination*, LEGALMATCH (Apr. 8, 2013, 2:42 PM), <http://www.legalmatch.com/law-library/article/state-vs-federal-laws-for-employment-disputes.html> (listing differences between state and federal laws in regards to: right-to-work laws and safety-and-health laws).

134. *See, e.g.*, MICH. COMP. LAWS ANN. § 408.384 (West 2013) (minimum wage is \$7.40 an hour); MASS. GEN. LAWS ANN. ch. 151 § 1 (West 2013) (minimum wage is \$8.00 an hour).

135. *See Summary of the Major Laws of the Department of Labor*, U.S. DEP’T OF LAB., <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Nov. 17, 2013).

136. 29 U.S.C. § 2612 (a)(1) (2006).

adding liquidity to the labor market.<sup>137</sup> This predictability benefits not only migrating workers, but also employees who remain in a single job for decades. These career employees enjoy peace of mind, knowing that certain basic rights are not up-for-grabs at the expiration of the present CBA; statutory rights are not subject to bargaining givebacks.<sup>138</sup>

The employment-law approach also levels the playing field between union and nonunion employers. For example, unionized employers tend to face higher labor costs than their nonunion competitors.<sup>139</sup> Unionization may also cause employers to behave inefficiently; for instance, by firing productive employees because of their union sympathies.<sup>140</sup> These factors leave unionized employers at a competitive disadvantage with their nonunion competitors.<sup>141</sup> But when uniformly applicable law, rather than collective bargaining, establishes baseline employment standards, such disparities should disappear. Employers cannot argue that higher standards—established by legislation rather than collective bargaining—render them uncompetitive with one another.<sup>142</sup> When all employers must meet the same

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137. See Jason Long & Joseph Ferrie, *Labour Mobility*, in 3 OXFORD ENCYCLOPEDIA OF ECONOMIC HISTORY 248, 248 (Joel Mokyr et al. eds., 2003) (“[L]abour mobility conveys important economic benefits. The reallocation of workers across regions permits the exploitation of complementary resources as they are discovered in new places, while reallocation across sectors makes possible the use of new technologies and the growth of new industries.”).

138. Holly Otterbein, *Teachers’ Union Still Reluctant on Salary Givebacks*, NEWSWORKS (June 25, 2013), <http://www.newsworks.org/index.php/local//the-latest/56498-teachers-union-still-reluctant-on-salary-givebacks> (describing Philadelphia School District’s attempts to obtain salary “give-backs” from teachers’ union at expiration of CBA); Kate Taylor, *Health Care Law Raises Pressure on Public Unions*, N.Y. TIMES, Aug. 4, 2013, [http://www.nytimes.com/2013/08/05/nyregion/health-care-law-raises-pressure-on-public-employees-unions.html?\\_r=1&hp=&adxnnl=1&adxnnlx=1375704672-saUPISPHYt1CCK8QMXv8Dw](http://www.nytimes.com/2013/08/05/nyregion/health-care-law-raises-pressure-on-public-employees-unions.html?_r=1&hp=&adxnnl=1&adxnnlx=1375704672-saUPISPHYt1CCK8QMXv8Dw) (detailing negotiations between teachers union in Orange County, California, and local government officials, in which unions were forced to accept greater out-of-pocket health-care expenses).

139. Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 INDUS. & LAB. REL. REV. 67, 67 (2006); see also BLS: *Union Members*, *supra* note 38 (noting that “among full-time wage and salary workers, union members had median usual weekly earnings of \$943, while those who were not union members had median weekly earnings of \$742.”). Admittedly, there is some evidence to suggest that union employees are more productive than nonunion employees, which may offset higher compensation rates. See 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, 1022 (1984) (citing R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 162–80 (1984)). But this increased productivity could be attributable to factors other than unionization itself. For instance, regions where labor laws are favorable to unions may also enjoy better public infrastructure or a better-educated labor pool.

Indeed, that employers resist unionization so strongly itself indicates that unions do not “pay for themselves” with productivity increases. See Belman & Voos, *supra* note 139, at 67 (“Some economists view high union/nonunion wage differentials as one factor contributing to both loss of existing union jobs and intense opposition by management to new union organization.”). If unionization is essentially a wash for the employer, or if it actually increases net productivity, then only an irrational employer would oppose unionization. Yet, most employers do so. See Richard A. Epstein, *The Employee No Choice Act*, CHIEF EXECUTIVE.NET (Dec. 12, 2008), <http://chiefexecutive.net/the-employee-nochoice-act>.

140. Dau-Schmidt, *Meeting the Demands*, *supra* note 77, at 693.

141. *Id.*

142. See Steven Greenhouse, *Fighting Back Against Wretched Wages*, N.Y. TIMES, July 27, 2013, [http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html?pagewanted=all&_r=0) (“Caterpillar’s chief executive, Douglas Oberhelman . . . says the freeze was vital to keep wages competitive with rival companies.”) [hereinafter Greenhouse, *Fighting Back*]; James Sherk, *The Union Difference: A Primer on What Unions Do to the Economy*, CAP. RES. CENTER

minimum standards, none are left arbitrarily disadvantaged against lower-cost peers.

Only national legislation, however, can achieve this type of leveling.<sup>143</sup> When raising employment standards, the biggest hurdle individual states and localities must overcome is the risk that they will drive employers into the arms of their more forgiving neighbors.<sup>144</sup> Washington D.C.'s recent experience is illustrative. In the summer of 2013, the D.C. City Council passed the Large Retailer Accountability Act of 2013,<sup>145</sup> which would have required certain "big-box" stores to pay their employees a 50% premium over the city's standard minimum wage.<sup>146</sup> The council was concerned with high poverty rates in D.C., as well as with a wide income gap between minimum-wage earners and the general population.<sup>147</sup> Also, the council was motivated in no small part by the pending arrival of Walmart,<sup>148</sup> which, at the time, had announced plans to open six stores in the district.<sup>149</sup> Walmart protested the act even before it passed<sup>150</sup> and moved swiftly to condemn the council's action after its adoption.<sup>151</sup> The retailer immediately announced it would shelve three of its six planned stores and would explore its options for closing the others.<sup>152</sup> Mayor Gray Davis ultimately caved to Walmart's pressure, vetoing the act.<sup>153</sup>

It should come as no surprise that D.C. backed down; Walmart's threat to abandon its planned stores in the city was hardly an idle one. National chains like

(Jan. 3, 2012), <http://capitalresearch.org/2012/01/the-union-difference-a-primer-on-what-unions-do-to-the-economy/> (arguing that General Motors' and Chrysler's high labor costs rendered them uncompetitive with foreign automakers, resulting in bankruptcy for both companies).

143. See Paul Winters, *BIO Applauds Bipartisan Legislation That Levels the Playing Field for Renewable Chemicals*, BIOTECHNOLOGY INDUSTRY ORG. (Sept. 12, 2013), <http://www.bio.org/media/press-release/bio-applauds-bipartisan-legislation-levels-playing-field-renewable-chemicals> (discussing how proposed legislation changing U.S. tax policy "creat[e] a level playing field" for industrial biotech companies).

144. See Liz Fiedler, *California to Raise Minimum Wage to \$10 by 2016*, ABC NEWS (Sept. 15, 2013), <http://abcnews.go.com/Business/california-raise-minimum-wage-10-2016/story?id=20258394> (The California Chamber of Commerce claimed legislation to raise the minimum wage in California to \$10 per hour was "a job killer.").

145. D.C. Council, B20-0062, Large Retailer Accountability Act of 2013 (July 10, 2013) (vetoed Sept. 12, 2013), available at <http://dcclims1.dccouncil.us/images/00001/20130122132700.pdf>.

146. Mike DeBonis, *D.C. Council Approves 'Living Wage' Bill Over Wal-Mart Ultimatum*, WASHINGTON POST, July 10, 2013, [http://articles.washingtonpost.com/2013-07-10/local/40487421\\_1\\_wal-mart-spokesman-steven-restivo-minimum-wage-retail-giant](http://articles.washingtonpost.com/2013-07-10/local/40487421_1_wal-mart-spokesman-steven-restivo-minimum-wage-retail-giant) [hereinafter DeBonis, *D.C. Council Approves*].

147. COUNCIL OF THE D.C. COMM. ON BUS. CONSUMER AND REGULATORY AFFAIRS, REPORT ON BILL 20-62 "LARGE RETAILER ACCOUNTABILITY ACT OF 2013" (2013), available at <http://dcclims1.dccouncil.us/images/00001/20130709155130.pdf> (federal poverty level for single person households is higher in D.C. than anywhere else in the country).

148. *Walmart in Washington, D.C.: Welcome to the Capital*, THE ECONOMIST (July 17, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/07/walmart-washington-dc> [hereinafter *Walmart in Washington*].

149. Mike DeBonis, *Wal-Mart Says it Will Pull out of D.C. Plans Should City Mandate 'Living Wage'*, WASHINGTON POST, July 9, 2013, [http://www.washingtonpost.com/local/dc-politics/wal-mart-says-it-will-pull-out-of-dc-plans-should-city-mandate-living-wage/2013/07/09/4fa7e710-e8d0-11e2-a301-ea5a8116d211\\_print.html](http://www.washingtonpost.com/local/dc-politics/wal-mart-says-it-will-pull-out-of-dc-plans-should-city-mandate-living-wage/2013/07/09/4fa7e710-e8d0-11e2-a301-ea5a8116d211_print.html).

150. See *id.*

151. See DeBonis, *D.C. Council Approves*, *supra* note 146.

152. *Id.*

153. Mike DeBonis, *D.C. Mayor Gray Vetoes 'Living Wage' Bill Aimed at Wal-Mart, Setting Up Decisive Council Vote*, WASHINGTON POST, Sept. 12, 2013, [http://www.washingtonpost.com/local/dc-politics/mayor-gray-vetoes-living-wage-bill-aimed-at-wal-mart-setting-up-decisive-council-vote/2013/09/12/664d7310-077d-11e3-a07f-49ddc7417125\\_story.html?wpmk=MK0000200](http://www.washingtonpost.com/local/dc-politics/mayor-gray-vetoes-living-wage-bill-aimed-at-wal-mart-setting-up-decisive-council-vote/2013/09/12/664d7310-077d-11e3-a07f-49ddc7417125_story.html?wpmk=MK0000200).

Walmart can easily take their investment elsewhere, and individual states and localities have no good way to stop them. Thus, state and local governments are stuck. If they adopt higher standards, employers will flee to more forgiving jurisdictions; but if they lower their standards to attract businesses, their constituents are left vulnerable to abuse. It would not, however, be productive to blame the employers for their lack of public mindedness. Many employers are corporations, which exist not for the betterment of the public at large, but to enrich their shareholders.<sup>154</sup> In light of that purpose, forum shopping in search of looser regulations is only rational; lawmakers cannot, and should not, expect corporations to act against their shareholders' interests. Employers will react to the incentives the law provides. Accordingly, the only way to prevent this type of flight-to-laxity—and thus the only way to effectively level the playing field among all employers—is to adopt standards at a national level, so as to remove the incentive to relocate between jurisdictions.

Relatedly, the employment-law approach not only eliminates disparities between employers, it also eliminates them between workers. In isolation, the wage gap between union and nonunion employees is difficult to justify. If employees deserve certain benefits, it is not because they are owed something as a matter of natural law, but because they contribute to an enterprise's overall productivity.<sup>155</sup> And employees' contribution has little or nothing to do with their willingness to organize and bargain collectively.<sup>156</sup> Accordingly, whether employees receive a living wage, enjoy fair working conditions, or have protection from arbitrary discharge, should not depend on whether they choose to elect a union.<sup>157</sup> The employment-law approach ameliorates this unjustified distinction by providing all employees with minimum rights and benefits, regardless of union status.

To be sure, the benefits just described are largely theoretical; none is a given. And indeed, there are several potential downsides, many of which are just as plausible as the potential benefits. Most obviously, the employment-law approach suffers from the same deficiency as any top-down policymaking solution: it lacks flexibility. Legislators crafting new employment laws are necessarily detached from the workplaces they aim to regulate. And by definition, uniform rules and regulations fail to account for individual circumstances. Uniformity is the antonym of diversity, which is the close relation of flexibility. Thus, in practice, it is very difficult for a statute to both confer employment rights on all workers across great swaths of the economy while still permitting adjustments for individual conditions.<sup>158</sup> Any divergence from the general standard necessarily sacrifices some measure of uniformity.

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154. See Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 534 (2006) (noting the “nearly overwhelming chorus of academic voices has endorsed ‘shareholder primacy,’ the view that managers’ fiduciary duties require them to maximize the shareholders’ wealth and preclude them from giving independent consideration to the interests of other constituencies”).

155. See Fried, *supra* note 139, at 1021–22.

156. See *id.* at 1022.

157. See *id.*

158. Stone, *supra* note 59, at 637 (arguing that statutorily mandated minimum terms “are too uniform and rigid to address the preferences of employees at all workplaces; they cannot accommodate local differences”).

So, if uniformity is crucial to attain the benefits just described (e.g., leveling the playing field, providing predictability), flexibility must suffer.

Title VII's prohibition on sex discrimination nicely illustrates this tradeoff. For example, in 2003, the Nevada Department of Corrections (hereinafter the NDC) launched an investigation at the Southern Nevada Women's Correctional Facility after learning that a guard had impregnated one of the inmates.<sup>159</sup> The investigation revealed "an uninhibited sexual environment" in the prison: guards had flirted with inmates, gone missing from their posts for long periods throughout the day, and "[fallen] prey to . . . inappropriate activities."<sup>160</sup> They had even exchanged contraband, such as jewelry, cosmetics, alcohol, and narcotics, for sex.<sup>161</sup> The investigation also uncovered widespread failure by the prison's supervisory personnel to detect and prevent these practices.<sup>162</sup> In response, the NDC took over responsibility for staffing the prison and announced a new personnel policy.<sup>163</sup> Under this policy, at least seventy percent of the prison's front-line personnel were required to be women, and three supervisory positions would be restricted to women only.<sup>164</sup> Male correctional officers challenged the policy with the EEOC, and later in federal court.<sup>165</sup> They argued that by making three supervisory positions available only to women, the NDC discriminated on the basis of sex in violation of Title VII.<sup>166</sup>

The Court of Appeals for the Ninth Circuit agreed. It rejected the NDC's attempt to defend its new policy as a bona fide occupational qualification (BFOQ), as the NDC failed to satisfy the exacting standard for establishing such a defense.<sup>167</sup> To establish a BFOQ, an employer must prove, among other things, either (a) "it has a substantial basis for believing that all or nearly all [men] lack the [relevant] qualification," or (b) "it is impossible or highly impractical . . . to insure by individual testing that its employees will have the necessary qualifications for the job."<sup>168</sup> The NDC, the court held, had not established either point. First, the NDC had failed to show that no men, or very few men, would qualify for the supervisory positions, as there was "no basis in fact[] for believing that individuals in [those positions] are particularly likely to sexually abuse inmates."<sup>169</sup> Second, it failed to show that other methods, such as background checks and prompt investigations, would be ineffective to weed out men who were likely to commit such offenses.<sup>170</sup> Accordingly, the NDC could not defend its policy as a BFOQ, and its exclusion of men amounted to unlawful discrimination under Title VII.<sup>171</sup>

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159. *Breiner v. Nevada Dep't of Corr.*, No. 2:05-CV-01412-KJD-RJJ, 2009 U.S. Dist. WL 367501, at \*1 (D. Nev. Feb. 9, 2009), *rev'd* 610 F.3d 1202 (9th Cir. 2010); *see also* Harrison Ford, *Unlawful to Exclude Men From Jobs in Women's Prison*, 17 ARIZ. EMP'T LAW LETTER 7 (2010).

160. *Breiner*, 2009 WL 367501, at \*1.

161. *Id.*

162. *Id.* at 1–2.

163. *Id.* at 2.

164. *Id.*

165. *Breiner v. Nevada Dep't of Corr.*, 610 F.3d 1202, 1205 (9th Cir. 2010).

166. *Id.*

167. *Id.* at 1211.

168. *Id.* at 1210.

169. *Id.* at 1211 (internal citation and original alterations omitted).

170. *Breiner*, 610 F.3d at 1215.

171. *Id.* at 1216.

The Ninth Circuit's final analysis may have been correct. Perhaps the NDC's policy was simply the product of lazy thinking, based on "assumptions of the comparative employment characteristics of men in general,"<sup>172</sup> rather than on hard evidence or the NDC's real-world needs. Nevertheless, the court's ruling aptly demonstrates the risks involved in applying uniform employment rules across broad swaths of the labor market. The NDC was, after all, proceeding on a facially rational assumption: male guards are more likely to sexually abuse female inmates than female guards, so staffing the prison with women was likely to reduce the occurrence of such assaults.<sup>173</sup> But because Title VII prohibits basing employment decisions on such assumptions, the NDC was denied a potentially useful heuristic for solving its problem.<sup>174</sup> Thus, while the statute's ban on sex discrimination is surely justified in most contexts, it can block the use of sex as an efficient sorting mechanism. While this effect will inevitably make more sense in some circumstances than in others, Title VII allows little flexibility to account for differing circumstances.

Yet this same example also illustrates why uniform standards are often necessary. Yes, Title VII limits employers' ability to consider sex as a criterion in employment decisions,<sup>175</sup> even when doing so might be efficient. But that is a price society gladly pays to eliminate sex discrimination. Even after Title VII's adoption, employers continued to offer spurious justifications for their discriminatory practices, including customer preferences,<sup>176</sup> concern for women's reproductive systems,<sup>177</sup> and cultural norms.<sup>178</sup> If the statute had given employers too much flexibility, then some or all of these justifications might have succeeded. But, because the rule is rigid and uniform, courts rejected what were, at their core, the products of "stereotypic impressions of male and female roles."<sup>179</sup> Thus, uniformity and rigidity helped achieve the statute's goal: eliminating invidious sex discrimination from the workplace.<sup>180</sup> It sacrificed flexibility for efficacy.

While this loss of flexibility is a legitimate concern,<sup>181</sup> no approach is perfect, even in the abstract. There will inevitably be theoretical, as well as practical, problems in applying any model with a goal as ambitious as regulating the entire American workplace. Whether the employment-law approach's problems outweigh its benefits is ultimately a values question. Do we, as a society, prefer collective in-

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172. *Id.* at 1216 (original alteration and quotation marks omitted).

173. *Id.* at 1210–11.

174. *Id.* at 1216.

175. 42 U.S.C. § 2000e-2 (2013).

176. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

177. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

178. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981).

179. *Id.*

180. *See, e.g., Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971).

181. For other criticism of the employment-law approach, *see, e.g., Stone, supra* note 59, at 637 (criticizing the individual-rights approach on the ground that it "does not allow employees to participate in corporate decisionmaking"); *see also Corbett, Labor Law, supra* note 4, at 264 (arguing that "[w]hile the proliferation of [individual-rights laws] is not inherently bad, [those laws] are not likely to assure most workers that they will have a workplace where they feel that they can perform their jobs safely and be treated in a fair and dignified manner by their supervisors and co-workers").

volvement or individual autonomy? Flexibility or predictability? A level playing field or survival of the lowest-cost provider?

These are interesting and difficult questions. But, as a practical matter, they are irrelevant. Organized labor has shown no signs of a revival, and the employment-law approach appears to be here to stay. The question, then, is whether modern employment law has, in practice, adequately replaced the old collective-bargaining approach. That is, does modern employment law provide employees with satisfactory wages and working conditions, protect them from abuse, and compensate them for their relative lack of bargaining power? And if not, what should be done to shore up employment law's deficiencies?

### III

As discussed in Part II, the employment-law approach offers certain theoretical advantages over the old collective-bargaining model.<sup>182</sup> Workers and employers enjoy some of the same benefits the old model offered (e.g., fair wages and benefits, stability) without its peculiar costs (e.g., bargaining expenses, an unequal playing field).<sup>183</sup> But theory is one thing, practice is another. And in practice, workers today, lacking collective representation, are largely exposed to the whims of market forces.<sup>184</sup> Employment law does not guarantee workers a living wage, prohibit certain forms of invidious discrimination, or protect against arbitrary discharge.<sup>185</sup> These weaknesses are significant, but not insurmountable. And if employment law is ever to offer employees the type of comprehensive protection that unions once did,<sup>186</sup> lawmakers must recognize and confront these weaknesses.

A good place to begin this confrontation is employment law's lack of any comprehensive protection against arbitrary discharge.<sup>187</sup> Federal and state laws shield employees from discharge on certain grounds, but those grounds are narrow.<sup>188</sup> For instance, Title VII protects workers from discharge based only on race, sex, religion, and national origin.<sup>189</sup> The ADA and ADEA protect disabled an

d elderly workers in a similar fashion,<sup>190</sup> and other federal laws protect members of the armed forces.<sup>191</sup> State anti-discrimination statutes add some additional

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182. See *supra* Part II, pp. 12.

183. See *supra* Part II, pp. 12.

184. Cf. Stone, *supra* note 59, at 591 (observing that, presently, "the United States government provides only minimal insurance against unemployment, retirement, or disability," and arguing that, in comparison to some European countries, "American workers exist in an unmediated, unregulated labor market.").

185. *Id.*

186. Dau-Schmidt, *Meeting the Demands*, *supra* note 77, at 691–92 (arguing that effective "unions can prevent employer strategic behavior" and counterbalance the employer's "monopsony in the labor market").

187. See Berks, *supra* note 31, at 250–251.

188. *Id.* at 250 ("Unlike the just cause provisions of collective bargaining agreements, however, these statutes prohibited only those discharges motivated by specific prohibited criteria.").

189. 42 U.S.C. § 2000e-2 (2012).

190. See 42 U.S.C. § 12112 (2012); 29 U.S.C. § 623 (2012).

191. *E.g.*, Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–4307 (2012); 41 C.F.R. § 60–300.21(a) (2007).

protected classes to the mix.<sup>192</sup> As a last resort, some states' common law provides a public-policy tort, which permits workers fired in a manner that conflicts with clearly defined state policies to file suit.<sup>193</sup> But outside the closely proscribed limits, employers are still free to discharge, demote, or refuse to hire employees for essentially any reason.<sup>194</sup> Modern employment law offers nothing like the comprehensive protection a typical collectively-bargained, for-cause discharge clause would offer. Thus, the vast majority of American workers, unprotected by such a clause, remain vulnerable to discharge for an arbitrary or frivolous reason—or indeed, no reason at all.

This type of capricious dismissal is particularly a problem in low-wage, transient jobs, such as jobs in the food-service industry.<sup>195</sup> Consider, for instance, the experience of Heriberto, a former food-preparation worker at Urasawa, an upscale restaurant in Beverly Hills.<sup>196</sup> According to one news report, Heriberto worked long hours—up to sixty hours per week—for little pay.<sup>197</sup> He earned between \$9.00 and \$11.50 an hour, was not paid overtime, and was even required to purchase his own set of \$700 knives.<sup>198</sup> Then, in June of 2012, nine hours into a shift, he began coming down with a fever.<sup>199</sup> When he asked to go home, the restaurant's proprietor fired him on the spot.<sup>200</sup> Or consider Marina, a young mother, who worked as a cashier at a taqueria.<sup>201</sup> Only four weeks after giving birth to her fourth child, she returned to work, taking night shifts because she shared child-care duties with her partner and could not afford day care.<sup>202</sup> During her break, Marina breastfed her new infant.<sup>203</sup> When her manager found out that she had done this, he informed her

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192. See, e.g., D.C. CODE § 2-1402.11 (2013) (prohibiting discrimination based on marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, and political affiliation); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2013) (outlawing discrimination based on gender identity, sexual orientation, genetic information, and ancestry).

193. See, e.g., *VanBuren v. Grubb*, 733 S.E.2d 919, 924 (Va. 2012); *Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 108 (N.J. 2002).

194. See, e.g., *Myers v. Alutiiq Int'l Solutions, LLC*, 811 F. Supp. 2d 261, 266 (D.D.C. 2011) (explaining that, under District of Columbia law, “[a]n employee who serves at the will of his or her employer may be discharged ‘at any time and for any reason, or for no reason at all.’” (quoting *Liberatore v. Melville Corp.*, 168 F.3d 1326, 1329 (D.C. Cir. 1999)); *Berks*, *supra* note 31, at 250–51 (“Even individuals expressly protected by federal and state civil rights legislation could still be fired for ‘good reason, bad reason, or no reason at all’ so long as the termination was not specifically motivated by the employee’s status as a member of a protected class.”) (footnote omitted).

195. Jennifer Medina, *At an Upscale Beverly Hills Restaurant, Claims of Underpaying Workers*, N.Y. TIMES, July 21, 2013, [http://www.nytimes.com/2013/07/21/us/at-an-upscale-beverly-hills-restaurant-claims-of-underpaying-workers.html?\\_r=0](http://www.nytimes.com/2013/07/21/us/at-an-upscale-beverly-hills-restaurant-claims-of-underpaying-workers.html?_r=0).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Stephanie Bornstein, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers*, UNIVERSITY OF CALIFORNIA, HASTINGS C. OF THE L.: CENTER FOR WORK LIFE L. 8 (2011), <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf>.

202. *Id.*

203. *Id.*

that she was prohibited from nursing her child during breaks.<sup>204</sup> He told her that she would be allowed to return to work only after she no longer needed to breastfeed the child.<sup>205</sup> Marina protested, telling the manager that she needed the work. Instead of accommodating Marina, the manager fired her.<sup>206</sup> National employment law, as it exists today, offers employees like Marina and Heriberto little protection against this type of capricious discharge, wholly unrelated to their job performance or the employer's legitimate business interests.

Employment law has also fallen short of securing adequate wages for a large swath of the American workforce. Federal law has established a floor for wages since 1938,<sup>207</sup> which Congress has raised periodically over the intervening decades.<sup>208</sup> The last such raise occurred in 2007, bringing the minimum to \$7.25 an hour.<sup>209</sup> But despite that increase, as of February 2013,<sup>210</sup> the minimum wage's purchasing power had declined by roughly a third from its historical peak in 1968.<sup>211</sup> Yet during the same period, worker productivity steadily increased.<sup>212</sup> If the minimum wage had kept pace with productivity, it would have reached \$21.72 per hour in 2012.<sup>213</sup> And, contrary to some assertions,<sup>214</sup> the minimum wage's failure to keep up with inflation, let alone productivity, doesn't just hurt teenagers. As of 2011, 1.7 million Americans earned exactly the applicable minimum wage, and another 2.2 million earned *less* than the minimum.<sup>215</sup> Although these wages left them well below the poverty line,<sup>216</sup> more than half of those Americans were trying to support families.<sup>217</sup> This problem isn't going away; the minimum wage's erosion will affect more and more workers over the coming decade. Of the ten occupations expected to add the most jobs by 2020, six fall toward the lower end of the pay

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204. *Id.*

205. *Id.*

206. *Id.*

207. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 206 (West 2013).

208. William P. Quigley, *'A Fair Day's Pay for a Fair Day's Work': Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 544 n.141 (1996).

209. U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, § 8102(b), 121 Stat. 112 (codified as amended at 29 U.S.C. § 206 (2012)).

210. See *The U.S. ranks 10th in purchasing power of minimum wage*, RANKING AMERICA (Feb. 23, 2013), <http://rankingamerica.wordpress.com/2013/02/23/the-u-s-ranks-10th-in-purchasing-power-of-minimum-wage/>.

211. See John Schmitt, *The Minimum Wage Is Too Damn Low*, CENTER FOR ECONOMIC AND POLICY RESEARCH, 1 (Mar. 2012), <http://www.cepr.net/documents/publications/min-wage1-2012-03.pdf> [hereinafter Schmitt, *The Minimum Wage*]; see also Annalyn Kurtz, *A history of the minimum wage since 1938*, CNNMONEY.COM (Feb. 14, 2013, 10:24 AM), <http://economy.money.cnn.com/2013/02/14/minimum-wage-history/>.

212. Schmitt, *The Minimum Wage*, *supra* note 211.

213. *Id.*

214. See James Sherk, *Who Earns the Minimum Wage? Suburban Teenagers, Not Single Parents*, THE HERITAGE FOUNDATION (Feb. 28, 2013), <http://www.heritage.org/research/reports/2013/02/who-earns-the-minimum-wage-suburban-teenagers-not-single-parents> (asserting that "[m]ost minimum wage workers . . . are not poor.").

215. See *Characteristics of Minimum Wage Workers: 2011*, BUREAU OF LAB. STAT. (2012), <http://www.bls.gov/cps/minwage2011.htm>.

216. See *id.*

217. Rick Unger, *The Minimum Wage Fight—Ground Zero In The Clash Of Conservatives vs. Progressive America*, FORBES.COM (Feb. 16, 2013, 12:02 PM), <http://www.forbes.com/sites/rickungar/2013/02/16/the-minimum-wage-fight-ground-zero-in-the-clash-of-conservative-vs-progressive-america/>.

scale;<sup>218</sup> and in the most recent economic recovery, 58% of all job growth has occurred in low-wage sectors.<sup>219</sup>

More broadly, employment law has also failed to carry organized labor's torch in terms of ameliorating the bargaining-power disparity between employees and employers. Without unions to counter their bargaining strength, employers have predictably pressed their advantage as far as the law allows.<sup>220</sup> And in states that have taken a hands-off approach to workplace regulation, employees are left in an untenable position.

In this regard, Texas is a prime offender. The Lone Star State is a right-to-work state, making union organizing especially difficult.<sup>221</sup> Texas also does not require employers to pay wages above the federal minimum,<sup>222</sup> and is the only state in the country that does not require all employers to carry workers' compensation insurance.<sup>223</sup> These conditions have, unsurprisingly, led to abuses, particularly in the construction industry.<sup>224</sup> A 2009 report<sup>225</sup> by the Workers Defense Project detailed unsavory practices among contractors in the Austin area, including wage theft, misclassification of employees as independent contractors, and the failure to carry workers' compensation insurance.<sup>226</sup> These abuses were widespread.<sup>227</sup> Forty-five percent of workers reported that their employers did not provide workers' compensation coverage, while 21% had been injured on the job.<sup>228</sup> Twenty percent of these injured workers also reported that their employers refused to pay for their medical treatment.<sup>229</sup> And almost half had been earning poverty-level wages to begin with, making it unlikely that they could afford to pay for treatment out-of-pocket.<sup>230</sup>

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218. See *Occupations with the largest job growth*, BUREAU OF LAB. STAT. (Feb. 1, 2012), [http://www.bls.gov/emp/ep\\_table\\_104.htm](http://www.bls.gov/emp/ep_table_104.htm); see also *Fast-Food Fight*, N.Y. TIMES, Aug. 7, 2013, [http://www.nytimes.com/2013/08/08/opinion/fast-food-fight.html?\\_r=0](http://www.nytimes.com/2013/08/08/opinion/fast-food-fight.html?_r=0).

219. Jennifer Gordon, *Subcontractor Servitude*, N.Y. TIMES, Sept. 1, 2013, [http://www.nytimes.com/2013/09/02/opinion/subcontractor-servitude.html?\\_r=0](http://www.nytimes.com/2013/09/02/opinion/subcontractor-servitude.html?_r=0).

220. See generally Jennifer Schaubach, "Right to Work" Laws: Get the Facts, MINNESOTA AFL-CIO, <http://www.mnafcio.org/news/right-work-laws-get-facts> (last visited Nov. 17, 2013) (illustrating that union organization can be difficult in a right to work state).

221. TEX. LAB. CODE ANN. § 101.301 (West 2013); see also *Let's go German*, *supra* note 41 (noting the difficulty unions have organizing in right-to-work states).

222. See Dep't of Labor, Wages and Hours Div., *Minimum Wage Laws in the States* (Jan. 1, 2013), <http://www.dol.gov/whd/minwage/america.htm>.

223. TEX. LAB. CODE ANN. § 406.002 (West 2013); see also Becca Aaronson, *As Large Companies Opt Out, Concerns Grow for Workers' Compensation System*, N.Y. TIMES, Apr. 7, 2012, [http://www.nytimes.com/2012/04/08/us/fears-grow-for-workers-compensation-system-as-large-texas-companies-opt-out.html?\\_r=0](http://www.nytimes.com/2012/04/08/us/fears-grow-for-workers-compensation-system-as-large-texas-companies-opt-out.html?_r=0).

224. See Workers Defense Project, *Building, Austin, Building Injustice: Working Conditions in Austin's Construction Industry*, WORKERSDEFENSE.ORG 2 (2009), [http://www.workersdefense.org/wp-content/uploads/2010/12/Building-Austn\\_Report.pdf](http://www.workersdefense.org/wp-content/uploads/2010/12/Building-Austn_Report.pdf) [hereinafter *Building Injustice*].

225. *Building Injustice*, *supra* note 224.

226. *Id.* at ii. For a summary of the report's findings, see Build A Better Texas, *The Problem*, BUILDTEXAS.ORG (2010), <http://www.buildtexas.org/theproblem.html>.

227. See *Building Injustice*, *supra* note 224, at ii.

228. *Id.* at 26.

229. *Id.*

230. See *id.* at 18.

One example of this type of abuse appeared in the pages of *The New York Times*. According to the newspaper, Jose Nieto, an Austin demolition worker, was injured when a large mirror fell from a wall and sliced into his arm.<sup>231</sup> He incurred roughly \$80,000 in medical expenses as a result.<sup>232</sup> His employer did not carry workers' compensation insurance and did not cover his medical bills.<sup>233</sup> Thus, without a union to advocate on his behalf, and with no external legal protection to look to, Mr. Nieto bore all the cost of his injury.<sup>234</sup>

This type of abuse is not limited to small or regional employers. Consider Amazon, a large multi-national firm notorious for its opposition to organized labor.<sup>235</sup> Although prominently lauded as a job creator, the company has also been criticized for its questionable labor practices.<sup>236</sup> For instance, in response to worker complaints about excessive heat in 2011, federal regulators launched an investigation into one of the company's Pennsylvania order-fulfillment facilities.<sup>237</sup> Workers at this facility had been suffering from heat exhaustion, and several had been rushed to a local emergency room.<sup>238</sup> Many of these victims were not technically Amazon employees; rather, the company obtained their services through a temporary staffing agency.<sup>239</sup> Because Amazon is in a position to bid staffing firms against each other, the agency in question was under intense pressure to keep its labor costs low.<sup>240</sup> One way in which it did so was to vigorously protest any unemployment-compensation claims.<sup>241</sup> The agency also had a strict attendance policy.<sup>242</sup> As a result, some employees, after missing work because of heat exhaustion, lost their jobs.<sup>243</sup> The agency then contested those employees' unemployment claims.<sup>244</sup> Lacking the bargaining power to secure better working conditions, and

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231. Steven Greenhouse, *The Workers Defense Project, a Union in Spirit*, N.Y. TIMES, Aug. 10, 2013, [http://www.nytimes.com/2013/08/11/business/the-workers-defense-project-a-union-in-spirit.html?nl=todaysheadlines&emc=edit\\_th\\_20130811&r=0](http://www.nytimes.com/2013/08/11/business/the-workers-defense-project-a-union-in-spirit.html?nl=todaysheadlines&emc=edit_th_20130811&r=0).

232. *Id.*

233. *Id.*

234. *Id.*

235. Nick Wingfield & Melissa Eddy, *In Germany, Union Culture Clashes With Amazon's Labor Practices*, N.Y. TIMES, Aug. 4, 2013, <http://www.nytimes.com/2013/08/05/business/workers-of-amazon-divergent.html?pagewanted=all&r=0> (describing the company's "opposition to unions in its warehouses as a general principle. . .").

236. Mark Landler & Jackie Calmes, *Obama Proposes Deal Over Taxes and Jobs*, N.Y. TIMES, July 30, 2013, [http://www.nytimes.com/2013/07/31/us/politics/obama-offers-to-cut-corporate-tax-rate-as-part-of-jobs-deal.html?\\_r=0](http://www.nytimes.com/2013/07/31/us/politics/obama-offers-to-cut-corporate-tax-rate-as-part-of-jobs-deal.html?_r=0) (detailing President Obama's visit to an Amazon facility in order "to illustrate [his] theme of a job revival in America" and critical reaction thereto).

237. Spencer Soper, *Inside Amazon's Warehouse*, THE MORNING CALL, Sept. 18, 2011, <http://www.mcall.com/news/local/mc-allentown-amazon-complaints-20110917,0,7937001,full.story> [hereinafter *Inside Amazon's Warehouse*].

238. *Id.*; see also Wingfield & Eddy, *supra* note 235.

239. *Inside Amazon's Warehouse*, *supra* note 237.

240. *Id.*

241. Spencer Soper, *Amazon warehouse workers fight for unemployment benefits*, THE MORNING CALL, Dec. 17, 2012, <http://www.mcall.com/business/mc-amazon-temporary-workers-unemployment-20121215,0,2836585.story> [hereinafter *Amazon workers fight for benefits*].

242. *Id.*

243. See *id.*

244. *Id.*

having no other guarantee of job security,<sup>245</sup> these workers were left without even the minimal safety net employment law ostensibly provided for them.<sup>246</sup>

Amazon is far from the only large American company to press its advantage in this manner. Like Amazon, Walmart has begun to rely on outside employment agencies to obtain part-time workers, who typically earn several dollars less per hour than their full-time counterparts.<sup>247</sup> Similarly, Caterpillar has driven down average wages by instituting a two-scale system (new employees earn significantly less than their seniors).<sup>248</sup> It has also forced long-term employees to accept wage freezes.<sup>249</sup> It has not been forced to do so by hard economic times; rather, it took these steps while enjoying record profits.<sup>250</sup> Practices such as these illustrate the raw power that employers exercise in the absence of strong unions; they enjoy free rein to adopt harsh, one-sided policies.

Employment law, as it exists today, offers little comfort to the victims of such policies. Employers have no obligation to pay a living wage, and workers have no ability to demand otherwise. Nor do workers have any guarantee against wholly arbitrary discharges. Because the employer is almost always more sophisticated and has access to better resources, employees are usually outmatched when they seek even the minimum benefits provided by state law, such as unemployment insurance.<sup>251</sup>

Clearly, if employment law is ever to provide an effective counterweight in the way unions once did, legislative action is necessary. But any new laws should not simply replicate the old collective-bargaining model. As we have seen, the employment-law approach offers certain benefits over collective bargaining, and lawmakers should not sacrifice those benefits in an attempt to reproduce a model that peaked in the mid-twentieth century. That old model was not perfect,<sup>252</sup> and died a natural death because of that imperfection. Instead, legislators should tailor new laws to the particular problems American workers face today; they should legislate for 2013's workplace, not 1950's. And in adopting these new laws, they must also avoid the old model's major pitfalls; they must not impose crippling costs on em-

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245. See Dau-Schmidt, *Meeting the Demands*, *supra* note 77, at 689–91 (arguing that “[i]ndividual workers do not always have the resources, information, or capacity to evaluate adequately all the risks they encounter in the workplace . . . do not always have the resources or the incentives to negotiate and enforce efficient contract terms with their employer . . . [and] do not have enough bargaining power to share fully in potential proceeds of the firm or to prevent possible exploitation by their employer.”).

246. *Inside Amazon's Warehouse*, *supra* note 237; see also Wingfield & Eddy, *supra* note 235 (Employees have also sued Amazon for allegedly failing to pay them for time spent standing in security lines.).

247. Greenhouse, *Fighting Back*, *supra* note 142.

248. *Id.*

249. *Id.*

250. *Id.*

251. See *Amazon workers fight for benefits*, *supra* note 241 (“Advocates for the working poor say the company’s aggressive stance on unemployment compensation exploits low-wage earners who need the benefit for food, housing and other necessities while they search for other jobs. The workers are often outmatched in the unemployment process.”).

252. See Dau-Schmidt, *Meeting the Demands*, *supra* note 77, at 693–94 (listing criticisms of the collective-bargaining model).

ployers or cause excessive rigidity in the labor market.<sup>253</sup> Legislators should also keep in mind the interests of both employees and employers, aiming to enhance protections for employees while preserving labor market flexibility and minimizing negative impacts on employers.

Three measures, I believe, fit these criteria:

First, lawmakers should raise the federal minimum wage and index future increases to the Consumer Price Index. Doing so would address broad declines in real wages and workers' inability to reverse those declines through bargaining. And while doing so would raise labor costs, increases would apply uniformly, so they would not cause competitive imbalances.

Second, lawmakers should ban discrimination against working parents and other primary caregivers and require employers to make reasonable accommodations in caregivers' favor. Such a measure would address the widespread discrimination these employees face in the modern workplace, which has been slow to adjust to their needs.<sup>254</sup> It would also guarantee these workers the flexibility they need, but have been generally unable to bargain for on their own.<sup>255</sup> Compliance costs are likely to be slight, and may even be wholly offset by gains in productivity.

Third, and perhaps most important, lawmakers should enact a national good-cause discharge law. This law would replicate the protection many unionized workers enjoyed under CBAs. To control the impact such a law would have on employers, lawmakers should also create an administrative enforcement scheme and limit plaintiffs' remedies. Doing so would lower litigation costs, speed claim resolution, and reduce uncertainty.

#### A. Raise the Minimum Wage and Index it to the CPI

The first of these measures—increasing the federal minimum wage—is the least novel. National policymakers have occasionally proposed increasing the minimum wage.<sup>256</sup> During his 2008 presidential campaign, Barack Obama proposed raising the wage to \$9.50 an hour.<sup>257</sup> He again proposed an increase in his 2013 State of the Union speech, though by this time he had pared his proposal back to \$9.00 an hour.<sup>258</sup> Likewise, Congress recently considered a proposal to raise the minimum to \$10.00 an hour.<sup>259</sup> Media commentators and employment law scholars have also called for increasing the minimum wage,<sup>260</sup> with some citing the growing

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253. *See id.* at 693–94 (arguing that unions “can put their employers at a competitive disadvantage . . . constrain the supply of labor to drive up wages . . . [and] dislocate workers to other employers or markets and increase the price of the good to consumers.”).

254. *See generally* Joan C. Williams & Amy J.C. Cuddy, *Will Working Mothers Take Your Company to Court?*, HARVARD BUS. REV. (Sept. 2012), <http://hbr.org/2012/09/will-working-mothers-take-your-company-to-court/ar/1>.

255. *See id.*

256. *See* Tami Luhby, *The impact of a \$9 minimum wage*, CNNMONEY.COM (Feb. 13, 2013, 9:57 AM), <http://money.cnn.com/2013/02/12/news/economy/obama-minimum-wage>.

257. *Id.*

258. *Id.*

259. Rebecca Berg, *Bill Pushes for Increase in Wages*, N.Y. TIMES, June 6, 2012, <http://www.nytimes.com/2012/06/07/business/bill-pushes-for-increase-in-wages.html>.

260. *See generally* Fast-Food Fight, *supra* note 218; *see also* William P. Quigley, ‘A Fair Day’s Pay for a Fair Day’s Work’: Time to Raise and Index the Minimum Wage, 27 ST. MARY’S L.J. 513 (1996).

pay disparity between average employees and the corporate executives they work for.<sup>261</sup>

While these modest increases would not guarantee every American a living wage, they would nevertheless be worthwhile. At the very least, they would provide low-wage workers with some additional measure of economic security. A full-time worker earning \$9.00 an hour and serving as the primary bread winner in a household of at least three people would earn only \$18,000 per year,<sup>262</sup> leaving him or her below the federal poverty line.<sup>263</sup> Even at \$10.00 an hour, the worker would earn just \$20,800. But both figures would substantially improve upon the \$15,080 a full-time minimum-wage earner brings home today.<sup>264</sup>

More important than any single increase, however, would be tethering the minimum wage to future increases in the Consumer Price Index, as some states have already done.<sup>265</sup> Doing so would insulate minimum-wage earners against general inflation and guard against further erosion in their earning power.<sup>266</sup> If Congress had taken this step when the minimum wage was at its peak, minimum-wage earners would now earn \$10.52 an hour.<sup>267</sup> That increase would have taken place slowly, without the need for any additional legislative action, and without asking employers to adjust to dramatic increases in their labor costs.<sup>268</sup> Thus, more than any single increase, an indexing provision would guarantee low-wage earners durable earnings security, while accounting for the difficulties sudden increases could cause employers.<sup>269</sup>

Taking these steps should not have a significant negative impact on employment levels. While the effect of higher minimum wages on job creation is still the subject of debate,<sup>270</sup> the weight of evidence suggests that they do not cause em-

261. *Fast-Food Fight*, *supra* note 218.

262. By “full-time worker,” I mean a person who works for forty hours per week, fifty-two weeks per year. Keep in mind, this rough figure probably overstates what an ordinary worker would actually earn; it does not account for unpaid sick days or other time off.

263. *What are the annual earnings for a full-time minimum wage worker?*, CENTER FOR POVERTY RESEARCH, <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> (last visited Nov. 17, 2013).

264. *Id.*

265. *See, e.g.*, WASH. REV. CODE ANN. § 49.46.020 (West 2013); *see also* Melanie Hicken, *10 states to boost minimum wage*, CNNMONEY.COM (Dec. 31, 2012, 5:31 AM), <http://money.cnn.com/2012/12/31/pf/states-minimum-wage/index.html> (citing “indexing” laws in Arizona, Colorado, Florida, Missouri, Montana, Ohio, Oregon, Vermont, and Washington).

266. *See* Melanie Hicken, *10 states to boost minimum wage*, CNNMONEY.COM (Dec. 31, 2012, 5:31 AM), <http://money.cnn.com/2012/12/31/pf/states-minimum-wage/index.html>.

267. Schmitt, *The Minimum Wage*, *supra* note 212, at 1.

268. *See id.*

269. Liana Fox, *Indexing the minimum wage for inflation*, ECON. POLICY INST. (Dec. 20, 2005), [http://www.epi.org/publication/webfeatures\\_snapshots\\_20051221/](http://www.epi.org/publication/webfeatures_snapshots_20051221/) (arguing that “[i]nflation indexing guarantees low-wage workers a wage that keeps pace with the rising costs of goods and services.”).

270. Compare John Schmitt, *Why Does the Minimum Wage Have No Discernable Effect on Employment?*, CENTER FOR ECON. AND POL’Y RESEARCH (2013), <http://www.cepr.net/documents/publications/min-wage-2013-02.pdf> [hereinafter Schmitt, *Discernable Effect*], and T. William Lester et al., *The Facts on Raising the Minimum Wage When Unemployment is High: Increasing the Minimum Wage During Rough Economic Times Does Not Kill Jobs*, CENTER FOR AM. PROGRESS ACTION FUND (June 20, 2012), <http://www.americanprogressaction.org/issues/labor/news/2012/06/20/11749/the-facts-on-raising-the->

employers to shed a great number of jobs, if any.<sup>271</sup> In an influential 1981 report, the Minimum Wage Study Commission concluded that indexing the minimum wage to inflation would have no significant effect on most low-wage earners' employment prospects, though it might have a small negative effect on employment rates among teenagers.<sup>272</sup> Subsequent research echoed the Commission's conclusion about the minimum wage's effect on unemployment in general.<sup>273</sup> Some studies went further, questioning whether minimum-wage hikes even affect teenage employment levels.<sup>274</sup> Indeed, rather than finding that high minimum wages kill jobs, some studies discovered ancillary positive effects, such as the leveling of wage disparities<sup>275</sup> and higher worker productivity.<sup>276</sup> They also reported that raising the minimum wage reduces poverty overall, not just among those families with a minimum-wage worker, by pushing up incomes across the earnings spectrum.<sup>277</sup> This evidence suggests that raising the minimum wage would not destroy jobs, and might have positive effects above and beyond the direct aid it would provide to low-income workers.<sup>278</sup>

As we have seen, wage increases are more likely to be effective if adopted at the national level. For example, federal legislation would have avoided the problems Washington D.C. and Walmart faced in the summer of 2013.<sup>279</sup> D.C.'s proposal failed largely because Walmart could have threatened to relocate to Maryland or Virginia, avoiding the city's higher minimum wage while still drawing customers from the D.C. area.<sup>280</sup> But, an increase in the federal minimum wage would

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minimum-wage-when-unemployment-is-high-2/, with DAVID NEUMARK & WILLIAM WASCHER, MINIMUM WAGES AND EMPLOYMENT (2007), [ftp://ftp.iza.org/RePEc/Discussionpaper/dp2570.pdf](http://ftp.iza.org/RePEc/Discussionpaper/dp2570.pdf) (abstract) (noting "a lack of consensus" on whether raising the minimum wage causes unemployment, but finding that "a sizable majority of the studies" demonstrate that minimum wages have "negative employment effects"), and Richard A. Ippolito, *The Impact of the Minimum Wage if Workers Can Adjust Effort*, 46 J.L. & ECON. 207, 207 (2003) ("Most empirical research shows a negative employment effect of the minimum wage, although mostly these effects are small.").

271. See Schmitt, *Discernable Effect*, *supra* note 270, at 2.

272. *Id.*

273. *Id.* at 22 ("[T]wo recent meta-studies analyzing the research conducted since the early 1990s concludes that the minimum wage has little or no discernible effect on the employment prospects of low-wage workers."); see also Lawrence F. Katz & Alan B. Krueger, *The Effect of the Minimum Wage on the Fast Food Industry*, 46 INDUS. & LAB. REL. REV. 6, 20–21 (1992).

274. See Schmitt, *Discernable Effect*, *supra* note 270, at 3 (citing DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (Princeton Univ. Press 1995)).

275. *Id.* at 20.

276. *Id.* at 19.

277. John T. Addison & McKinley L. Blackburn, *Minimum Wages and Poverty*, 52 INDUS. & LAB. REL. REV. 393, 395, 407 (1999). Some studies reaching this conclusion have, however, been challenged based on their assumptions about the minimum wage's coverage and the degree to which a rise in minimum wage displaces low-wage workers. See *id.* at 395.

278. To alleviate any lingering concerns about teenage employment, legislators could simply exempt teenage jobs. *Raise Minimum Wage, But Exempt Summer Jobs for Teens*, THE BOSTON GLOBE, June 17, 2013, <http://www.bostonglobe.com/editorials/2013/06/17/minimum-wage-hike-should-coupled-with-lower-rate-for-seasonal-youth-employment/VEodXFoNzZrSKS0xPfN6cP/story.html> (urging state lawmakers to raise the general minimum wage to \$10 an hour, but to also establish a separate minimum wage for teenage workers). Doing so would not undermine the principal purpose of raising the minimum wage—aiding low-income workers and families—as teenagers are less likely to be their families' primary breadwinners.

279. See *Walmart in Washington*, *supra* note 148.

280. See *id.*

have foreclosed this option. As a result, D.C.'s government would not have been forced to choose between bringing jobs to the city and alleviating its high poverty levels; wages would have risen, and Walmart would have had no incentive to leave. Moreover, a uniform federal increase would have been fairer to Walmart. One reason Walmart so ardently objected to D.C.'s proposal was that it exempted Walmart's unionized competitors, Safeway and Giant.<sup>281</sup> A federal increase would have applied uniformly, without arbitrarily disadvantaging certain businesses. Thus, federal legislation would have been more effective in raising wages for workers in D.C., who otherwise lacked the bargaining power to demand such an increase, while at the same time not unfairly disadvantaging Walmart.

### B. Protect Parents and Other Caregivers from Discrimination

Less obvious than the problem of low wages, but equally important, is workplace discrimination against parents and other primary caregivers (also known as "family-responsibility discrimination"). Modern America is no longer a country of two-parent households, consisting of a stay-at-home mother and a career-oriented father.<sup>282</sup> Rather, an increasing number of households are single parent,<sup>283</sup> and even when both parents are present, both tend to work.<sup>284</sup> Moreover, due to an aging population, larger numbers of women in the workforce, changes in family sizes, and higher healthcare costs, more and more employees bear the responsibility of caring for an elder relative.<sup>285</sup> Despite these shifts, employers have been slow to adjust their leave and scheduling policies<sup>286</sup> due, in part, to the perceived cost of

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281. *Id.*

282. See *Employment Characteristics of Families Summary*, BUREAU OF LAB. STAT. (Apr. 26, 2013, 10:00 AM), <http://www.bls.gov/news.release/famee.nr0.htm> (reporting that over 70% of mothers with children under the age of eighteen work or are looking for work; 64.8% of mothers with children under the age of six) [hereinafter BLS].

283. Rachel M. Shattuck & Rose M. Kreider, *Social and Economic Characteristics of Currently Unmarried Women with a Recent Birth: 2011*, U.S. CENSUS BUREAU (May 2013), <http://www.census.gov/prod/2013pubs/acs-21.pdf> (reporting that "[t]he percentage of U.S. births to unmarried women has been increasing steadily since the 1940s and has increased even more markedly in recent years. According to NCHS, the birth rate for unmarried women in 2007 was 80% higher than it was in 1980 and increased 20% between 2002 and 2007.").

284. BLS, *supra* note 282 (noting that in more than half of two-parent households, both parents work).

285. See Margaret B. Neal & Donna L. Wagner, *Working Caregivers: Issues, Challenges, and Opportunities for the Aging Network* (Brief), NAT'L FAMILY CAREGIVERS SUPPORT PROGRAM, <http://www.caregiverslibrary.org/Portals/0/Working%20Caregivers%20-%20Issues%20for%20the%20Aging%20Network%20Fin-Neal-Wagner.pdf> (last visited Nov. 17, 2013).

286. Workplace Flexibility 2010, *Flexible Work Arrangements: Selected Case Studies*, GEORGETOWN UNIVERSITY LAW CENTER (2010), [http://workplaceflexibility2010.org/images/uploads/FWA\\_CaseStudies.pdf](http://workplaceflexibility2010.org/images/uploads/FWA_CaseStudies.pdf) ("[M]ost workers do not have access to flexible work arrangements and barriers to their effective implementation persist in many organizations . . ."); Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REF. 569, 569 (2002) ("Few individuals are employed in job settings that afford the necessary flexibility to respond adequately to the 'predictable unpredictability' of childrearing.") [hereinafter Smith, *Parental Status*].

accommodating caregivers.<sup>287</sup> Moreover, even when employers do offer flexible options, they increasingly<sup>288</sup> discriminate against employees who take advantage of them.<sup>289</sup> This discrimination can take the form of passing over employees with caregiving responsibilities for promotions, assigning them to less-favorable projects, or refusing to hire them altogether.<sup>290</sup> Such unequal treatment affects both men and women,<sup>291</sup> but men often encounter severe hostility.<sup>292</sup> And unlike the victims of other types of discrimination, family-responsibility discrimination victims lack any effective legal recourse.<sup>293</sup>

The problems presented by this discrimination are closely related to declining wages, as the effects on low-income workers are particularly harsh.<sup>294</sup> Child care costs can be crushing for those earning low wages. Approximately 40% of low-income mothers pay for child care, and a third of those that do so spend half of their income on that alone.<sup>295</sup> Another 34% rely on family members to watch their children.<sup>296</sup> But a substantial number of low-income workers do not even have these less-than-ideal options. According to one survey, 30% of low-income workers polled during a one-week period had to disrupt their work schedules for caregiving responsibilities.<sup>297</sup> Nevertheless, most low-wage workplaces offer little to no flexibility for primary caregivers.<sup>298</sup> Low-wage employers often refuse to make even minimal accommodations and impose rigid attendance policies that exacerbate caregivers' dilemmas.<sup>299</sup>

Two legislative steps would go a long way toward eliminating this inequity from the workplace. First, lawmakers should require employers to make "reasonable accommodations" for primary caregivers. Lawmakers could model this requirement on similar provisions in the ADA and Title VII, which require employers

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287. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 87 (2003) ("Substantial literature exists that questions the assumption that accommodating family responsibilities costs employers money in the context of restructured work.") (internal quotation marks omitted).

288. Stephanie J. Eifler, *Choosing Not to Choose: A Legislative Solution for Working Adults Who Wish to be Successful Employees and Successful Caregivers*, 60 DRAKE L. REV. 1205, 1207 (2012) (citing Stephanie Bornstein & Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, CTR. FOR WORKLIFE LAW 1 (Dec. 2009), <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>).

289. *Id.* at 1207 ("As one might guess, pregnant women and mothers of young children are common targets of FRD [family responsibility discrimination], although it can also affect men who wish to take on more than a nominal role in family caregiving.") (internal quotation marks and original alterations omitted).

290. See *id.* at 1211, 1229 (giving examples).

291. *Id.* at 1208.

292. Bornstein, *supra* note 201, at 2 (reporting that "lawsuits brought by low-income men show severe gender stereotyping of men who are responsible for caring for children or elderly parents at home.>").

293. Eifler, *supra* note 288, at 1212–16 (noting that plaintiffs seeking redress for such discrimination have used a hodge-podge of legal theories, including the Pregnancy Discrimination Act, the FMLA, and the common-law public-policy exception, with mixed results).

294. Bornstein, *supra* note 201, at 2.

295. *Id.* at 5.

296. *Id.*

297. *Id.* at 7.

298. *Id.* at 2.

299. *Id.*

to accommodate their employees' disabilities and religious beliefs, respectively.<sup>300</sup> Similar to those laws, the new law should provide that employers must accommodate their employees' caregiving obligations, so long as the requested accommodations do not impose an undue hardship.<sup>301</sup> For instance, depending on the circumstances, employers might be required to allow parents to take adequate maternity or paternity leave, offer flexible work schedules, or provide on-site daycare.<sup>302</sup> Courts should not find it difficult to evaluate requested accommodations in context, given their extensive experience implementing Title VII's and the ADA's requirements.<sup>303</sup> They can easily reject any unreasonable request for flexibility. For instance, they can distinguish between employees that, by the nature of their work, must be on duty during specific hours (e.g., receptionists, security guards) and those whose work is amenable to flexible scheduling (e.g., data-entry workers).

The accommodations that courts do require, moreover, should not significantly burden the affected employers. Compliance costs are likely to be minimal, and related cost savings may provide a complete offset. These cost savings will come from two sources: (1) reduced recruitment and training expenses; and (2) increased productivity.<sup>304</sup> First, by accommodating parental obligations, employers can retain a greater percentage of their young employees—those most likely to be starting families and raising small children—and thereby reduce their recruiting and retraining expenses.<sup>305</sup> In professional firms, these cost savings can be substantial.<sup>306</sup> For example, some estimates put the cost of replacing an experienced law-firm associate somewhere between \$200,000 and \$500,000.<sup>307</sup> And even in nonprofessional workplaces, finding and training qualified candidates can be quite expensive.<sup>308</sup> Second, by retaining their employees for longer periods, employers will enjoy a more experienced and productive workforce.<sup>309</sup> Experienced employees work more efficiently than new recruits. For instance, an experienced housekeeper can clean

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300. See Williams & Segal, *supra* note 287, at 83 (citing Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999) and Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131 (1996)); see also Eifler, *supra* note 288, at 1222 (suggesting a similar measure).

301. Williams & Segal, *supra* note 287, at 83.

302. *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified January 19, 2011) (suggesting employers provide flexible work arrangements, such as flextime programs, telecommuting, reduced-time options, and job sharing) [hereinafter *EEOC Best Practices*].

303. See ROTHSTEIN ET AL., *supra* note 61, at 375–80, 466–71 (citing cases).

304. JOAN WILLIAMS, *UNBENDING GENDER* 88–94 (2000).

305. *Why Employees Need Workplace Flexibility*, SLOAN CENTER ON AGING & WORK AT BOSTON C., [http://workplaceflexibility.bc.edu/need/need\\_employees](http://workplaceflexibility.bc.edu/need/need_employees) (last visited Nov. 17, 2013) (quoting a 2009 survey reporting that “90% of organizations say their work/life balance programs have improved worker satisfaction, and nearly three-fourths (74%) say they have improved retention of workers.”).

306. WILLIAMS, *supra* note 304, at 88.

307. Williams & Segal, *supra* note 287, at 88.

308. *Id.* at 89.

309. See Eifler, *supra* note 288, at 1212 (“When workplaces are not responsive to the needs and wishes for alternative work arrangements of their employees the chances are that these employees will work below their potential or leave altogether.”) (quoting Ariane Hegewisch & Janet C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective*, INST. FOR WOMEN'S POLICY RESEARCH 4 (2008), <http://www.lisdatacenter.org/wp-content/uploads/2011/02/flex-work-report.pdf>).

eight hotel rooms in the time it takes a new housekeeper to clean six, thereby reducing the employer's cost per room.<sup>310</sup> Even putting aside experience levels, employees in flexible workplaces report being happier, healthier, and more productive.<sup>311</sup> Thus, accommodation benefits all parties: employees can balance their caregiving and work responsibilities, while employers enjoy less turnover and more productive workers.

A reasonable-accommodation requirement would not, however, be effective standing alone. Even now, many employers have flexible policies in place, but employees do not use them because they fear retaliation, stigma, or both.<sup>312</sup> Moreover, even when caregivers choose to forgo flexibility options, they are still often viewed as less competent or dedicated solely because of their familial responsibilities.<sup>313</sup> Thus, to guarantee these employees equal treatment in the workforce, and to ensure the accommodation requirement has its intended effect, Congress should expressly forbid family-responsibility discrimination.<sup>314</sup>

This proposal is hardly revolutionary. Scholars have been debating the idea for years,<sup>315</sup> and it has occasionally attracted the attention of lawmakers. For instance, in 1999, Sen. Christopher Dodd introduced the Ending Discrimination Against Parents Act,<sup>316</sup> which would have “[p]rohibit[ed] employment discrimination against parents and those with parental responsibilities.”<sup>317</sup> The Act also provided a mixed-motives framework, conferred enforcement powers on the EEOC, and outlawed retaliation and coercion.<sup>318</sup>

Although the Act never became law, it could still serve as a blueprint for future legislation. Today, Congress could adopt it largely in its original form, with minor amendments to include other primary caregivers and add a reasonable-accommodation requirement. The benefits of doing so would be two-fold. First, the Act would provide the victims of family-responsibility discrimination with a concrete form of redress. Second, by recognizing family-responsibility discrimination as invidious, Congress would help eliminate the prevailing stigma against working caregivers.<sup>319</sup>

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310. Williams & Segal, *supra* note 287, at 89.

311. See EEOC *Best Practices*, *supra* note 302 (“Studies have demonstrated that flexible work policies have a positive impact on employee engagement and organizational productivity and profitability.”).

312. Eifler, *supra* note 288, at 1222 (arguing that “even the most caregiver-friendly accommodations will be underutilized if they are not supplemented by antidiscrimination laws that protect caregiver employees—many of whom need their jobs for their family’s livelihood—from retaliation and discrimination.”).

313. See Williams & Segal, *supra* note 287, at 90 (“Once a woman’s status as a mother becomes salient—either because she gets pregnant, takes maternity leave, or adopts a flexible work arrangement—she may begin to be perceived as a low-competence caregiver rather than as a high-competence business woman. Thus, women who did not have problems at work before having children may find their competence questioned after they become mothers.”) (footnote omitted).

314. Eifler, *supra* note 288, at 1218; see Williams & Segal, *supra* note 287, at 84.

315. See Smith, *Parental Status*, *supra* note 286, at 570 (discussing proposals to ending parental discrimination).

316. S. 1907, 106th Cong. (1999), available at <https://www.govtrack.us/congress/bills/106/s1907>.

317. *Id.*

318. *Id.* §§ 5, 6, 8, 11.

319. See Eifler, *supra* note 288, at 1220 (arguing that, “like in other civil rights legislation, anti-discrimination statutes designed to protect caregiver employees are necessary to change attitudes in the workplace.”).

## C. Protect Employees from Arbitrary Discharge

The two measures just discussed would help fill the void left by organized labor's decline. Both would address abuses occurring in the modern workplace, and would provide employees with benefits they have been unable to bargain for individually. But while unions were once essential to raising wages and protecting employees from discrimination, they were also indispensable in protecting employees from arbitrary discharge.<sup>320</sup> If employment law is ever to fully replace unions in the modern workplace, lawmakers must create some similar security mechanism. The best way to do so would be to enact a national good-cause discharge law.<sup>321</sup>

In the past, union-negotiated CBAs often contained some type of good-cause discharge clause.<sup>322</sup> Employment law, however, currently provides no comparable protection.<sup>323</sup> In most states, the default rule is employment-at-will, under which employers are generally free to terminate their employees for any reason whatsoever.<sup>324</sup> The effect of such a discharge can be devastating.<sup>325</sup> Not only do the discharged employees lose their immediate source of income, they often lose an important source of self-esteem<sup>326</sup> and ancillary benefits (such as healthcare and child care).<sup>327</sup> Moreover, discharged employees may struggle to obtain new employment, as many employers look askance at applicants with discharges on their employment records.<sup>328</sup> Because termination can have such severe effects, commentators have long advocated for good-cause discharge legislation,<sup>329</sup> and at least one state has adopted such a law.<sup>330</sup> Nevertheless, today most workers are not covered by a CBA or wrongful-discharge statute, and thus have no general legal protection against

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320. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 362 (1994) (noting that one of unions' "major selling points" was their ability to assure employee job security).

321. *Id.* at 365.

322. *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 282 (Iowa 1995) (observing that "federal labor law gave rise to union contracts that include just cause discharge provisions").

323. *Id.* at 281–82.

324. *Id.* (tracking the history of the employment-at-will rule).

325. Minda & Raab, *supra* note 94, at 1161 ("One of the most catastrophic events that can happen in life is the sudden and unexpected loss of gainful employment.").

326. RICHARD H. PRICE, ET AL., *JOB LOSS: HARD TIMES AND ERODED IDENTITY, PERSPECTIVES ON LOSS: A SOURCEBOOK* 303, 304 (John H. Harvey ed. 1998) (noting that job loss can lead to "increased depressive symptoms, increased anxiety, decreased subjective perceptions of competence, and decreased self-esteem.") (internal citations omitted).

327. *See id.* at 307 (observing that some mental-health effects attributable to job loss may be caused by resulting economic hardship, including the "loss of access to health care").

328. Minda & Raab, *supra* note 94, at 1167 ("The stigma of discharge, even if undeserved, may be difficult to overcome. . . . The consequences of job loss may be a catastrophic event for many discharged employees, effectively removing them from the labor market.").

329. *See, e.g.*, Parween S. Mascari, Comment, *What Constitutes A "Substantial Public Policy" in West Virginia for Purposes of Retaliatory Discharge: Making A Mountain Out of A Molehill?*, 105 W. VA. L. REV. 827, 871 (2003); Mark A. Redmiles, *Shelter from the Storm: The Need for Wrongful Discharge Legislation in Alaska*, 6 ALASKA L. REV. 321 (1989); St. Antoine, *supra* note 320, at 362.

330. *See* MONT. CODE ANN. §§ 39-2-901–915 (West 2013).

most forms of arbitrary dismissal.<sup>331</sup> A national good-cause discharge law would shield these millions of vulnerable workers.

Such a law need not impose substantial costs on employers. Indeed, lawmakers could craft the law to be more efficient than the costly, patchwork system in place today. In many states, court-made common law currently provides employees a wrongful-discharge cause of action, at least when their termination violated a clearly articulated public policy.<sup>332</sup> When a discharged employee files suit in one of these states, courts must determine what counts as a sufficiently definite public policy.<sup>333</sup> This inquiry is often a difficult one,<sup>334</sup> and litigation expenses are a burden for all parties involved. The average employee is typically unable to finance extended litigation, and many cannot convince an attorney to risk taking their case on contingency.<sup>335</sup> Although employers are generally deeper-pocketed than employees, they too can drown in litigation costs. One study estimated that almost 75% of wrongful-discharge suits that go to trial result in a verdict for the employee, the average award being \$450,000.<sup>336</sup> And even victories do not come cheap for employers: the average successful defense costs between \$100,000 and \$200,000.<sup>337</sup>

Federal legislation, if carefully drafted, could replace this narrow, imprecise, and costly system with an efficient, speedy, and well-defined administrative scheme. In doing so, legislators should look to state unemployment-compensation schemes, in which administrative decision makers must regularly determine whether an employee was terminated for job-related misconduct.<sup>338</sup> As in many of those schemes, Congress could ease the decision makers' task by listing per se examples

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331. See Berks, *supra* note 31, at 255, 260 (observing that private-sector union membership declined and that Montana is the only state to have adopted a good-cause discharge statute).

332. See *supra* note 36.

333. See St. Antoine, *supra* note 320, at 364 (“The tort theory generally requires some outrageous violation of a well-established public policy, a relatively rare occurrence.”) (footnote omitted).

334. See, e.g., Ballinger v. Del. River Port Auth., 800 A.2d 97, 107–10 (N.J. 2002) (struggling with whether policeman’s termination by agency created by a Pennsylvania-New Jersey compact, allegedly for investigating and reporting criminal activity, violated a clear public policy); Bradley T. Ewing et al., *The Employment Effects of a “Good Cause” Discharge Standard in Montana*, 59 INDUS. & LAB. REL. REV. 17 (2005) (citing criticism of the uncertainty created by Montana’s judicially created exceptions to the employment-at-will doctrine, including a *public-policy* exception).

335. St. Antoine, *supra* note 320, at 365.

336. *Id.*

337. *Id.*

338. See, e.g., N.D. CENT. CODE § 52-06-02(2) (West 2011); 43 PA. CONS. STAT. ANN. § 802(e) (2002); D.C. MUN. REGS. tit. 7, § 3-12 (1994); Jadallah v. D.C. Dep’t of Emp’t Servs., 476 A.2d 671, 675 (D.C. 1984) (applying the statutory misconduct standard); Hansen v. C.W. Mears, Inc., 486 N.W.2d 776, 780 (Minn. Ct. App. 1992) (applying a scheme differentiating between “misconduct” and “gross misconduct”); Hulse v. Job Serv. N. Dakota, 492 N.W.2d 604, 608 (N.D. 1992) (providing examples of misconduct); Frumento v. Unemp’t Comp. Bd. of Rev., 351 A.2d 631, 633 (Pa. 1976) (interpreting statutory requirement of discharge for “willful misconduct”); see also James K. Bradley & Carol J. Mowery, *Trends in Unemployment Compensation Law*, 80 PA. B.A. Q. 117, 119 (2009) (observing that although “the term ‘willful misconduct’ is not defined in the [l]aw, the Pennsylvania Supreme Court has defined it as an act of wanton or willful disregard of the employer’s interests, a deliberate violation of the employer’s rules, a disregard of the standard of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer’s interests or of the employee’s duties and obligations to the employer.”).

of good-cause in the statute itself.<sup>339</sup> Such examples might include the willful disregard for an employer's written policies, a drug-test failure, or conviction of a crime. Congress could also explicitly incorporate arbitration principles, which would supply a ready-made body of arbitral precedent for administrative decision makers to reach for.<sup>340</sup> Furthermore, Congress could also explicitly preempt state wrongful-discharge law and make the administrative scheme exclusive, with only limited judicial review. Doing so would provide uniformity across state lines.<sup>341</sup> Finally, Congress could strictly limit plaintiffs' remedies by, for example, permitting recovery only of a certain period of back wages. This would insure employers against potentially devastating verdicts, which in some cases have gone as high as \$20 million.<sup>342</sup> Taken together, these steps would reduce any uncertainty in the nature of "good cause," speed claim resolution, and lower costs.

Montana, the only state to have yet adopted a good-cause discharge statute,<sup>343</sup> provides the best illustration of how such a scheme might play out on the national level. In the early 1980s, the Montana Supreme Court handed down a number of employee-friendly decisions carving out new exceptions to the employment-at-will doctrine.<sup>344</sup> Some evidence suggests that these new exceptions depressed employment rates in the state, perhaps by scaring away employers.<sup>345</sup> In response, the state legislature adopted the Wrongful Discharge from Employment Act (WDEA), which made it unlawful for an employer to terminate a nonprobationary employee other than for good cause.<sup>346</sup> While the Act displaced the common-law employment-at-will doctrine—a potentially frightful prospect for employers—it also placed checks on run-away litigation.<sup>347</sup> For instance, the Act's attorneys' fees

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339. See D.C. MUN. REGS. tit. 7, § 3-12 (1994) (providing examples of "gross misconduct," such as sabotage, theft, dishonesty, intoxication, and repeated absences); MO. ANN. STAT. § 288.050 (West 2013) (providing that absenteeism or tardiness give rise to a rebuttable presumption of misconduct); see, e.g., TEX. LAB. CODE ANN. § 201.012 (West 2013) (defining "misconduct" to include "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees," but not "an act in response to an unconscionable act of an employer or superior").

340. See St. Antoine, *supra* note 320, at 371 (noting that the drafters of the Model Employment Termination Act, "META," took a similar approach).

341. See *id.* at 367 (explaining that META's drafters were motivated in part "on studies indicating that recent judicial modifications in the doctrine of employment at will had created great uncertainty for both employers and employees.>").

342. See *id.* at 365 ("Juries can succumb to emotional appeals, and they have awarded single individuals \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million.") (footnote omitted).

343. Ewing et al., *supra* note 334, at 17 (stating "Montana became the only state to adopt a 'good cause' standard for discharge of employees...").

344. *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982) (establishing a good-faith exception); *Keneally v. Orgain*, 606 P.2d 127, 129 (Mont. 1980) (establishing a public-policy exception).

345. Ewing et al., *supra* note 334, at 22 (hypothesizing that "[e]mployment growth in Montana was negatively affected by the adoption of the public policy exception in *Keneally* in January 1980 and the good faith exception in *Gates* in January 1982").

346. MONT. CODE ANN. §§ 39-2-901-915 (West 2013).

347. See MONT. CODE ANN. § 39-2-913 (West 2013) (preempting common-law remedies); see also Ewing et al., *supra* note 334, at 21 ("The 'good cause' provision substantively altered the traditional rule of employment-at-will and effectively replaced the common law good faith exception.>").

scheme strongly encouraged plaintiffs to arbitrate their claims rather than file suit.<sup>348</sup> The Act also limited potential recoveries to a maximum of four years' lost wages and fringe benefits; plaintiffs could not recover for pain, suffering, or emotional distress.<sup>349</sup> Further, the Act required plaintiffs to exhaust their employers' internal grievance procedures.<sup>350</sup> Perhaps as a result of these limits, the Act proved beneficial to both employees and employers. Employment rates in the state stabilized,<sup>351</sup> and the stock prices of Montana's publically traded companies rose measurably.<sup>352</sup>

In light of Montana's experience, lawmakers should feel comfortable that a good-cause discharge law would not only stabilize wrongful-discharge law across the country, but also reduce litigation costs. More importantly, it would directly address nonunionized employees' vulnerability to arbitrary discharge. The law would permanently displace the harsh employment-at-will doctrine and extend to nonunion employees the protection their union counterparts once enjoyed. This, more than any other step lawmakers could take, would move employment law toward filling the role organized labor once played.

#### CONCLUSION

In proposing these measures, I do not imply that they are the only worthwhile employment-law measures. I do not even suggest that they are necessarily the best possible solutions; surely, there are other, equally worthy measures. I also do not suggest that the broad outlines in which I have sketched my proposals could not be improved by further refinement. Rather, I offer these proposals only as a starting point, a place to begin a discussion about expanding and enhancing modern employment law to fill in the gaps left by organized labor's decline.

And make no mistake—that discussion is crucial. Organized labor's collapse has left workers with no effective counterweight to their employers' near-unilateral power over the employment relationship. Whatever small measure of power workers still have, it comes to them by way of external legal rights; i.e., employment law. But employment law does not yet totally fill unions' vacant shoes. Recognizing that an imbalance still exists between employers and nonunion employees, and that vigorous employment laws are the only way to correct that imbalance, is the first step. The second step is expanding and strengthening employment law in a way that addresses the problems of today's workplace. Whether lawmakers do so by taking up the measures proposed here, or others, they must do something to fill organized labor's place. They cannot simply hope for a miraculous labor revival; unions are gone and are not coming back. Lawmakers must go to work with the tool they have—employment law.

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348. See MONT. CODE ANN. § 39-2-915 (West 2013) (“A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.”).

349. MONT. CODE ANN. § 39-2-905 (West 2013).

350. MONT. CODE ANN. § 39-2-911 (West 2013).

351. Ewing et al., *supra* note 334, at 17 (arguing that “the seminal Montana wrongful discharge case reduced annual employment growth in Montana by 0.46 percentage points, and that the ‘good cause’ statute restored the original growth rate”).

352. Ewing et al., *supra* note 334, at 21–22.