

DEVELOPMENTS IN THE LAW  
LABOR AND EMPLOYMENT

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*“[F]or working’s sake[]  
Too proud to bend  
Too poor to break,  
I laugh until my stomach ache[]”*

MAYA ANGELOU, *When I Think About Myself*,  
in *MAYA ANGELOU: POEMS* 26, 26 (1981).

*“It’s a rich man’s game  
No matter what they call it”*

DOLLY PARTON, *9 to 5*,  
on *9 TO 5 AND ODD JOBS* (RCA Records 1980).

*“Institutionalized rejection of difference is an absolute necessity in a  
profit economy which needs outsiders as surplus people.”*

AUDRE LORDE, *Age, Race, Class, and Sex:  
Women Redefining Difference*, in *SISTER OUTSIDER:  
ESSAYS AND SPEECHES* 114, 115 (1984).

*“Sí se puede.”*

Dolores Huerta, Keynote Address at the Annual Convention  
of the American Public Health Association (Oct. 21, 1974).

## INTRODUCTION

This month marks the fifty-fifth anniversary of the assassination of Dr. Martin Luther King, Jr.<sup>1</sup> History remembers Dr. King as the non-violent leader of the civil rights movement in America.<sup>2</sup> Often overlooked, however, is his steadfast commitment to the organized labor movement.<sup>3</sup> In 2011, Professor Michael K. Honey compiled and published sixteen speeches that Dr. King delivered to labor unions and workers' rights coalitions — most of which had never been seen by the general public.<sup>4</sup> Inspired by his mentor A. Philip Randolph, a leader of the labor movement,<sup>5</sup> Dr. King advocated for the coordination of the labor and civil rights movements in a “unity of purpose.”<sup>6</sup> Dr. King viewed issues of economic justice as inextricably linked with issues of racial justice.

The civil rights movement was about human rights; for Dr. King, human rights were labor rights.<sup>7</sup> Fifty-five years ago, he advocated for better working conditions and livable wages for low-wage workers.<sup>8</sup> He called on the City of Memphis to “respect the dignity of labor,” and he envisioned a future in which the American public would see that “whenever [workers] are engaged in work that serves humanity and is for the building of humanity, it has dignity, and it has worth.”<sup>9</sup> “All labor . . . has dignity.”<sup>10</sup>

In the time since Dr. King's speeches, the labor market and nature of work in America have been completely transformed. New technology,

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<sup>1</sup> *Martin Luther King Is Slain in Memphis; A White Is Suspected; Johnson Urges Calm*, N.Y. TIMES, Apr. 5, 1968, at A1.

<sup>2</sup> *About Dr. Martin Luther King, Jr.*, KING CTR., <https://thekingcenter.org/about-tkc/martin-luther-king-jr> [<https://perma.cc/388S-7KPC>].

<sup>3</sup> Joe Fassler, “All Labor Has Dignity”: Martin Luther King, Jr.'s Fight for Economic Justice, THE ATLANTIC (Feb. 22, 2011), <https://www.theatlantic.com/entertainment/archive/2011/02/all-labor-has-dignity-martin-luther-king-jrs-fight-for-economic-justice/71423> [<https://perma.cc/6KPD-GRRC>].

<sup>4</sup> MARTIN LUTHER KING, JR., “ALL LABOR HAS DIGNITY” (Michael K. Honey ed., 2011).

<sup>5</sup> The Ezra Klein Show, Opinion, *Transcript: Ezra Klein Interviews Brandon Terry*, N.Y. TIMES (Jan. 17, 2023), <https://www.nytimes.com/2023/01/17/opinion/transcript-ezra-klein-interviews-brandon-terry.html> [<https://perma.cc/87VH-U649>].

<sup>6</sup> Martin Luther King, Jr., AFL-CIO Fourth Constitutional Convention Speech (Dec. 11, 1961), in “ALL LABOR HAS DIGNITY,” *supra* note 4, at 35, 38; *see also* Fassler, *supra* note 3. Notably, King and Randolph were critical of the labor movement due to its own history of racial discrimination. King, *supra*, at 40–41.

<sup>7</sup> *See* Michael Honey, *Forty Years Since King: Labor Rights Are Human Rights*, ORG. AM. HISTORIANS MAG. HIST., Apr. 2008, at 18, 20.

<sup>8</sup> Martin Luther King, Jr., American Federation of State, County and Municipal Employees (AFSCME) Speech (Mar. 18, 1968), in “ALL LABOR HAS DIGNITY,” *supra* note 4, at 170, 172 (“Now the problem is not only unemployment. Do you know that most of the poor people in our country are working every day? (Applause) And they are making wages so low that they cannot begin to function in the mainstream of the economic life of our nation.”).

<sup>9</sup> *Id.* at 171.

<sup>10</sup> *Id.* at 172.

a global pandemic, changing attitudes toward work, and greater participation of women have all driven a restructuring of American work. However, many of the federal statutes that form the basis of labor and employment law remain largely unchanged. Meanwhile, the importance of work to American life has only increased. Despite the predictions of early twentieth-century economists and writers that technological developments would lead to a decline in working hours and an increased value placed on other aspects of life,<sup>11</sup> Americans today work more hours each year than workers in any other similarly productive country.<sup>12</sup> And despite an ambitious program for working benefits started during the Great Depression,<sup>13</sup> Americans now “have shorter vacations, get less in unemployment, disability, and retirement benefits, and retire later” than do people in comparable societies.<sup>14</sup>

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This edition of *Developments in the Law* grapples with the American conception of dignity in labor and explores the ways in which our current employment law regime is outdated and inadequate to serve the needs of a transformed workforce. This Introduction briefly lays out the legal framework affecting employee rights and surveys some major developments in the labor force to provide context for the following Chapters.

#### A. A Legal Framework from the New Deal Era

The foundations for the modern American labor and employment law framework took shape during the Great Depression. President Franklin Delano Roosevelt campaigned on protecting human dignity,<sup>15</sup> and his New Deal employment legislation showed his commitment to ensuring that all American workers attained a baseline level of dignity in their work. The following Chapters discuss many of these statutes at length. In 1933, President Roosevelt signed the National Industrial Recovery Act<sup>16</sup> (NIRA), which required companies to write industry-wide codes to set a minimum wage, secured the right of workers to

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<sup>11</sup> See, e.g., JOHN MAYNARD KEYNES, *Economic Possibilities of Our Grandchildren*, in *ESSAYS IN PERSUASION* 321, 325–26 (3d ed. 2010); Erik Barnouw, *Time on Our Hands*, N.Y. TIMES BOOK REV., Sept. 22, 1957, at 28.

<sup>12</sup> Derek Thompson, *Workism Is Making Americans Miserable*, THE ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441> [<https://perma.cc/Y7RP-WCFJ>].

<sup>13</sup> See *infra* section A, pp. 1588–91.

<sup>14</sup> Thompson, *supra* note 12 (quoting SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 30 (2004)).

<sup>15</sup> *Franklin and Eleanor Roosevelt: Human Rights and the Creation of the United Nations*, GEO. WASH. UNIV., <https://erpapers.columbian.gwu.edu/franklin-and-eleanor-roosevelt-human-rights-and-creation-united-nations> [<https://perma.cc/89N8-268P>].

<sup>16</sup> Ch. 90, 48 Stat. 195 (1933), *invalidated in part by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

bargain collectively, and outlawed child labor.<sup>17</sup> As he signed it, President Roosevelt said that “[h]istory will probably record [this Act] as the most important and far-reaching legislation ever enacted by the American Congress.”<sup>18</sup> It received such widespread support that a family in Pennsylvania named their child “Nira” as an homage to the legislation.<sup>19</sup> In 1935, President Roosevelt’s Congress passed the National Labor Relations Act<sup>20</sup> (NLRA), or the Wagner Act, which reaffirmed the right of workers to organize, to bargain collectively with their employers, and to act in a concerted way to ensure mutual aid and protection.<sup>21</sup> It also created the National Labor Relations Board (NLRB),<sup>22</sup> the federal agency “vested with the power to safeguard employees’ rights to organize, engage with one another to seek better working conditions, choose whether or not to have a collective bargaining representative negotiate on their behalf with their employer, or refrain from doing so.”<sup>23</sup> The Board was given the power to investigate labor practices, hold adjudicatory hearings, issue orders, and award remedies, including injunctive remedies through petitions to the federal courts.<sup>24</sup>

In 1937, the Supreme Court held in *West Coast Hotel Co. v. Parrish*<sup>25</sup> that states could set a minimum wage.<sup>26</sup> As Professor Katherine Stone writes, this decision, along with the passage of the Wagner Act, “signaled the establishment of a new era” of government intervention in labor.<sup>27</sup> In the ensuing decades, state and federal statutes were passed that regulated other aspects of work.<sup>28</sup> This legislation included the Fair Labor Standards Act of 1938<sup>29</sup> (FLSA), which established a national federal minimum wage, mandatory overtime and recordkeeping provisions, and child labor standards in the private sector, as well as in federal,

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<sup>17</sup> Rogene A. Buchholz, *National Industrial Recovery Act*, ENCYC. BRITANNICA (Dec. 3, 2019), <https://www.britannica.com/topic/National-Industrial-Recovery-Act> [https://perma.cc/T486-GVAM]; Brent McKee, *New Deal Programs*, LIVING NEW DEAL, <https://livingnewdeal.org/what-was-the-new-deal/programs> [https://perma.cc/GQ53-JH2X].

<sup>18</sup> Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> [https://perma.cc/NS4K-CZRA].

<sup>19</sup> *Id.*

<sup>20</sup> Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169). In 1947, Congress passed the Labor Management Relations Act, 1947 (Taft-Hartley Act), Ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–167, 171–187, 557), which amended significant aspects of the NLRA.

<sup>21</sup> Katherine Van Wezel Stone, *The Post-war Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513 (1981).

<sup>22</sup> 29 U.S.C. § 153.

<sup>23</sup> *Who We Are*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are> [https://perma.cc/VN34-MWYR].

<sup>24</sup> Stone, *supra* note 21, at 1513.

<sup>25</sup> 300 U.S. 379 (1937).

<sup>26</sup> *Id.* at 399.

<sup>27</sup> Stone, *supra* note 21, at 1512.

<sup>28</sup> *Id.* at 1512–13.

<sup>29</sup> Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

state, and local government.<sup>30</sup> The next decades saw the passage of other important pieces of labor and employment legislation, such as the Age Discrimination in Employment Act of 1967,<sup>31</sup> which regulates age discrimination; the Occupational Safety and Health Act of 1970,<sup>32</sup> which seeks to establish and ensure workplace health and safety conditions; the Equal Employment Opportunity Act of 1972,<sup>33</sup> which aims to protect against discrimination on the basis of race and sex; and the Employee Retirement Income Security Act of 1974,<sup>34</sup> which establishes standards for private pensions. Subsequent legislation continued the trend of government intervention in labor. Some statutes mentioned in the Chapters of this edition include the Pregnancy Discrimination Act of 1978,<sup>35</sup> which amended Title VII of the Civil Rights Act of 1964<sup>36</sup> to prohibit sex discrimination on the basis of pregnancy; the Family and Medical Leave Act of 1993<sup>37</sup> (FMLA), which requires employers to cover unpaid, job-protected leave for their employees for certain family and medical reasons;<sup>38</sup> and the Trafficking Victims Protection Act of 2000,<sup>39</sup> which aims to protect dignity in labor at home and abroad by enabling a robust U.S. response to labor trafficking.

This framework of employee rights, composed of rights attained both by collective bargaining and through government legislation, formed what Professor Stone deems “the standard employment contract” in America.<sup>40</sup> It was composed of “an array of job rights that included decent wages, protections against unfair treatment at work, social insurance provided by the state or the employer and, notably, some degree of job security.”<sup>41</sup> Importantly, however, this standard employment contract served as “the platform from which many other social rights — old age assistance, vacation entitlements, health insurance, and so on — were delivered.”<sup>42</sup> Workers in America, more than in any other

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<sup>30</sup> Grossman, *supra* note 18; *Wages and the Fair Labor Standards Act*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/CQ25-XR56>].

<sup>31</sup> Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634).

<sup>32</sup> Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of the U.S. Code).

<sup>33</sup> Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.).

<sup>34</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S. Code).

<sup>35</sup> Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

<sup>36</sup> 42 U.S.C. §§ 2000e to 2000e-17.

<sup>37</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of the U.S. Code).

<sup>38</sup> *Family and Medical Leave Act*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/fmla> [<https://perma.cc/PQ93-9QYY>].

<sup>39</sup> Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

<sup>40</sup> Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge*, in *RETHINKING WORKPLACE REGULATION* 1, 2 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

developed country, depend on this legal framework for their rights.<sup>43</sup> Thus, individual dignity is, in many ways, contingent upon employment.<sup>44</sup> Americans “work[] to live and work[] to have something to live for.”<sup>45</sup>

Today, the American economy and labor force look much different than they did in the 1930s, when the foundations of this legal framework were laid. Recent developments call into question the adequacy of the traditional legal framework for labor and employment law — built upon an array of bargained-for and government-imposed rights. Each Chapter will delve further into these developments, but some will be briefly surveyed in this Introduction.

### B. Gender in the Workplace

The face of the American workplace has been transformed over the last two centuries, most notably through the increased participation of women. In 1920, women made up 20% of the U.S. labor force.<sup>46</sup> Today, women represent 47% of the labor force.<sup>47</sup> During World War II, women joined the workforce at unprecedented rates to fill the gap left by men who went overseas to join the war effort.<sup>48</sup> Many of these women lost their jobs in the postwar era but were left with “a new drive to work and join the workforce.”<sup>49</sup> So female workforce participation once again began to increase. By 1950, about 34% of women aged sixteen or older participated in the labor force, growing to nearly 60% of such women in 1998.<sup>50</sup> In the 1970s, a time Professor Claudia Goldin argues was the start of what she calls “the quiet revolution,” more women with children stayed in the workforce.<sup>51</sup> During this time, women were expanding their horizons and planning “for careers rather than jobs.”<sup>52</sup> They invested in formal education and aimed for jobs with

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<sup>43</sup> Deepa Das Acevedo, *Essentializing Labor Before, During and After the Coronavirus*, 52 ARIZ. ST. L.J. 1091, 1096 (2020).

<sup>44</sup> *Id.* at 1095–96.

<sup>45</sup> *Id.* at 1096.

<sup>46</sup> *History*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/wb/about/history> [<https://perma.cc/2PLS-GDWT>].

<sup>47</sup> *Id.*

<sup>48</sup> Haylee Broyles, *How Women Entered the Workforce in World War II*, THE COLLECTOR (Dec. 6, 2022), <https://www.thecollector.com/women-in-the-workforce-world-war-ii> [<https://perma.cc/G29T-FNKB>]; *Women in the Work Force During World War II*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/wwii-women.html> [<https://perma.cc/ZJ9N-NHY5>].

<sup>49</sup> Broyles, *supra* note 48.

<sup>50</sup> *Changes in Women’s Labor Force Participation in the 20th Century*, U.S. BUREAU LAB. STAT. (Feb. 16, 2000), <https://www.bls.gov/opub/ted/2000/feb/wk3/arto3.htm> [<https://perma.cc/9SCD-8KRY>].

<sup>51</sup> Elisabeth Jacobs & Kate Bahn, *Women’s History Month: U.S. Women’s Labor Force Participation*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 22, 2019), <https://equitablegrowth.org/womens-history-month-u-s-womens-labor-force-participation> [<https://perma.cc/BQ6U-GD8T>].

<sup>52</sup> Claudia Goldin, *The Quiet Revolution that Transformed Women’s Employment, Education, and Family*, 96 AM. ECON. REV. (PAPERS & PROC.), 1, 8 (2006).

upward mobility.<sup>53</sup> In the 1970s and 1980s, women graduated college and sought advanced degrees at higher rates than ever before.<sup>54</sup>

According to Goldin, the “quiet revolution” transformed the “outlook of women concerning their individual identities.”<sup>55</sup> Women began getting married later in life and viewed career success as playing a larger role in their own personal satisfaction.<sup>56</sup> But women’s labor force participation began to slow in the 1990s.<sup>57</sup> In the twenty-first century, participation continued to see a “gradual decline.”<sup>58</sup> And women’s labor force participation dipped during the pandemic.<sup>59</sup> While 59.2% of women worked before the pandemic, this number dropped to 58.4% by September of 2022 — a loss of 1.067 million women from the U.S. labor force.<sup>60</sup> Many attribute this to the greater need for childcare as schools were closed, a need that disproportionately burdened mothers.<sup>61</sup> But women today are still demanding a seat at the table. And, as the #MeToo movement showed, women are also demanding respect and calling for fundamental changes in workplace culture to eradicate sexual harassment in the workplace.<sup>62</sup> Chapters I and IV describe in more detail the inequalities facing women in the workplace, despite federal statutes prohibiting outright discrimination. And, as Chapter IV details, *Dobbs v. Jackson Women’s Health Organization*,<sup>63</sup> which overturned *Roe v. Wade*,<sup>64</sup> severely threatens any strides that have been made toward gender equality.

### C. Technology and the Gig Economy

The technological revolution has also radically transformed jobs in America.<sup>65</sup> The automation of jobs has shifted labor demand “away

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 9–11.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.*

<sup>57</sup> *Women in the Labor Force: A Databook*, U.S. BUREAU LAB. STAT. (Apr. 2021), <https://www.bls.gov/opub/reports/womens-databook/2020/home.htm> [<https://perma.cc/R8Y8-ATKU>].

<sup>58</sup> *Id.*

<sup>59</sup> Katica Roy, *More than a Million Women Have Left the Workforce. The Fed Needs to Consider Them as It Defines “Full Employment,”* FORTUNE (Sept. 6, 2022, 5:02 AM), <https://fortune.com/2022/09/06/women-workforce-fed-rates-consider-full-employment-katica-roy> [<https://perma.cc/XNX5-MT8S>].

<sup>60</sup> *Id.*

<sup>61</sup> See Scott Horsley, *Women Are Returning to (Paid) Work After the Pandemic Forced Many to Leave Their Jobs*, NPR (Sept. 28, 2022, 5:00 AM), <https://www.npr.org/2022/09/28/1125149612/women-are-returning-to-paid-work-after-the-pandemic-forced-many-to-leave-their-j> [<https://perma.cc/S7L9-FDRV>].

<sup>62</sup> Sydney Cone et al., *Workplace Conduct Still Needs Improvement After #MeToo*, BLOOMBERG L. (Oct. 24, 2022, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/workplace-conduct-still-needs-improvement-after-metoo> [<https://perma.cc/2UPR-S4TG>].

<sup>63</sup> 142 S. Ct. 2228 (2022).

<sup>64</sup> 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

<sup>65</sup> See Umberto Colombo, *The Technology Revolution and the Restructuring of the Global Economy*, in GLOBALIZATION OF TECHNOLOGY: INTERNATIONAL PERSPECTIVES 23, 23 (Janet H. Muroyama & H. Guyford Stever eds., 1988).

from routine low- to middle-level skills to higher-level and more sophisticated technical and managerial skills.<sup>66</sup> Many have predicted that this move toward automation, which may accelerate even more with recent rapid developments in artificial intelligence,<sup>67</sup> will lead to job displacement.<sup>68</sup> Already, automation has led to greater income inequality.<sup>69</sup> However, not all predictions have been negative. Some experts, including the World Economic Forum, predict that automation will create more jobs than it displaces.<sup>70</sup>

Technology hasn't just changed the nature of existing jobs; it has also created a new way to work, and a new \$350 billion industry — gig work.<sup>71</sup> Online platforms have transformed the service economy and the labor market by monetizing what had been dormant human capital.<sup>72</sup> The gig economy includes “the delivery of services, the sharing of assets, and the recirculation of goods,”<sup>73</sup> facilitated by online platforms such as Uber, TaskRabbit, and Airbnb, which connect an on-demand worker to a consumer.<sup>74</sup>

This kind of casual, short-term labor has completely disrupted the typical model of work in America, which was founded upon “the standard employment contract” that assumed long-term employment. Some have praised the gig economy for disrupting this typical corporate model and providing more transparency and flexibility for workers, including those typically excluded from the traditional labor market.<sup>75</sup> However, for many reasons, some of which are explained in Chapter II, online platforms in the gig economy have engaged in the “subversion of laws protecting those most vulnerable.”<sup>76</sup> Gig workers have few protections in employment law, largely due to their unfavorable classification as “independent contractors” instead of “employees” under the FLSA.<sup>77</sup>

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<sup>66</sup> Zia Qureshi, *Technology, Change, and a New Growth Agenda*, in GROWTH IN A TIME OF CHANGE: GLOBAL AND COUNTRY PERSPECTIVES ON A NEW AGENDA 3, 4 (Zia Qureshi & Hyeon-Wook Kim eds., 2020).

<sup>67</sup> *15 Jobs and Tasks Tech Experts Believe Will Be Automated Within a Decade*, FORBES (Feb. 18, 2022, 8:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/02/18/15-jobs-and-tasks-tech-experts-believe-will-be-automated-within-a-decade> [https://perma.cc/27EB-6NNZ].

<sup>68</sup> See Daron Acemoglu & Pascual Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, 128 J. POL. ECON. 2188, 2241 (2020).

<sup>69</sup> See Qureshi, *supra* note 66, at 5.

<sup>70</sup> Mohamed Kande & Murat Sonmez, *Don't Fear AI. It Will Lead to Long-Term Job Growth.*, WORLD ECON. F. (Oct. 26, 2020), <https://www.weforum.org/agenda/2020/10/dont-fear-ai-it-will-lead-to-long-term-job-growth> [https://perma.cc/R5GP-5BXV].

<sup>71</sup> Chris Kolmar, *23 Essential Gig Economy Statistics [2023]: Definitions, Facts, and Trends on Gig Work*, ZIPPPIA (Feb. 16, 2023), <https://www.zippia.com/advice/gig-economy-statistics> [https://perma.cc/6PZV-ENPK].

<sup>72</sup> See *id.*

<sup>73</sup> Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 96 (2016).

<sup>74</sup> See *id.* at 96–99.

<sup>75</sup> See Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 53 (2017).

<sup>76</sup> *Id.* at 55.

<sup>77</sup> See Lobel, *supra* note 73, at 132.



The legal consequences of being classified as an employee are great, as only employees receive many of the benefits of the federal legislation described above.<sup>78</sup> As a result, the FLSA, “designed to protect those most in need,”<sup>79</sup> fails to do just that. And, as Chapter II explains, minorities and Americans with lower incomes are overrepresented in the gig economy.<sup>80</sup> While the New Deal legislation was intended to bring dignity to the most vulnerable of laborers, this very population is excluded from protection in a meaningful way.

#### D. COVID-19 Pandemic

The COVID-19 pandemic transformed the way we work.<sup>81</sup> COVID-19 is a respiratory disease first discovered in 2019 in Wuhan, China.<sup>82</sup> It is caused by the coronavirus SARS-CoV-2.<sup>83</sup> The virus is very contagious and spreads person to person through respiratory droplets.<sup>84</sup> Once infected, one’s symptoms can range from mild to incredibly severe, and older adults and those with certain underlying conditions are at an increased risk.<sup>85</sup> Because of the nature of the disease, it spread rapidly across the globe in 2020. Since the first confirmed case in Washington State in January 2020,<sup>86</sup> there have been over one hundred million confirmed cases and one million deaths attributable to the disease in the United States.<sup>87</sup>

Immediately, the pandemic forced American workers to stay in their homes to avoid infection. This affected different industries in different ways. Workers who could not work from home due to the in-person nature of their jobs shouldered the burden of the pandemic. With business closures and travel bans, hospitality and retail workers were hit especially hard, and many lost their jobs.<sup>88</sup> As those industries are “heavily occupied by minorities, who also tend to have less emergency

<sup>78</sup> See Lobel, *supra* note 75, at 63–64.

<sup>79</sup> *Id.* at 62.

<sup>80</sup> See Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021> [<https://perma.cc/Z6B3-8XRW>].

<sup>81</sup> Rebecca Henderson, *How COVID-19 Has Transformed the Gig Economy*, FORBES (Dec. 10, 2020, 10:18 AM), <https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy> [<https://perma.cc/L6QX-J7S2>].

<sup>82</sup> *Basics of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> [<https://perma.cc/DB9Q-ZXW9>].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Press Release, Ctrs. for Disease Control & Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/FRL8-GLKK>].

<sup>87</sup> *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/4MA7-G6YE>].

<sup>88</sup> Das Acevedo, *supra* note 43, at 1101.

savings,” workers of color lost their jobs at disproportionate rates and were more heavily affected by such job loss.<sup>89</sup> All in all, “the youngest, poorest, and most marginalized Americans . . . suffered first and worst.”<sup>90</sup>

Fortunately, since 2020, the labor market has largely bounced back. Unemployment has fallen to 3.5%, its lowest in the past five decades.<sup>91</sup> As of August 2022, the United States “replaced all of the jobs that were lost in the early months of the pandemic.”<sup>92</sup> However, while jobs have returned, many prepandemic practices have not. To start, more workers are working from home. In 2022, 59% of workers who said their jobs can mostly be done from home were working from home, and most were doing so by choice.<sup>93</sup> In response, many, although not all, employers are now acknowledging and creating “new working norms.”<sup>94</sup> And in some industries, more flexible working conditions are now the new normal.<sup>95</sup> This flexibility benefits many groups, including workers with disabilities<sup>96</sup> and those with caretaking responsibilities.<sup>97</sup> But the option to work from home is largely confined to younger, more educated, and higher-income workers.<sup>98</sup> Chapter I describes in more detail trends around workers’ pursuit of better work-life balance as well as ramifications for workforce productivity.

As Professor Deepa Das Acevedo describes, employment law consists of many binary classifications (such as employee versus independent contractor and exempt versus nonexempt), and out of the pandemic grew a new classification: “essential versus non-essential labor.”<sup>99</sup> During the early days of the pandemic, health care workers, emergency

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1102.

<sup>91</sup> All Things Considered, *The Unemployment Rate Fell to 3.5%, Matching Its Lowest Level in the Last 50 Years*, NPR (Aug. 5, 2022, 5:07 PM), <https://www.npr.org/2022/08/05/1116036160/the-unemployment-rate-fell-to-3-5-matching-its-lowest-level-in-the-last-50-years> [https://perma.cc/7DRE-K9HH].

<sup>92</sup> *Id.* (statement of Ailsa Chang).

<sup>93</sup> Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america> [https://perma.cc/65JL-KWGE].

<sup>94</sup> André Dua et al., *Americans Are Embracing Flexible Work — And They Want More of It*, MCKINSEY & CO. (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> [https://perma.cc/QC66-FRA9].

<sup>95</sup> *Id.*

<sup>96</sup> Gus Alexiou, *Remote Work Boosts Employees with Disabilities, Research Shows*, FORBES (Oct. 27, 2022, 10:00 AM), <https://www.forbes.com/sites/gusalexiou/2022/10/27/new-research-confirms-boon-of-remote-working-for-disabled-employees-in-the-us> [https://perma.cc/3P5U-G943].

<sup>97</sup> See Janice Gassam Asare, *Flexibility Is the Key to Supporting Working Mothers in a Post-pandemic Workplace*, FORBES (May 5, 2022, 11:43 PM), <https://www.forbes.com/sites/janicegassam/2022/05/05/flexibility-is-the-key-to-supporting-working-mothers-in-a-post-pandemic-workplace> [https://perma.cc/FJ9M-C3WU].

<sup>98</sup> Dua et al., *supra* note 94.

<sup>99</sup> Das Acevedo, *supra* note 43, at 1093.

services workers, and sanitation workers, among others,<sup>100</sup> were recognized as essential to the continued operation of society, and were required to continue going in to work.<sup>101</sup> However, despite their importance, essential workers are often denied the basic protections of employment law.<sup>102</sup> Fifty-five years ago, Dr. King remarked that he hoped that one day, society would see that the sanitation worker is just as important to society as the physician, “for if he doesn’t do his job, diseases are rampant.”<sup>103</sup> But when the country was hit with COVID-19, Americans showed their gratitude for essential workers by banging on pots and pans instead of by providing them with tangible employee benefits.<sup>104</sup> Essential workers are often denied a living wage and paid leave.<sup>105</sup> “COVID-19 has laid bare the wide gap between the value that health care support, service, and direct care workers bring to society and the extremely low wages they earn in return.”<sup>106</sup>

The gig economy, technological advancements, and COVID-19 have also affected the privacy of both consumers and employees. Online platforms collect personal information and data from consumer usage of their apps.<sup>107</sup> And these apps often employ rating systems that allow consumers to rate the service, creating “a system of stranger trust.”<sup>108</sup> But, as Professor Orly Lobel writes, this kind of system “brings us close to the ultimate Foucauldian panopticon” of constant surveillance.<sup>109</sup> Additionally, technological advancements have led to the electronic surveillance of workers.<sup>110</sup> Employees are now being “tracked, recorded

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<sup>100</sup> *The Essential Workers Project*, JOHNS HOPKINS BERMAN INST. OF BIOETHICS, <https://bioethics.jhu.edu/research-and-outreach/covid-19-bioethics-expert-insights/essential-workers-project> [<https://perma.cc/XYU6-9FHD>].

<sup>101</sup> Das Acevedo, *supra* note 43, at 1093.

<sup>102</sup> *Id.* at 1093–94.

<sup>103</sup> King, *supra* note 8, at 172.

<sup>104</sup> See Adam Jeffery, *New Yorkers Stop and Give Daily Thanks and Gratitude for Coronavirus Frontline Workers*, CNBC (Dec. 10, 2020, 8:22 AM), <https://www.cnbc.com/2020/04/05/new-yorkers-stop-and-give-daily-thanks-and-gratitude-for-coronavirus-frontline-workers.html> [<https://perma.cc/53D2-DB55>].

<sup>105</sup> Molly Kinder, *Essential but Undervalued: Millions of Health Care Workers Aren’t Getting the Pay or Respect They Deserve in the COVID-19 Pandemic*, BROOKINGS INST. (May 28, 2020), <https://www.brookings.edu/research/essential-but-undervalued-millions-of-health-care-workers-arent-getting-the-pay-or-respect-they-deserve-in-the-covid-19-pandemic> [<https://perma.cc/3HTD-Y4D7>]; Press Release, Rep. Ayanna Pressley, *The PAID Leave Act* (Apr. 3, 2020), <https://pressley.house.gov/sites/pressley.house.gov/files/Paid%20Leave%20One%20Pager.pdf> [<https://perma.cc/2PSC-CUBF>].

<sup>106</sup> Kinder, *supra* note 105.

<sup>107</sup> E.g., *Uber Privacy Notice*, UBER (Dec. 23, 2022), <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=privacy-notice> [<https://perma.cc/MM9S-64EG>].

<sup>108</sup> Lobel, *supra* note 75, at 55.

<sup>109</sup> *Id.*

<sup>110</sup> The Daily, *The Rise of Workplace Surveillance*, N.Y. TIMES, at 00:42 (Feb. 15, 2023), <https://www.nytimes.com/2022/08/24/podcasts/the-daily/workplace-surveillance-productivity-tracking.html> [<https://perma.cc/DJ95-D2N3>].

and ranked.”<sup>111</sup> This became popular across industries as more people began working from home, and many employees are now tracked to determine when they are actively working based on keyboard and computer activity.<sup>112</sup>

### E. Labor Movement

Today, Americans’ approval rating of labor unions is at 71%, the highest it has been since 1965, when Dr. King was delivering his speeches on labor.<sup>113</sup> And there was a 57% increase in union-election petitions filed with the NLRB during the first half of 2021.<sup>114</sup> The current President, President Joe Biden, promised to be “the most pro-union president you’ve ever seen.”<sup>115</sup> And he is, perhaps, the most pro-union President since President Roosevelt.<sup>116</sup> Both President Biden and President Roosevelt expressed similar views on the dignity of labor and the importance of unions. In 2021, President Biden said, “[T]hat’s what the labor union is all about: dignity.”<sup>117</sup> Unions have seen recent high-profile victories at big corporations such as Starbucks<sup>118</sup> and Amazon.<sup>119</sup> This momentum may be largely attributable to the pandemic.<sup>120</sup> Former NLRB Chairman Professor Mark Gaston Pearce says the pandemic was “the wakeup call or the catalyst that has prompted two perspectives: ‘is there another way to work and live?’ and the relationship between employers with workers.”<sup>121</sup> Chapter I explores in depth some reasons for this rise in labor-union activity and the broader

<sup>111</sup> Jodi Kantor & Arya Sundaram, *The Rise of the Worker Productivity Score*, N.Y. TIMES (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html> [https://perma.cc/L7WA-4ZPX].

<sup>112</sup> The Daily, *supra* note 110, at 02:12.

<sup>113</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/QZ6J-CGQJ]; *see supra* p. 1587.

<sup>114</sup> McCarthy, *supra* note 113.

<sup>115</sup> Abigail Johnson Hess, *Biden Promises to Be “the Most Pro-union President” — And Union Members in Congress Are Optimistic*, CNBC (Dec. 2, 2020, 10:05 PM), <https://www.cnbc.com/2020/12/01/biden-promises-to-be-the-most-pro-union-president-and-rep.html> [https://perma.cc/48J3-VHTU].

<sup>116</sup> *See* Caroline Mims Nyce, *Is Biden the Most Pro-union President in History?*, THE ATLANTIC (Sept. 15, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/biden-railroad-labor-unions-deal-erik-loomis/671445> [https://perma.cc/R7HY-RE69].

<sup>117</sup> Remarks at a White House Labor Day Celebration, 2021 DAILY COMP. PRES. DOC. 1 (Sept. 8, 2021); *see also supra* notes 7–10 and accompanying text.

<sup>118</sup> Noam Scheiber, *Starbucks Workers at 3 More Buffalo-Area Stores Vote to Unionize*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/business/economy/starbucks-union-vote-buffalo.html> [https://perma.cc/Z2AW-FVRF].

<sup>119</sup> Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html> [https://perma.cc/D7QN-QVCR].

<sup>120</sup> Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here’s Why It’s Happening Now*, CNBC (May 7, 2022, 12:05 PM), <https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html> [https://perma.cc/NAC9-UWC7].

<sup>121</sup> *Id.*

trend of demanding better working conditions. Chapter III describes how this momentum in organizing can be used to protect workers against other unfair practices by their employers. We may be seeing the next major labor movement. While the last came in response to the inequalities and inhumanity of the Great Depression,<sup>122</sup> the next may come out of the structural inequalities and inhumanity laid bare by the COVID-19 pandemic.

#### F. Chapter Summaries

The following Chapters analyze five developments in labor and employment law in the United States. Chapter I describes a trend in American workers' attitudes toward work that was brought into sharp relief by the COVID-19 pandemic — a desire to attain better work-life balance.<sup>123</sup> American workers today experience poor work-life balance compared to workers in other countries. The high rates of resignation and union activity since the pandemic signal that workers are now demanding a better balance. The Chapter argues that a renewed attention to this issue could, and should, spur a federal response.

The Chapter opens by discussing the American conception of work-life balance, and why the prioritization of work over other life activities became part of the American cultural fabric. It continues by examining the two U.S. federal laws that regulate aspects of work-life balance: the FLSA and the FMLA, which the Chapter argues are inadequate to accommodate the needs of a modern workforce. Their histories show they were enacted to provide more protection and flexibility to the American worker, but they were based on what are now outdated conceptions of workforce participation, gender norms, and family structures. Their contents show that they set a “starkly limited baseline” of working hours and nonworking time.<sup>124</sup> And their structures show that their protections exclude large swaths of the working population. Their histories, contents, and structures all serve to disproportionately disadvantage women, single parents, those with disabilities, those in low-wage jobs, caretakers, and those who wish to engage with their communities.

Chapter I calls on the federal government to reenvision a modern American conception of work-life balance — to create a new expectation for the American worker that will allow workers time to also be parents, care for their families, and engage with their communities. The Chapter shows why the time to act is now. It examines five trends that have arisen because of the pandemic — caregiving, the Great Resignation, antiwork, the union boom, and quiet quitting — which

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<sup>122</sup> See *supra* notes 15–27 and accompanying text.

<sup>123</sup> The Chapter defines this balance as “the relationship between work and non-working time.” *Infra* ch. I, p. 1605 (quoting Clare Kelliher et al., *All of Work? All of Life? Reconceptualising Work-Life Balance for the 21st Century*, 29 HUM. RES. MGMT. J. 97, 97 (2019)).

<sup>124</sup> *Infra* ch. I, p. 1610.

show the consequences of an outdated employment law framework. The Chapter then examines state and local laws that have been passed because of this renewed attention. Specifically, lawmakers have moved to expand access to paid leave and to provide more predictable and fair schedules for workers. But, as the Chapter explains, these provisions only fill in the gaps left open by the FLSA and the FMLA. The federal government should respond to the concerns of millions of Americans and not only reform outdated federal laws to set a higher baseline for work-life balance but also reimagine what employers should expect of their workers, and what employees can expect out of their employment and out of their lives. Doing so will not only benefit the health and satisfaction of the American worker but also improve workplace productivity and strengthen our democracy.

Chapter II begins with a look at online gig platforms and their regulation by the Federal Trade Commission's (FTC) recent enforcement. As discussed, gig workers on online platforms have few protections in employment law. Against the landscape of a "regulatory vacuum,"<sup>125</sup> Chapter II envisions a path forward for gig workers: through the FTC. The FTC wields enforcement power in the areas of antitrust and consumer protection under the Federal Trade Commission,<sup>126</sup> Clayton,<sup>127</sup> and Sherman Acts.<sup>128</sup> While the FTC has not traditionally occupied a role that protects American workers, it has recently signaled its intent to regulate the online gig economy. Chapter II evaluates the promise and potential drawbacks of the FTC's entrance into this space. The Chapter concludes with a cautious but optimistic prescription — while this use of federal consumer protection laws will no doubt face scrutiny and practical challenges, the FTC's regulation of online gig platforms will improve the status quo for a population that enjoys few benefits and protections.

In order to assess the promise of the FTC's advance into regulating gig work, the Chapter places the FTC's policy announcement in its proper context. It begins with a brief history of gig work and a discussion of the industry's recent exponential growth. It explains the varying conceptions of gig platforms' utility — while some view the rise of online gig platforms as a move toward efficiency and flexibility for workers, others observe the darker side of the industry, in which these platforms take advantage of their workers through their unchecked control and ability to set poor working conditions. The Chapter continues by showing how and explaining why gig workers have few protections in labor and employment law. It then covers the FTC, detailing its origins; its development throughout the twentieth century; and its

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<sup>125</sup> *Infra* ch. II, p. 1629.

<sup>126</sup> 15 U.S.C. §§ 41–58.

<sup>127</sup> *Id.* §§ 12–27; 29 U.S.C. §§ 52–53.

<sup>128</sup> 15 U.S.C. §§ 1–7.

modern conception, authority, and enforcement powers. The Chapter concludes by evaluating the promise of the FTC's proposed actions. It covers what the FTC will be able to do in this space, given its authority. It discusses the limitations of this approach — specifically the legal, conceptual, and practical limitations of having the FTC regulate this industry to protect workers — and then surveys the substantive possibilities and structural benefits that the FTC brings to the table.

Chapter III looks at a specific mechanism that American employers are using to undercut worker protections — mandatory arbitration clauses in employment contracts. These clauses require employees to agree to resolve future disputes through binding arbitration, instead of in a courtroom. The Chapter highlights the evils of these clauses, particularly how the “claim-suppressive effects of forced arbitration have eliminated up to ninety-eight percent of all employment claims and virtually insulated employers from liability altogether.”<sup>129</sup> Those subject to mandatory arbitration clauses are effectively denied the vindication of their substantive rights. The proliferation of these clauses has led to the growth of a strategy to combat them — mass arbitration.<sup>130</sup> And while mass arbitration has been largely successful in winning settlements for workers and pressuring some employers to abandon mandatory arbitration clauses, the Chapter argues that the strategy does not go far enough in part because employers and arbitration companies are adapting and making changes to lessen its effectiveness. The Chapter proposes a novel strategy that takes aim at mandatory arbitration clauses: “mass organizing.”<sup>131</sup> The strategy involves leveraging litigation, workers-rights education and organization, and political organizing. By doing this, workers and plaintiff-side attorneys can continue to put pressure on employers and hold defendants accountable for violating their employees' rights.

Chapter III begins by discussing the claim-suppressive effects of mandatory arbitration clauses and class waivers. It explains the structural reasons why arbitration clauses have such devastating effects in the context of employment law and how they are acutely severe for low-wage workers, thereby disproportionately affecting female and Black workers. The Chapter describes the rise of mass arbitration as a response to mandatory arbitration clauses, and the limitations of this strategy. It then sketches out how mass arbitration could be taken a step further to facilitate long-term worker organizing. Chapter III concludes by discussing the benefits, ethical concerns, and legal challenges of the model.

A *Developments in the Law* issue on labor and employment in 2023 would be incomplete without a Chapter devoted to the effects of *Dobbs*

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<sup>129</sup> *Infra* ch. III, p. 1652.

<sup>130</sup> See J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022).

<sup>131</sup> *Infra* ch. III, p. 1653.

*v. Jackson Women's Health Organization* on the American workforce. Chapter IV deals with just that, through the lens of the corporate-employer response to the ruling. Following the leak of the *Dobbs* draft decision in 2022, many corporate employers responded by agreeing to cover the travel expenses of their employees who need to go to other states for access to reproductive care.<sup>132</sup> While many viewed this unprecedented commitment by employers as a welcome emergency solution, the move raises salient questions about the nature and role of corporations in American society: Should corporations be obligated to step in where our government does not? Can and should corporations act as arbiters of morality and checks on an out-of-touch Court? Are the realities and context of *Dobbs* and abortion access unique, such that dependence on this unlikely intervenor is justified? Or will corporations step in only when it helps their bottom lines? While the activist corporation is not a new phenomenon,<sup>133</sup> its implications were brought to the fore of the American consciousness when the extremely politically charged issue of abortion access became involved. Chapter IV examines the phenomenon in this context and concludes that this corporate action does not go far enough and that employees should not be forced to rely only on their employers for this protection.

The Chapter begins with a discussion of how access to reproductive health care affects who can work to begin with. It explains that a lack of abortion access disproportionately excludes from the workforce people of color and gender minorities who can get pregnant. Abortion access is an economic justice issue and thus “runs together with racial justice questions.”<sup>134</sup> The Chapter explains how access to reproductive care is directly correlated to fair employment opportunities. It also explains how current federal protections for pregnant workers are inadequate in providing equality to pregnant workers in practice. And with these populations already facing discrimination at all levels of society, what was never a level playing field is made even worse.

The Chapter continues by discussing the commitments made by corporate actors. It examines the incentives corporations have to provide reproductive health care and retain their employees who can get pregnant. It then dives into the legal and political consequences of ensuring abortion access, showing that these corporate “care packages” are not a reliable solution for employees. The Chapter concludes by proposing alternative ways of protecting workers through the state and federal governments. The issue of access to abortion is a polarizing one, and this Chapter confronts the questions of how it affects the American

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<sup>132</sup> Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [<https://perma.cc/GS4T-N6GM>].

<sup>133</sup> See Aaron K. Chatterji & Michael W. Toffel, *The New CEO Activists*, HARV. BUS. REV. Jan.–Feb. 2018, at 78, 89.

<sup>134</sup> *Infra* ch. IV, p. 1678.



worker, what the role of employers is in this debate, and how employment law can be used to remedy the resulting employment inequalities.

Finally, Chapter V looks beyond U.S. borders at incidents of forced labor internationally. The Chapter argues that the United States has a moral obligation to the victims of forced labor, as it is the world's largest economy and the largest importer of products that are at risk of being produced by forced labor. It surveys the current tools available to combat these human rights violations abroad, concluding that responses by the judicial, executive, and legislative branches all have downsides and are structurally inadequate to fully address the problem. Absent some larger intervention from the federal government, the retention of a private right of action in federal courts, and a more forceful commitment to enforcement across all three branches, the United States cannot fulfill its moral duty to victims of forced labor abroad.

Chapter V begins with an overview of the problem of forced labor around the world and sets out an argument for the moral obligation of the United States to address it. This practice forces twenty-seven million individuals worldwide to work in deplorable conditions.<sup>135</sup> And because the “demands and whims of American consumers” determine the fates of these workers, it is the moral, if not legal, duty of the United States to address the problem of forced labor.<sup>136</sup> The question is how. This Chapter helps answer that question by assessing the options available in the United States to accomplish the task. The Chapter details the avenues for relief that the United States offers individual victims of forced labor: the ability to bring civil cases in federal courts under the Alien Tort Statute<sup>137</sup> (ATS) or the Trafficking Victims Protection Reauthorization Act of 2003<sup>138</sup> (TVPRA). It explains that the door to relief through the courts is all but closed: the Supreme Court has narrowed the extraterritorial reach of the ATS, and the bar to prove a connection between the United States and an incident of forced labor under the TVPRA is very high. Additionally, a further limitation to the TVPRA's potency may be on the horizon, as some litigants have challenged the extraterritoriality of the statute.<sup>139</sup>

Against the backdrop of limited private pathways to judicial relief for victims of forced labor, the Chapter continues by surveying the potential public policy levers available to the legislative and executive branches — and their shortcomings. Chiefly, the executive branch is “captured by the greater overarching political goals of the state,” and any action aimed at remedying forced-labor practices will be contingent

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<sup>135</sup> U.S. DEP'T OF LAB., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR: REPORT TO CONGRESS 3 (2022).

<sup>136</sup> *Infra* ch. V, p. 1704.

<sup>137</sup> 28 U.S.C. § 1350.

<sup>138</sup> Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.).

<sup>139</sup> *Infra* ch. V, p. 1710 (citing *Doe I v. Apple Inc.*, No. 19-cv-03737, 2021 WL 5774224 (D.D.C. Nov. 2, 2021)).

upon American diplomatic and political priorities.<sup>140</sup> Thus, actions against forced labor become hollow and politically driven, which, the Chapter argues, limits what the United States can do. And while Congress can step in and do what the Executive will not, Congress has been reluctant to fill this role in recent years. The Chapter concludes with an assessment of what this landscape — the diminishing power of the judiciary and the hollow actions of the Executive — means for victims of forced labor around the world. The legislative and executive branches wield enormous power — but that power works only when they wish to use it.

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This year's edition of *Developments in the Law* explores just some of the many recent changes in the American workforce and the way we work. Through the lens of the law, the following Chapters show how the traditional employment law framework is outdated and unable to confront these changes. And, importantly, the legal framework fails to protect those whom it was meant to — the most vulnerable of our society. The Chapters also examine the consequences of a legal framework that conditions basic protections of individual dignity on employment. When certain vulnerable workers are excluded from legal protection, they are also excluded from this promise of dignity — the promise of dignity envisioned by Dr. King and President Roosevelt. However, we are emerging from a global pandemic that has made us rethink how we want to live our lives and, thus, how we want to work. American society is perhaps ready for significant reform and a return to dignity in labor.

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<sup>140</sup> *Infra* ch. V, p. 1721.

## CHAPTER ONE

### LEGISLATIVE MOMENTUM ON WORK-LIFE BALANCE

In July 2022, Zaid Khan posted a TikTok video<sup>1</sup> that quickly went viral.<sup>2</sup> In the video, he explains that he “recently learned about [the] term . . . ‘quiet quitting,’” which refers to “not outright quitting your job, but . . . quitting the idea of going above and beyond.”<sup>3</sup> “[Y]our worth as a person is not defined by your labor,” he concludes.<sup>4</sup> The video struck a chord, prompting a flurry of media coverage analyzing the phenomenon of quiet quitting and what it says about work culture and Generation Z.<sup>5</sup>

But quiet quitting is nothing new. On the contrary, as one commentator put it, “[w]hat the kids are now calling ‘quiet quitting’ was, in previous and simpler decades, simply known as ‘having a job.’”<sup>6</sup> Still, it was the newest in a series of viral work-related trends that have dominated the public discourse since the beginning of the COVID-19 pandemic. Before quiet quitting, there was also antiwork,<sup>7</sup> the Great Resignation,<sup>8</sup> a resurgence of union organizing,<sup>9</sup> and a lasting discussion of the challenges faced by workers with caretaking responsibilities.<sup>10</sup>

These trends are nebulous and multidimensional. Unlike an organized movement, the precise contours, complaints, or goals of viral messages are difficult to pin down, even when they coalesce around similar

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<sup>1</sup> Zaid Khan (@zaidleppelin), *On Quiet Quitting #workreform*, TIKTOK (July 25, 2022), <https://www.tiktok.com/@zaidleppelin/video/7124414185282391342> [<https://perma.cc/XU7X-BAFR>].

<sup>2</sup> Anuz Thapa, *How “Quiet Quitting” Became the Next Phase of the Great Resignation*, CNBC (Sept. 2, 2022, 5:06 PM), <https://www.cnbc.com/2022/09/02/how-quiet-quitting-became-the-next-phase-of-the-great-resignation.html> [<https://perma.cc/FU6T-4XYG>].

<sup>3</sup> Khan, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Perisha Kudhail, *Quiet Quitting: The Workplace Trend Taking over TikTok*, BBC (Aug. 31, 2022), <https://www.bbc.com/news/business-62638908> [<https://perma.cc/5JRE-34LZ>]; Derek Thompson, *Quiet Quitting Is a Fake Trend*, THE ATLANTIC (Sept. 16, 2022), <https://www.theatlantic.com/newsletters/archive/2022/09/quiet-quitting-trend-employee-disengagement/671436> [<https://perma.cc/F3VB-WYMT>].

<sup>6</sup> Thompson, *supra* note 5.

<sup>7</sup> Oliver Whang, *Hating Your Job Is Cool. But Is It a Labor Movement?*, N.Y. TIMES MAG. (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/magazine/antiwork-reddit.html> [<https://perma.cc/4H35-HU6W>].

<sup>8</sup> Hannah Grabenstein, *Why a Third of American Workers Changed Jobs During the Great Resignation*, PBS (Sept. 22, 2022, 12:00 PM), <https://www.pbs.org/newshour/economy/1-in-3-americans-who-switched-jobs-during-the-great-resignation-say-they-did-it-for-better-pay> [<https://perma.cc/TSF5-N3KM>].

<sup>9</sup> Weekend Edition Sunday, *The Pandemic Could Be Leading to a Golden Age for Unions*, NPR, at 00:45 (Oct. 17, 2021, 7:54 AM), <https://www.npr.org/2021/10/17/1046850192/the-pandemic-could-be-leading-to-a-golden-age-for-unions> [<https://perma.cc/A8QV-WARD>].

<sup>10</sup> Misty L. Heggeness & Jason M. Fields, *Parents Juggle Work and Child Care During Pandemic: Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Aug. 18, 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html> [<https://perma.cc/49PD-8LYX>].

themes. But one common thread that runs throughout all five trends suggests a heightened interest in restructuring American employment laws to achieve better work-life balance. Scholars and activists have repeatedly called for reforms with this objective in mind, yet the basic work-life framework in America has remained relatively constant — and effectively nonexistent — for nearly a century, despite dramatic social and technological changes during that period.<sup>11</sup> In recent years, some state and local policymakers have successfully passed laws that better support work-life balance.<sup>12</sup> The viral trends during the pandemic indicate that this effort is welcome and suggest that federal policymakers, too, should take seriously the call for baseline structures that empower workers to lead well-rounded lives.

This Chapter will explore the pandemic-era trends and some recent work-life policy developments. To that end, section A will provide background on what we might think of as the current work-life baseline at the federal level, as well as some of the critiques it has inspired. Section B will describe each of the recent trends and how they reflect a need to revise the basic work-life framework. Finally, section C will consider how state and local legislatures have responded to calls for better balance and will touch upon where we should go from here.

#### A. Foundations of Work-Life Balance

“Work-life balance” is not a legal phenomenon. It is more aptly characterized as a cultural, sociological, economic, and psychological issue. In general, work-life balance is “the relationship between work and non-working time.”<sup>13</sup> But it is difficult to define exactly how that balance is to be understood and measured.<sup>14</sup> For example, “good work-life balance” could be assessed subjectively (in terms of the individual worker’s impressions of their work-life balance) or absolutely (in terms of whether the worker’s time is balanced equally between work and nonwork activities).<sup>15</sup> Typically, though, the phrase is intended in the subjective sense, referring to individuals’ impressions of satisfaction, conflict, and/or autonomy regarding their work and nonwork roles,<sup>16</sup> which can be “linked” in a variety of ways.<sup>17</sup>

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<sup>11</sup> See *infra* section A, pp. 1605–13.

<sup>12</sup> See *infra* section C, pp. 1621–27.

<sup>13</sup> Clare Kelliher et al., *All of Work? All of Life? Reconceptualising Work-Life Balance for the 21st Century*, 29 HUMAN RESOURCES MANAGEMENT JOURNAL 97, 97 (2019).

<sup>14</sup> Natalie Reiter, *Work Life Balance: What DO You Mean?*, 43 JOURNAL OF APPLIED BEHAVIORAL SCIENCE 273, 274 (2007).

<sup>15</sup> See *id.* at 278 tbl.1.

<sup>16</sup> See Thomas Kalliath & Paula Brough, *Work-Life Balance: A Review of the Meaning of the Balance Construct*, 14 JOURNAL OF MANAGEMENT & ORGANIZATION 323, 324–25 (2008).

<sup>17</sup> Jeffrey R. Edwards & Nancy P. Rothbard, *Mechanisms Linking Work and Family: Clarifying the Relationship Between Work and Family Constructs*, 25 ACADÉMICA DE GESTÃO DE EMPRESAS 178, 178–79 (2000).

The subjective experience of work-life balance is heavily affected by nonlegal factors, like identity or market features. For example, parents are particularly likely to feel dissatisfied with their work-life balance,<sup>18</sup> people of different genders may experience work-life balance differently,<sup>19</sup> and younger generations of American workers value work-life balance more highly than older generations.<sup>20</sup> In the United States, race- and gender-based biases,<sup>21</sup> the precarity of work,<sup>22</sup> an insufficient social safety net,<sup>23</sup> and the relative lack of economic mobility<sup>24</sup> all motivate overworking in an attempt to achieve economic security — a drive that is perhaps enhanced by the famous “Protestant work ethic,” which holds that hard work is a moral good.<sup>25</sup>

Whether measured subjectively or objectively, poor work-life balance carries personal and collective risks. For example, studies suggest that there are both mental<sup>26</sup> and physical<sup>27</sup> health hazards that accompany overwork. Likewise, researchers have found that productivity suffers when employees work excessively long hours<sup>28</sup> — and that productivity is not necessarily lost when employers experiment with compressed or flexible schedules.<sup>29</sup> Overworked employees can also

<sup>18</sup> Jennifer Reid Keene & Jill Quadagno, *Predictors of Perceived Work-Family Balance: Gender Difference or Gender Similarity?*, 47 SOCIO. PERSPS. 1, 2–3 (2004).

<sup>19</sup> *Id.* at 3–5.

<sup>20</sup> E.g., Karen Holcombe Ehrhart et al., *Web-Based Recruitment in the Millennial Generation: Work-Life Balance, Website Usability, and Organizational Attraction*, 21 EUR. J. WORK & ORGANIZATIONAL PSYCH. 850, 853 (2012).

<sup>21</sup> Kimberly Seals Allers, *Rethinking Work-Life Balance for Women of Color*, SLATE (Mar. 5, 2018, 10:00 AM), <https://slate.com/human-interest/2018/03/for-women-of-color-work-life-balance-is-a-different-kind-of-problem.html> [<https://perma.cc/YPK8-EP4G>].

<sup>22</sup> JAMIE K. MCCALLUM, WORKED OVER: HOW ROUND-THE-CLOCK WORK IS KILLING THE AMERICAN DREAM 38–39 (2020).

<sup>23</sup> See, e.g., PAMELA LOPREST & DEMETRA NIGHTINGALE, URB. INST., THE NATURE OF WORK AND THE SOCIAL SAFETY NET 13–15 (2018); MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 225 (2020).

<sup>24</sup> Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398, 398 (2017).

<sup>25</sup> MCCALLUM, *supra* note 22, at 53–55; see also DEVON PRICE, LAZINESS DOES NOT EXIST 24 (2021).

<sup>26</sup> E.g., Michael R. Frone, *Work-Family Conflict and Employee Psychiatric Disorders: The National Comorbidity Survey*, 85 J. APPLIED PSYCH. 888, 888 (2000).

<sup>27</sup> Frank Pega et al., *Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-Related Burden of Disease and Injury*, 154 ENV'T INT'L 1, 13 (2021); Kelly D. Chandler, *Work-Family Conflict Is a Public Health Concern*, 2 PUB. HEALTH PRAC. 1, 1 (2021).

<sup>28</sup> Sarah Green Carmichael, *The Research Is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), <https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies> [<https://perma.cc/GP2T-LMEQ>].

<sup>29</sup> See Jose Maria Barrero et al., *Why Working from Home Will Stick* 4 (Becker Friedman Inst., Working Paper No. 2020–174, 2021), [https://bfi.uchicago.edu/wp-content/uploads/2020/12/BFI\\_](https://bfi.uchicago.edu/wp-content/uploads/2020/12/BFI_)

become prone to mistakes,<sup>30</sup> and researchers have shown that family<sup>31</sup> and community<sup>32</sup> life suffers when work-life balance is poor.

Responding to these concerns, many countries have sought to address work overload and work-life conflict through policy. Relative to those in the United States, workers in Europe spend fewer hours working<sup>33</sup> and enjoy greater paid leave.<sup>34</sup> Denmark, for example, touts the fact that Danish workers are entitled to five weeks of paid vacation each year and generally conduct their work within the confines of the official workweek, which is thirty-seven hours.<sup>35</sup> Other countries have experimented with policy interventions such as limiting work-related correspondence outside of working hours<sup>36</sup> and creating maximum hour caps for workweeks.<sup>37</sup> Perhaps unsurprisingly, then, workers in many of these countries enjoy better work-life balance than U.S. workers.<sup>38</sup>

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WP\_2020174.pdf [https://perma.cc/J8UC-AGW3]; Prithwiraj Choudhury et al., *Work-from-Anywhere: The Productivity Effects of Geographic Flexibility*, 42 STRATEGIC MGMT. J. 655, 655 (2021); see also Carmichael, *supra* note 28.

<sup>30</sup> E.g., Claire C. Caruso, *Negative Impacts of Shiftwork and Long Work Hours*, 39 REHAB. NURSING 16, 18 (2014).

<sup>31</sup> E.g., Erin L. Kelly et al., *Getting There from Here: Research on the Effects of Work-Family Initiatives on Work-Family Conflict and Business Outcomes*, 2 ACAD. MGMT. ANNALS 305, 320 (2008); Emily Fitzgibbons Shafer et al., *Partners' Overwork and Individuals' Wellbeing and Experienced Relationship Quality*, 21 CMTY., WORK & FAM. 410, 410 (2018).

<sup>32</sup> See Claire C. Caruso, *Possible Broad Impacts of Long Work Hours*, 44 INDUS. HEALTH 531, 533–34 (2006); Anna North, *Long Hours Make Bad Neighbors*, VOX (Dec. 3, 2021, 11:00 AM), https://www.vox.com/the-goods/22810409/work-hours-loneliness-volunteering-overwork-community [https://perma.cc/3NM4-D4NL] (“Part of being a member of a community is coordinating your time with others,” Daniel Schneider, a professor of public policy at the Harvard Kennedy School, told Vox. With the rise of precarious and unpredictable work in today’s economy, many people simply can’t do that.”).

<sup>33</sup> Alexander Bick et al., *Hours Worked in Europe and the United States: New Data, New Answers*, 121 SCANDINAVIAN J. ECON. 1381, 1381 (2019).

<sup>34</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave [https://perma.cc/R8FL-UJL7].

<sup>35</sup> *Work-Life Balance*, MINISTRY FOREIGN AFFS. DEN., https://denmark.dk/society-and-business/work-life-balance [https://perma.cc/RH8X-BFMR]. Despite this relatively shorter week and longer vacation time, though, Danes are apparently more productive than American workers. ORG. FOR ECON. COOP. & DEV. [OECD], OECD COMPENDIUM OF PRODUCTIVITY INDICATORS 2021: CROSS-COUNTRY COMPARISONS OF LABOUR PRODUCTIVITY LEVELS 7 (2021).

<sup>36</sup> See Melody Burke, *The Right to Disconnect: Emerging Issues and Ways to Overcome Them*, ONLABOR (Mar. 30, 2022), https://onlabor.org/the-right-to-disconnect-emerging-issues-and-ways-to-overcome-them [https://perma.cc/M75S-A99T].

<sup>37</sup> MCCALLUM, *supra* note 22, at 10 (“More than one hundred countries have a legally mandated maximum length of the workweek — [but] not the United States.”).

<sup>38</sup> The OECD Better Life Index measures “work-life balance” based on indicators of daily time “devoted to leisure and personal care” and the proportion of employees “working very long hours.” *Work-Life Balance*, OECD BETTER LIFE INDEX, https://www.oecdbetterlifeindex.org/topics/work-life-balance [https://perma.cc/Q4BP-HG5X]; see also Kristen Doerer, *U.S. Has a Lousy Work-Life Balance*, PBS (July 3, 2015, 5:38 PM), https://www.pbs.org/newshour/economy/u-s-lousy-work-life-balance [https://perma.cc/A54J-4ESL] (“While the U.S. ranks high in housing, income and wealth, it ranks abysmally low on work-life balance — 29th among the 36 advanced nations surveyed.”).

This Chapter is not a comparative legal analysis, but these other countries' successes illustrate how the law can help establish better work-life balance by defining baseline norms.<sup>39</sup> Labor and employment law may not be able to fully address all of the features that bear upon workers' subjective experiences of balance, but it serves an important signaling or expressive function,<sup>40</sup> which can gradually effect social change.<sup>41</sup> Thus, revising federal law to give workers more autonomy over their time could move the country toward better work-life balance.

*I. America's (Austere) Work-Life Legal Framework? —* Two U.S. federal laws stand out as prime candidates for reform: the Fair Labor Standards Act of 1938<sup>42</sup> (FLSA) and the Family and Medical Leave Act of 1993<sup>43</sup> (FMLA). Layered on top of these laws are numerous regulations as well as state, local, and private policies, but these two laws provide a useful entry point into what might be considered the baseline national expectations around working and nonworking time.

The FLSA is the federal wage-and-hour law. It sets the federal hourly minimum wage (originally \$0.25<sup>44</sup> and currently \$7.25<sup>45</sup>) and regulates overtime work for covered employees.<sup>46</sup> Once an employee covered by the Act — a nonexempt worker — hits forty hours of work within the designated one-week period, they must be compensated at a rate of pay that is at least 1.5 times their regular rate.<sup>47</sup> Importantly, the FLSA does not set minimum or maximum total working hours,<sup>48</sup> and it carves out a variety of exceptions for agricultural workers, executive and professional workers, and others.<sup>49</sup> These exempt workers do not benefit from the FLSA's time-and-one-half pay provisions.

Alongside the FLSA's basic wage-and-hour framework, the FMLA establishes a job-protected leave program.<sup>50</sup> Generally, the FMLA provides qualifying workers with up to twelve weeks of unpaid leave a year

<sup>39</sup> See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2722–25 (2008), for a discussion of how employment law can serve to set workers' expectations about whether certain workplace norms are just or problematic.

<sup>40</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

<sup>41</sup> See generally Michael Waldman et al., *How Does Legal Change Happen? Perspectives from the Academy*, in LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 143–55 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (indicating how legal efforts can facilitate social change).

<sup>42</sup> 29 U.S.C. §§ 201–219.

<sup>43</sup> *Id.* §§ 2601–2654.

<sup>44</sup> GERALD MAYER, BENJAMIN COLLINS & DAVID H. BRADLEY, CONG. RSCH. SERV., R42713, *THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW I* (2013).

<sup>45</sup> 29 U.S.C. § 206(a)(1).

<sup>46</sup> *Id.* § 207(a)(1).

<sup>47</sup> *Id.*

<sup>48</sup> Charlotte Alexander et al., *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 5 (2015); *Overtime Pay*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/overtime> [https://perma.cc/BEY8-UY9H].

<sup>49</sup> 29 U.S.C. § 213(a).

<sup>50</sup> See *id.* § 2612.

for purposes of caring for a newborn, foster, or adopted child, or for caring for themselves or a family member with a “serious health condition.”<sup>51</sup> To be eligible for FMLA leave, an employee must have worked for their employer for at least twelve months and at least 1,250 hours during the prior twelve-month period;<sup>52</sup> the Act applies only to employers of a certain size.<sup>53</sup>

Both the FMLA and the FLSA were motivated at least in part by work-life balance concerns. The FLSA was signed into law on June 25, 1938<sup>54</sup> following decades of labor organizing related to minimum-wage and maximum-hour paradigms. Throughout the 1800s, workers had advocated to shorten the standard workday from ten or more hours to eight.<sup>55</sup> The year 1886, in particular, saw over a thousand strikes and lockouts — involving hundreds of thousands of workers — directed toward that end.<sup>56</sup> The eight-hour movement professed the slogan “[e]ight hours for work, eight hours for rest, and eight hours for what we will,”<sup>57</sup> reflecting an “enduring and cherished dream of the American labor movement”<sup>58</sup> to endow workers with more time off for leisure, family, and community activities.<sup>59</sup> After gradually adopting eight-hour day policies for federal employees and then for various industries,<sup>60</sup> Congress eventually passed the FLSA at the tail end of the Great Depression.<sup>61</sup> The law aimed to address unemployment by spreading work over a greater number of workers, while also better protecting employees’ access to leisure time.<sup>62</sup>

The FMLA was adopted over fifty years after the FLSA in an effort to ensure that American workers would “no longer have to choose between the job they need and the family they love.”<sup>63</sup> The Women’s

<sup>51</sup> See *id.* § 2612(a)(1).

<sup>52</sup> See *id.* § 2611(2)(A).

<sup>53</sup> See *id.* § 2611(2)(B)(ii). For a more detailed discussion of the FMLA’s eligibility requirements and benefits, see Juan C. Flores, Comment, *12 Months, 12 Weeks, 1250 Hours, 75 Miles, and 50 Employees: Why the Numbers of the FMLA Don’t Add Up for New Parents of Color and Low-Wage Workers*, 54 U.S.F. L. REV. 313, 317–18 (2020).

<sup>54</sup> Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> [<https://perma.cc/3VH8-65VW>].

<sup>55</sup> Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 11 (2001).

<sup>56</sup> *Id.* at 12.

<sup>57</sup> Michael J. Goldberg, *Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law, 1882–1935*, 15 LAB. LAW. 93, 119 n.147 (1999).

<sup>58</sup> *Id.* at 119–20.

<sup>59</sup> Matthew Dimick, *Better than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473, 482–83 (2017).

<sup>60</sup> Miller, *supra* note 55, at 15–16.

<sup>61</sup> Grossman, *supra* note 54.

<sup>62</sup> Dimick, *supra* note 59, at 483.

<sup>63</sup> Statement on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 50, 50 (Feb. 5, 1993) (statement of President William J. Clinton); see also Kelly McDonald Garrison et al.



Legal Defense Fund, now the National Partnership for Women and Families, drafted the legislation that would eventually become the FMLA in 1984, and spent the next nine years advocating for its passage.<sup>64</sup> As “the first time that the United States federal government acknowledged and attempted to promote ‘work-family policy’ through legislation,”<sup>65</sup> the law sought to alleviate work-family conflict,<sup>66</sup> which had become particularly visible following rapid increases in workforce participation by women.<sup>67</sup>

Combined, the two laws set a starkly limited baseline regarding working time and time off from work. Under the FLSA, there is ultimately neither a cap nor a minimum on the number of hours that an employer may require, nor are there substantial limitations on how employers can manage employees’ schedules. This lack of regulation has led to a proliferation of “just-in-time” scheduling practices that impose unpredictability and other burdens on workers.<sup>68</sup> Furthermore, a significant fraction of the workforce is exempt from FLSA coverage.<sup>69</sup> And because the FMLA guarantees only unpaid leave — and guarantees it

eds., *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 338 (2020) (quoting Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22).

<sup>64</sup> *History of the FMLA*, NAT’L P’SHIP FOR WOMEN & FAMS., <https://www.nationalpartnership.org/our-work/economic-justice/family-medical-leave-act/history-of-the-fmla.html> [<https://perma.cc/9XKD-QT7E>].

<sup>65</sup> Garrison et al., *supra* note 63, at 338.

<sup>66</sup> DONNA R. LENHOFF & LISSA BELL, NAT’L P’SHIP FOR WOMEN & FAMS., GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 1–2.

<sup>67</sup> See Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States’ Failure to Ameliorate the Work-Family Conflict Is a Dereliction of the Government’s Basic Responsibilities*, 88 N.C. L. REV. 1593, 1597 (2010). One hundred years ago, women participated in the paid labor force at a rate of only about twenty percent. Carol Boyd Leon, *The Life of American Workers in 1915*, BUREAU LAB. STAT. (Feb. 2016), <https://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm> [<https://perma.cc/H6Y2-H5DZ>]. Married women generally did not participate in the paid workforce, although workforce participation for married women varied by race; for example, Black women were twice as likely as white women to continue working after marriage. Janet L. Yellen, *The History of Women’s Work and Wages and How It Has Created Success for Us All*, BROOKINGS INST. (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all> [<https://perma.cc/PCA2-293W>]. “The participation rate for prime working-age women peaked in the late 1990s and currently stands at about 76 percent.” *Id.*

<sup>68</sup> Alexander et al., *supra* note 48, at 4–5 (“Though the FLSA guarantees a minimum wage for all hours worked and requires overtime pay for more than forty work hours per week, it does not establish minimum hours requirements or regulate employers’ scheduling practices.” *Id.* at 5.); see also Sara Sternberg Greene, *Working to Fail*, 27 DUKE J. GENDER L. & POL’Y 167, 172 (2020).

<sup>69</sup> The increase in the proportion of the workforce engaged in “white-collar” occupations over recent decades, see Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LAB. REV., Mar. 2006, at 37, means that the FLSA’s “executive, administrative, and professional employee” exception is “now relevant for a considerably higher share of the workforce” than originally anticipated, DAVID H. BRADLEY, CONG. RSCH. SERV., R45007, OVERTIME EXEMPTIONS IN THE FAIR LABOR STANDARDS ACT FOR EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES 3 (2017).

only for qualifying health and caretaking purposes — there is no presumption of compensated leave time. In short, to the extent that the United States has a vision for work-life balance at all, it is quite spartan.

2. *Existing Critiques and Changing Times.* — Commentators have long identified assumptions embedded in this rather minimalist work-life structure that are based on outdated patterns of workforce participation and family structure. These entrenched patterns systematically disadvantage certain categories of workers — including women, single parents, individuals with disabilities, and low-wage workers — and make it difficult for today’s workforce to participate in non-market-work activities like caretaking or civic and community engagement.

One recurring critique is that American workplaces assume a certain “ideal worker.” For much of the twentieth century, most families were structured such that a man could work for pay while his wife provided hours of unpaid homemaking labor, which served to preserve her husband’s time for work.<sup>70</sup> A gendered “ideal worker” assumption resulted in the emergence of what Professor Michelle Travis has called the “full-time face-time norm,” meaning a “judicial presumption that work itself is defined by very long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace.”<sup>71</sup> The norm historically disadvantaged women and people with disabilities, whose needs and socially defined responsibilities may make it difficult to be present in a centralized workplace for long hours.<sup>72</sup>

This expectation is at odds with the realities of today’s workforce. Starting with the economic boom after the Second World War and continuing through social movements promoting equal opportunity, labor force participation among women increased dramatically<sup>73</sup> and the typical household structure shifted. In 1940, two years after the passage of the FLSA, over seventy-five percent of households were structured around a married couple, compared to only forty-eight percent in 2010.<sup>74</sup> The percentage of single-parent households has more than doubled, and the percentage of single-person households has more than tripled.<sup>75</sup> High rates of single-parent and single-person households mean that many more workers today are simultaneously responsible for household and caretaking duties that historically might have been handled by a “homemaker” partner.

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<sup>70</sup> Eichner, *supra* note 67, at 1596.

<sup>71</sup> Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL’Y 203, 204 (2021).

<sup>72</sup> *Id.*

<sup>73</sup> See Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV., May 2002, at 18. Women also now make up a significant percentage of lawyers, doctors, professors, and managers, professions in which they were historically underrepresented. Yellen, *supra* note 67.

<sup>74</sup> See LINDA A. JACOBSEN ET AL., POPULATION REFERENCE BUREAU, HOUSEHOLD CHANGE IN THE UNITED STATES 3 (2012).

<sup>75</sup> *See id.*

In addition, despite the FLSA's introduction of a "standard" work-week, the decades since its passage have witnessed a bifurcation in working hours. In the United States, the proportion of workers in professional, managerial, and service occupations has risen, with a simultaneous drop-off in the proportion of laborers.<sup>76</sup> For "exempt" white-collar professionals, working hours have increased,<sup>77</sup> giving rise to complaints of "[o]verwhelming workloads."<sup>78</sup> These employees "tend to have especially long hours" because those "[e]xtra hours are essentially free to the employer."<sup>79</sup> Exempt employees' workloads have also been exacerbated by the advent of technology like email and smartphones, which have contributed to the evolution of an "always on" culture.<sup>80</sup>

For nonexempt workers, the opposite problem increasingly exists: many people are unable to obtain the number of hours of work (and the concomitant income) that they desire.<sup>81</sup> The number of part-time workers — a group dominated by women — has been increasing for years,<sup>82</sup> and these workers experience a dual penalty of lower wages and fewer benefits when compared to equivalent full-time employees.<sup>83</sup> Involuntary part-time work is imposed particularly frequently on people of color,<sup>84</sup> who are also disproportionately subject to unpredictable work schedules<sup>85</sup> that make planning for non-paid-work activities surpassingly difficult.<sup>86</sup> Finally, technological advancement means that many workers face some amount of threat of displacement via automation.<sup>87</sup>

Taking time away from work has also become more difficult. Since the 1970s, employers have decreased paid leave benefits.<sup>88</sup> At the same time, the minimum wage has fallen increasingly out of step with rising inflation and cost of living. Real wages of those at the bottom of the income distribution have been stagnant for the last forty years, even

<sup>76</sup> Wyatt & Hecker, *supra* note 69, at 37.

<sup>77</sup> Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHL-KENT L. REV. 157, 157 (1994).

<sup>78</sup> Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 51 (2014).

<sup>79</sup> Schor, *supra* note 77, at 170.

<sup>80</sup> See Matthew Kitchen, *How to Disconnect from 'Always On' Work Culture*, WALL ST. J. (Oct. 5, 2018, 7:49 AM), <https://www.wsj.com/articles/how-to-disconnect-from-always-on-work-culture-1538740171> [<https://perma.cc/54DL-6BFB>].

<sup>81</sup> See Ruan & Reichman, *supra* note 78, at 51.

<sup>82</sup> *Id.* at 35–36, 49, 53.

<sup>83</sup> LONNIE GOLDEN, ECON. POL'Y INST., PART-TIME WORKERS PAY A BIG-TIME PENALTY 1 (2020).

<sup>84</sup> LONNIE GOLDEN & JAESEUNG KIM, CTR. FOR L. & SOC. POL'Y, THE INVOLUNTARY PART-TIME WORK AND UNDEREMPLOYMENT PROBLEM IN THE U.S. 17 tbl.1, 20 (2020).

<sup>85</sup> DANIEL SCHNEIDER & KRISTEN HARKNETT, IT'S ABOUT TIME: HOW WORK SCHEDULE INSTABILITY MATTERS FOR WORKERS, FAMILIES, AND RACIAL INEQUALITY 2–4 (2019).

<sup>86</sup> Ruan & Reichman, *supra* note 78, at 38–39.

<sup>87</sup> See generally Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254 (2018).

<sup>88</sup> See, e.g., MCCALLUM, *supra* note 22, at 34.

while those at the top have seen notable gains.<sup>89</sup> Among low-wage employees, Black and Latino workers as well as women are overrepresented relative to their respective shares of the total workforce.<sup>90</sup>

The inadequacy of the minimum wage and the lack of a “minimum hour guarantee” mean that many lower-income workers cannot take advantage of the leave time established by the FMLA, which is unpaid.<sup>91</sup> Further, the FMLA’s qualifying factors serve to exclude many poor women and women of color, who are more likely to work for smaller employers or to experience work disruptions that might disqualify them from coverage.<sup>92</sup> For those who do qualify, the FMLA is a constrained benefit that typically does not extend to the everyday challenges of caretaking.<sup>93</sup>

In sum, Congress adopted what we might think of as our foundational law related to work-life balance in 1938, and little has changed about the basic structure of that law. Yet in the nearly ninety years that have passed since then, the American workforce and economic landscape have changed dramatically. Accordingly, scholars and advocates have raised recurring concerns about excessive,<sup>94</sup> insufficient,<sup>95</sup> and unpredictable<sup>96</sup> working hours and lack of access to leave time.<sup>97</sup> These issues make it difficult for many workers today to accommodate non-work civic, community, and caretaking responsibilities, leaving one to wonder whether there is a larger role for law to play in supporting work-life balance.

### B. Trends of the Pandemic Era

Against this backdrop, it is perhaps unsurprising that the challenges of the COVID-19 pandemic motivated extensive discussion of American work-life norms. Though by no means an exhaustive survey of employment- and labor-related topics of conversation during the pandemic, this section identifies five trends that stand out for the

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<sup>89</sup> SARAH A. DONOVAN & DAVID H. BRADLEY, CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2019, at 2 (2020); see also Juliana Menasce Horowitz et al., *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer than Half Call It a Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality> [<https://perma.cc/UMF7-293W>].

<sup>90</sup> MARTHA ROSS & NICOLE BATEMAN, BROOKINGS METRO. POL’Y PROGRAM, MEET THE LOW-WAGE WORKFORCE 9 (2019).

<sup>91</sup> Garrison et al., *supra* note 63, at 354.

<sup>92</sup> *Id.* at 355.

<sup>93</sup> See *supra* notes 50–53 and accompanying text.

<sup>94</sup> E.g., Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1939–40 (1999) (arguing that “rising work hours have created ‘role overload,’” *id.* at 1939, that has gone unaddressed thanks to policymakers inaccurately viewing “home” and “work” as “separate spheres,” *id.* at 1898).

<sup>95</sup> See, e.g., MCCALLUM, *supra* note 22, at 40–41.

<sup>96</sup> E.g., Ruan & Reichman, *supra* note 78, at 38–39.

<sup>97</sup> E.g., Jennifer Bennett Shinall, Essay, *Paid Sick Leave’s Payoff*, 75 VAND. L. REV. 1879, 1881–82 (2022).

impressions they made in popular media. Concerns about work-life balance seem to animate all five trends.

*I. Caregiving.* — Over the past three years, there has been widespread reporting on the stresses of caregiving for children during the pandemic.<sup>98</sup> When pandemic shutdowns commenced in March 2020, students were sent home from school en masse and childcare options contracted.<sup>99</sup> Even once they reopened, schools and childcare services were prone to frequent disruptions as various COVID-19 surges required closures and shifts to remote formats.<sup>100</sup> And COVID-19 vaccinations for young children were slow to become available, requiring families with small kids to exercise special caution for longer than those without small kids.<sup>101</sup>

By the end of the first two years of the pandemic, two-thirds of working parents had “parental burnout,” meaning that their ability to function had been reduced by chronic stress and exhaustion.<sup>102</sup> In fact, by January 2022, parents were at least as stressed as they had been at the beginning of the pandemic.<sup>103</sup> Thanks to the many challenges of pandemic parenting — “exhaustion from the competing pressures of working from home and juggling childcare responsibilities, struggles

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<sup>98</sup> This section focuses on caregiving related to children, but elder care is also an important facet of the caregiving crisis. “Most older Americans who need help with the so-called activities of daily living . . . rely on unpaid family caregivers.” Paula Span, *Family Caregivers Feel the Pandemic’s Weight*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/05/21/health/coronavirus-home-caregivers-elderly.html> [<https://perma.cc/2A4D-RXJN>]; see also Jesse Archer et al., *Caregiving in Quarantine: Evaluating the Impact of the Covid-19 Pandemic on Adult Child Informal Caregivers of a Parent*, 7 GERONTOLOGY & GERIATRIC MED. 1, 1 (2021). About one in five Americans provides care to an adult with “health or functional needs,” and the percentage of people caring for someone with Alzheimer’s disease or dementia has increased in recent years. NAT’L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 4–5 (2020), <https://www.caregiving.org/research/caregiving-in-the-us/caregiving-in-the-us-2020> [<https://perma.cc/MGL4-4NM2>].

<sup>99</sup> See Laura Santhanam, “*This Is Not Working.*” *Parents Juggling Jobs and Child Care Under COVID-19 See No Good Solutions*, PBS (July 23, 2020, 4:15 PM), <https://www.pbs.org/news-hour/health/this-is-not-working-parents-juggling-jobs-and-child-care-under-covid-19-see-no-good-solutions> [<https://perma.cc/HXS7-D9QH>].

<sup>100</sup> Jennifer Liu, “*People Are Feeling the Pain*”: *Parents Struggle with School Reopenings, Closures as Covid Spikes*, CNBC (Jan. 7, 2022, 1:46 PM), <https://www.cnbc.com/2022/01/07/working-parents-struggle-with-school-rules-closures-while-covid-rages.html> [<https://perma.cc/V94V-TXLF>]; Anya Kamenetz, *Parents and Caregivers of Young Children Say They’ve Hit Pandemic Rock Bottom*, NPR (Jan. 20, 2022, 9:47 AM), <https://www.npr.org/2022/01/20/1074182352/unvaccinated-young-kids-child-care-parents-omicron-disruptions> [<https://perma.cc/F3RP-8BEF>].

<sup>101</sup> Alison Green, *Your Co-workers with Kids Are Not OK*, SLATE (Feb. 14, 2022, 5:50 AM), <https://slate.com/human-interest/2022/02/working-kids-pandemic-stress-mothers-struggling.html> [<https://perma.cc/Z23V-TCMB>].

<sup>102</sup> Wyatt Grantham-Philips, “*Overwhelming*” *Exhaustion: COVID Leaves 66% of Working Parents Burnt Out, Study Suggests*, USA TODAY (May 7, 2022, 5:02 PM), <https://www.usatoday.com/story/life/health-wellness/2022/05/07/covid-19-pandemic-parents-burnout/9688676002> [<https://perma.cc/3JQT-EDKU>].

<sup>103</sup> Melinda Wenner Moyer, *Latest COVID Surge Pushes Parents to Next-Level Stress*, SCI. AM. (Jan. 19, 2022), <https://www.scientificamerican.com/article/latest-covid-surge-pushes-parents-to-next-level-stress1> [<https://perma.cc/SCH7-P74E>].

with returning to the office but not finding consistent childcare, and reevaluating their overall work-life balance” — parents were also more likely than nonparents to quit their jobs.<sup>104</sup> Such negative effects were widespread, as parents of children under the age of eighteen make up one-third of the American workforce.<sup>105</sup>

These stringent childcare burdens disproportionately impacted certain demographic groups.<sup>106</sup> Women and people of color head most single-parent households,<sup>107</sup> so they experience the unique challenge of single-handedly providing both financial support and daily care to children more frequently than white men. In two-parent households where both parents worked, mothers in heterosexual relationships tended to take on more childcare responsibilities throughout the pandemic.<sup>108</sup> And when schools reopened in September 2020, a much higher number of women than men dropped out of the workforce.<sup>109</sup> Though these patterns in caretaking have long existed,<sup>110</sup> the pandemic threw them once again into sharp relief.

2. *The Great Resignation.* — A little over a year into the pandemic, a second major work-related trend hit the headlines. Coined in May 2021 by Professor Anthony Klotz of Texas A&M University’s Mays Business School,<sup>111</sup> the term “Great Resignation” refers to the uncommonly high rates of workers quitting their jobs observed beginning in

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<sup>104</sup> Aaron De Smet et al., *Married to the Job No More: Craving Flexibility, Parents Are Quitting to Get It*, MCKINSEY & CO. (Dec. 3, 2021), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/married-to-the-job-no-more-craving-flexibility-parents-are-quitting-to-get-it> [https://perma.cc/UCP8-H36T].

<sup>105</sup> Santhanam, *supra* note 99.

<sup>106</sup> Anya Kamenetz, *The Help that Never Came*, THE ATLANTIC (Aug. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/covid-parenting-mom-dad-divide-work/671188> [https://perma.cc/HBC6-SS3E].

<sup>107</sup> See Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents> [https://perma.cc/DV2P-NYSM]. The most recent census statistics show that women head eighty percent of one-parent households. Press Release, U.S. Census Bureau, Census Bureau Releases New Estimates on America’s Families and Living Arrangements (Nov. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/americas-families-and-living-arrangements.html> [https://perma.cc/2L5P-STLR].

<sup>108</sup> Moyer, *supra* note 103; see Katherine Schaeffer, *Working Moms in the U.S. Have Faced Challenges on Multiple Fronts During the Pandemic*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/fact-tank/2022/05/06/working-moms-in-the-u-s-have-faced-challenges-on-multiple-fronts-during-the-pandemic> [https://perma.cc/9FV5-9YVM]; Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html> [https://perma.cc/G8UY-5VMM].

<sup>109</sup> Soo Youn, *Quitting Was Her Only Option. She Is One of 865,000 Women to Leave the Workforce Last Month*, THE LILY (Oct. 7, 2020), <https://www.thelily.com/quitting-was-her-only-option-she-is-one-of-865000-women-to-leave-the-workforce-last-month> [https://perma.cc/FS6M-BTCJ].

<sup>110</sup> E.g., LEILA SCHOCHET, CTR. FOR AM. PROGRESS, THE CHILD CARE CRISIS IS KEEPING WOMEN OUT OF THE WORKFORCE 1–2 (2019).

<sup>111</sup> Whang, *supra* note 7.

early 2021.<sup>112</sup> Over the course of that year, more than 40 million people left their jobs,<sup>113</sup> with the number of quits in a month hitting a twenty-year high of 4.5 million during November 2021.<sup>114</sup> Though some of these workers did not return to the workforce — for example, due to retirement — many simply switched jobs, often in response to offers of higher pay or better benefits.<sup>115</sup> Resignations were particularly high in the hospitality, professional services, and retail industries.<sup>116</sup>

To be fair, these resignation trends were not entirely new. Even before the pandemic began, there had been increasing rates of quitting and retirement.<sup>117</sup> But Klotz believes that the pandemic brought about significant and fundamental changes in people's expectations about work.<sup>118</sup> The proliferation of remote work as well as experimentation with flexible working hours and four-day workweeks gave workers "more flexibility and control over [their] lives, and more autonomy and freedom."<sup>119</sup> Experiencing these freedoms may have made workers hesitant to return to more restricted and traditional work environments.

3. *Antiwork*. — Concurrent with the Great Resignation, there was also widespread discussion of the concept of "antiwork." Prior to the pandemic lockdowns, the r/antiwork subreddit — a topic page on the social media platform Reddit — had approximately 100,000 followers.<sup>120</sup> Today, the subreddit has over 2.4 million subscribers; the majority subscribed during a period of rapid growth in engagement and

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<sup>112</sup> Amy Fontinelle, *What Is the Great Resignation? Causes, Statistics, and Trends*, INVESTOPEDIA (Nov. 30, 2022), <https://www.investopedia.com/the-great-resignation-5199074> [<https://perma.cc/C3J4-FV4B>].

<sup>113</sup> Emma Goldberg, *All of Those Quitters? They're at Work.*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/business/great-resignation-jobs.html> [<https://perma.cc/VX2A-67WF>].

<sup>114</sup> *Number of Quits at All-Time High in November 2021*, BUREAU LAB. STAT. (Jan. 6, 2022), <https://www.bls.gov/opub/ted/2022/number-of-quits-at-all-time-high-in-november-2021.htm> [<https://perma.cc/PYN3-PMXE>].

<sup>115</sup> Goldberg, *supra* note 113; Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected> [<https://perma.cc/4CB7-G5EX>].

<sup>116</sup> *Job Openings and Labor Turnover — March 2022*, BUREAU LAB. STAT., at tbl.4 (May 3, 2022, 10:00 AM), [https://www.bls.gov/news.release/archives/jolts\\_o5032022.pdf](https://www.bls.gov/news.release/archives/jolts_o5032022.pdf) [<https://perma.cc/A2W5-GXJL>].

<sup>117</sup> Kate Morgan, *Why Workers Just Won't Stop Quitting*, BBC (Aug. 18, 2022), <https://www.bbc.com/worklife/article/20220817-why-workers-just-wont-stop-quitting> [<https://perma.cc/F9LS-Z53Z>].

<sup>118</sup> See Michelle Fox, *The Great Resignation Has Changed the Workplace for Good. "We're Not Going Back," Says the Expert Who Coined the Term*, CNBC (May 10, 2022, 2:20 PM), <https://www.cnbc.com/2022/05/10/the-great-resignation-has-changed-the-workplace-for-good.html> [<https://perma.cc/DT5U-N44N>].

<sup>119</sup> *Id.*

<sup>120</sup> Brian O'Connor, *The Rise of the Anti-work Movement*, BBC (Jan. 27, 2022), <https://www.bbc.com/worklife/article/20220126-the-rise-of-the-anti-work-movement> [<https://perma.cc/VA7Q-RHKD>].

coverage in 2021.<sup>121</sup> Some of these subscribers may have been attracted to the forum as a source of solidarity and support in dealing with abusive employers: the subreddit famously features posts of screenshotted conversations between employees and their bosses in which the supervisors make aggressive and insensitive demands of their employees.<sup>122</sup>

But the subreddit is more than an opportunity to complain about poor treatment in the workplace. Created in 2013, the subreddit describes itself as being for “for those who want to end work, are curious about ending work, want to get the most out of a work-free life, want more information on anti-work ideas and want personal help with their own jobs/work-related struggles.”<sup>123</sup> With a tagline of “Unemployment for all, not just the rich!,” the subreddit is also a gathering place for discussion of socialist and anarchist critiques of capitalism.<sup>124</sup> Its library lists Bob Black’s *The Abolition of Work*, David Graeber’s *On the Phenomenon of Bullshit Jobs*, and Bertrand Russell’s *In Praise of Idleness* as “Essential Reads,”<sup>125</sup> indicating the community’s interest in a more fundamental restructuring of work.<sup>126</sup>

4. *Union Boom.* — In 2019, only about one in ten employed Americans was a member of a union.<sup>127</sup> But on the eve of the 2020 election, then-candidate Joe Biden promised to be “the most pro-union president you’ve ever seen.”<sup>128</sup> Although his Administration has since

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<sup>121</sup> *R/Antiwork Stats*, SUBREDDIT STATS, <https://subredditstats.com/r/antiwork> [<https://perma.cc/4SEL-S79T>].

<sup>122</sup> See Brenna Ehrlich, *Do These Viral Stories About Shitty Bosses Signal an Anti-work Revolution?*, ROLLING STONE (Oct. 20, 2021), <https://www.rollingstone.com/culture/culture-news/anti-work-subreddit-1244507> [<https://perma.cc/P4X7-FR6P>]. One post, for example, shows an exchange in which a boss tells their employee to “[s]top being a victim” after the worker requests to take a scheduled day off to mourn the death of a parent. Whang, *supra* note 7.

<sup>123</sup> *R/Antiwork: Unemployment for All, Not Just the Rich!*, REDDIT, <https://www.reddit.com/r/antiwork> [<https://perma.cc/92U3-MAPN>].

<sup>124</sup> *Id.*; O’Connor, *supra* note 120.

<sup>125</sup> *The Anti-work Library*, REDDIT, <https://www.reddit.com/r/antiwork/wiki/library> [<https://perma.cc/4QPW-X9J7>].

<sup>126</sup> Members of the subreddit community have also engaged in organized activity. In December 2021, “idlers” responded to Kellogg’s announcement that it would break off negotiations and hire nonunion workers by flooding the company’s application portal. O’Connor, *supra* note 120. Earlier that fall, members of the subreddit helped organize a Black Friday boycott. Lexi McMenamin, *This Antiwork Subreddit Is Watching the Great Resignation*, TEEN VOGUE (Nov. 9, 2021), <https://www.teenvogue.com/story/reddit-antiwork-viral> [<https://perma.cc/97VK-W2K2>].

<sup>127</sup> Abigail Johnson Hess, *Biden Promises to Be “the Most Pro-union President” — And Union Members in Congress Are Optimistic*, CNBC (Dec. 2, 2020, 10:05 PM), <https://www.cnbc.com/2020/12/01/biden-promises-to-be-the-most-pro-union-president-and-rep.html> [<https://perma.cc/H65Y-HWEZ>].

<sup>128</sup> *The Latest: Trump Predicts He’ll “So Easily” Win Michigan*, AP NEWS (Nov. 3, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-district-of-columbia-elections-3f42f2ddb730a8dff916b54be74672ao> [<https://perma.cc/48T8-DP54>].



struggled to deliver on union-related legislation,<sup>129</sup> the COVID-19 pandemic seems to have driven a resurgence in union organizing. High-profile union battles at Starbucks, Amazon, and Google have made headlines, and the National Labor Relations Board (NLRB) has received an influx of union representation petitions and unfair labor practice complaints.<sup>130</sup>

At the same time, the Biden Administration has tried to facilitate an environment that is supportive of labor organizing. The President installed a new, more progressive General Counsel at the NLRB and has made a point of meeting with labor leaders throughout his time in office.<sup>131</sup> These actions created a “clear opportunity for labor,” according to Professor Ariel Avgar.<sup>132</sup> The combined factors have brought about the highest popular opinion rating regarding unions in half a century: over seventy percent of Americans approve of labor unions.<sup>133</sup>

5. *Quiet Quitting*. — In contrast to the literal quitting of the Great Resignation, “quiet quitting” is something of a misnomer. Rather than involving actual resignation, quiet quitting is the “newly coined term for when workers only do the job that they’re being paid to do, without taking on any extra duties, or participating in extracurriculars at work.”<sup>134</sup> The term began circulating last summer, leading to a spate of quiet-quitting-related articles throughout the fall.<sup>135</sup>

The contrasting responses to the trend were striking. On one hand, some evaluations expressed concern that the quiet-quitting rate was high — at least fifty percent, according to Gallup<sup>136</sup> — and could get worse. Those responses equated quiet quitting with disengagement,

<sup>129</sup> See Ahiza García-Hodges, *Biden’s Vow to Be “Most Pro-union President” Tested in First Year*, NBC NEWS (Jan. 20, 2022, 6:15 PM), <https://www.nbcnews.com/business/economy/bidens-vow-union-president-tested-first-year-rcna12791> [https://perma.cc/L4Q8-G7ZJ]. The Protecting the Right to Organize Act (PRO Act), H.R. 842, 117th Cong. (2021) (as passed by House of Representatives, Mar. 9, 2021), successfully passed the House before dying in the Senate. See Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [https://perma.cc/SD3W-659C].

<sup>130</sup> Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here’s Why It’s Happening Now*, CNBC (May 7, 2022, 12:05 PM), <https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html> [https://perma.cc/92FW-FGBY].

<sup>131</sup> *Id.*

<sup>132</sup> García-Hodges, *supra* note 129.

<sup>133</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/Y5LL-HJTC].

<sup>134</sup> Tayo Bero, Opinion, “*Quiet Quitting?*” *Everything About This So-Called Trend Is Nonsense*, THE GUARDIAN (Sept. 8, 2022, 6:14 AM), <https://www.theguardian.com/commentisfree/2022/sep/08/quiet-quitting-not-real-work-culture> [https://perma.cc/DG24-GG3U].

<sup>135</sup> See, e.g., Chinmay G. Pandit, *Understanding the Noise Around Quiet Quitting*, ONLABOR (Oct. 11, 2022), <https://onlabor.org/understanding-the-noise-around-quiet-quitting> [https://perma.cc/6C3B-XZSJ].

<sup>136</sup> Jim Harter, *Is Quiet Quitting Real?*, GALLUP (Sept. 6, 2022), <https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx> [https://perma.cc/J6LZ-DZW2].

noting that the rate of disengaged workers is rising and the rate of workplace satisfaction is decreasing.<sup>137</sup> But quiet-quitting proponents point out that the name makes the phenomenon seem more concerning than it actually is: they explain that quiet quitting simply means doing the job that you are paid for, rather than conducting extra work for free.<sup>138</sup> On that view, quiet quitting is about “shift[ing] away from ‘hustle-culture mentality’ and toward clearer boundaries between work and life.”<sup>139</sup>

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Far more could be said about the preceding trends. Each one unquestionably contains numerous dimensions, demands, and cultural signals. Importantly, though, longstanding critiques about work-life balance in the United States stand out as particularly visible in the data and trends observed during the pandemic.

For example, coverage of the caretaking struggles for single parents and working parents who shoulder a disproportionate share of the caregiving responsibilities once again illustrated how “[r]igid mandatory work hours and the expectation of continuous, uninterrupted employment combine with the length of the work week to squeeze out caregiving and family time.”<sup>140</sup> During the pandemic, many parents struggled to obtain flexibility and leave time to address caretaking responsibilities.<sup>141</sup> The incompatible time demands resulted in their performance of both caregiving and paid work duties suffering, and some parents left the workforce entirely<sup>142</sup> — an option realistic only for those parents able to rely on savings or an alternate source of income.

Long, rigid work hours can also “diminish[] civic and community involvement,”<sup>143</sup> perhaps helping to explain why there were many people whose work-related frustrations during the pandemic were motivated by a desire for more flexibility and free time. In surveys that asked about priorities in the search for a new job, for example, approximately two-thirds of Great Resignation workers cited “work-life

<sup>137</sup> *Id.*

<sup>138</sup> Jason Lalljee, *Meet a Gen Z Remote Worker Who Told Her Boss She Was Quiet Quitting for the Sake of Her Health: “I Need to Do My Role as Defined, But Also Not Apologize for Who I Am,”* INSIDER (Oct. 9, 2022, 7:15 AM), <https://www.businessinsider.com/gen-z-quiet-quitting-great-resignation-disability-adhd-labor-burnout-2022-10> [<https://perma.cc/TF7Q-VB5C>].

<sup>139</sup> Pandit, *supra* note 135.

<sup>140</sup> Crain, *supra* note 94, at 1948.

<sup>141</sup> See, e.g., Alaina Harwood, *Caregiver Discrimination in the Wake of the COVID-19 Pandemic*, 33 HASTINGS J. ON GENDER & L. 79, 87 (2022).

<sup>142</sup> Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1, 6–9 (2021).

<sup>143</sup> Crain, *supra* note 94, at 1948; see also SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 6 (2020) (discussing connection between worker power and healthy democracy).

balance.”<sup>144</sup> Anecdotal evidence supports the suggestion that what these workers sought was greater free time for life activities besides work: in an interview with *NPR* during the emergence of the Great Resignation, software developer Jonathan Caballero explained the pandemic “changed [his] mindset,” giving him a greater appreciation for free time.<sup>145</sup> He went on to look for a new job that offered more flexibility.<sup>146</sup>

Likewise, the recent union boom seems at least partly motivated by a desire for greater flexibility and balance. Former NLRB Chairman and current Georgetown Law Professor Mark Pearce characterizes the pandemic as a “catalyst” for workers to think critically about “the relationship between employers with workers” and ask themselves: “[I]s there another way to work and live?”<sup>147</sup> That questioning motivated many workers to engage in union organizing to address the imbalance of power between employers and employees, which currently enables employers to establish conditions that force personal, familial, and community needs to yield to work tasks. Unionized workers are demanding “better working conditions, more sick pay and more flexible schedules”<sup>148</sup> to facilitate increased autonomy and balance in their lives.

Quiet quitting similarly seems tied in part to a desire to have more space for nonwork activities. As some quiet quitters have observed, the “trend” is really more of a countertrend against employers taking advantage of workers by failing to hire enough employees or piling new tasks on existing employees.<sup>149</sup> (Contrary to the arguments of those who think quiet quitting is “being content with mediocrity” or the path to nonadvancement,<sup>150</sup> extra tasks do not necessarily help advance the careers of those who perform them.<sup>151</sup>) By refusing to take on extra work, quiet quitters are taking a stand against employers’ attempts to increase corporate profits at the expense of employees’ lives outside of work.

Finally, commentators have speculated that the *r/antiwork* forum’s dramatic rise in popularity during the second year of the pandemic related to a shift in popular mentality about work. People seem to be

<sup>144</sup> Fox, *supra* note 118.

<sup>145</sup> Andrea Hsu, *As the Pandemic Recedes, Millions of Workers Are Saying “I Quit,”* *NPR* (June 24, 2021, 6:01 AM), <https://www.npr.org/2021/06/24/1007914455/as-the-pandemic-recedes-millions-of-workers-are-saying-i-quit> [<https://perma.cc/5ZC2-AW83>].

<sup>146</sup> *See id.*

<sup>147</sup> Elias & Lucas, *supra* note 130.

<sup>148</sup> *E.g.*, Lauren Kaori Gurley et al., *Rail Union Rejects Contract as Strike Threatens U.S. Economy Before Holidays*, *WASH. POST* (Nov. 21, 2022, 9:55 AM), <https://www.washingtonpost.com/business/2022/11/21/rail-union-strike-white-house> [<https://perma.cc/8YAK-W825>].

<sup>149</sup> *See* Lalljee, *supra* note 138.

<sup>150</sup> Kudhail, *supra* note 5.

<sup>151</sup> Indeed, they can have the opposite result. As one example, women take on most of the office housework — like planning parties and taking notes in meetings — yet those tasks typically don’t advance their careers. Kami Rieck, *Women and People of Color Can’t Afford to “Quiet Quit,”* *WASH. POST* (Sept. 6, 2022, 10:35 AM), [https://www.washingtonpost.com/business/women-and-people-of-color-cant-afford-to-quiet-quit/2022/09/05/1707431e-2d28-11ed-bcc6-0874b26ae296\\_story.html](https://www.washingtonpost.com/business/women-and-people-of-color-cant-afford-to-quiet-quit/2022/09/05/1707431e-2d28-11ed-bcc6-0874b26ae296_story.html) [<https://perma.cc/AB2L-HUZE>].

wondering whether the United States is “entirely too obsessed with work” and whether employment should be restructured to ensure that workers have more time for other meaningful endeavors.<sup>152</sup> Sociologist David Frayne ties these questions to the pandemic, explaining that traumatic events can encourage people to reevaluate values and goals.<sup>153</sup>

At bottom, the American baseline for work-life balance seems to fall far short of supporting a fulfilling and well-rounded life for many workers. But this result is not foreordained. The pandemic also underscored how various basic benefits could go a long way toward supporting better work-life balance.

### C. *Work-Life Developments and the Future*

The viral trends of the pandemic both echo and encourage recent legislative efforts to better support work-life balance. Starting prior to the pandemic and accelerating with the increased attention on work-life balance during the past three years, state and local governments have passed paid leave and fair workweek laws.<sup>154</sup> These statutory developments represent important progress toward a future in which workers experience greater balance, and similar action at the federal level is long overdue. Yet such changes need not be the ceiling for innovation. Congress should enshrine paid leave and schedule predictability, but it should also finally deliver a modern vision for work-life balance.

Expanded access to paid leave is a crucial cornerstone of improving work-life balance in the United States,<sup>155</sup> since so many workers currently lack realistic access to time off for personal and family needs.<sup>156</sup> Recently, Congress came close to implementing a federal paid leave program: the House of Representatives “passed four weeks of paid family and medical leave that would have covered all workers in the country”<sup>157</sup> as part of the Build Back Better Act.<sup>158</sup> Unfortunately, those provisions were not included in the Inflation Reduction Act of 2022,<sup>159</sup>

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<sup>152</sup> Farhad Manjoo, Opinion, *Even with a Dream Job, You Can Be Antiwork*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/opinion/work-resignations-covid.html> [<https://perma.cc/WPG6-A9MB>].

<sup>153</sup> *Id.*

<sup>154</sup> *E.g.*, COLO. REV. STAT. § 8-13.3-401 (2020); DEL. CODE ANN. tit. 19, § 3701-3724 (2022); N.M. STAT. ANN. § 50-17-1 (2021); BERKELEY, CAL., MUN. CODE ch. 13.102 (2022); L.A., CAL., ADMIN. CODE ch. XCIII, art. 5, §§ 185-188 (2022).

<sup>155</sup> See Garrison et al., *supra* note 63, at 354-56.

<sup>156</sup> *Id.* at 354.

<sup>157</sup> STATEMENT: Senate Fails to Deliver for Women and Working Families with the Inflation Reduction Act, BETTER BALANCE (July 28, 2022), <https://www.abetterbalance.org/statement-senate-fails-to-deliver-for-women-and-working-families-with-the-inflation-reduction-act> [<https://perma.cc/3DG6-HK2N>]; see also Lorie Konish, *As More States Take Up Paid Family Leave, Here's Where the Push for a National Policy Stands*, CNBC (May 16, 2022, 9:37 AM), <https://www.cnbc.com/2022/05/16/as-states-take-up-paid-family-leave-heres-where-congress-stands.html> [<https://perma.cc/X5P2-JK42>].

<sup>158</sup> H.R. 5376, 117th Cong. (2021) (as passed by House of Representatives, Nov. 19, 2021).

<sup>159</sup> H.R. 5376, 117th Cong. (2022) (enacted).

which replaced the Build Back Better Act after negotiations over the earlier bill stalled in the Senate.<sup>160</sup> Congress did include paid sick and family leave in the Families First Coronavirus Response Act,<sup>161</sup> but that law was passed as a pandemic measure and has since expired.<sup>162</sup>

Other proposals for sick and family leave will likely continue to be considered,<sup>163</sup> but the timeline for federal action on permanent paid leave remains murky. In the meantime, some state and local governments have tried to fill the gap for their constituents. While several states already had paid sick<sup>164</sup> and family<sup>165</sup> leave policies in place prior to the pandemic, there was a fresh surge of legislative activity around the issue of paid leave soon after the pandemic started.<sup>166</sup> Some of these laws aimed at short-term leave to address illnesses or emergencies,<sup>167</sup> while others targeted longer-term leave for purposes of caretaking or extended medical conditions.<sup>168</sup> These kinds of laws have

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<sup>160</sup> Christopher Hickey, *Not the Year for Women and Parents: Child Care Provisions Were Cut from the Inflation Reduction Act. It's Not the First Time.*, CNN (Aug. 12, 2022, 5:51 PM), <https://www.cnn.com/2022/08/12/politics/inflation-reduction-children-families/index.html> [https://perma.cc/MH6Y-3BMM]. Even if the Build Back Better Act had passed, though, the United States would have remained an outlier on paid family and medical leave: average paid maternity leave globally is twenty-nine weeks. Claire Cain Miller, *The World "Has Found a Way to Do This": The U.S. Lags on Paid Leave*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html> [https://perma.cc/P3UE-5WGX]; see also SARAH A. DONOVAN, CONG. RSCH. SERV., R44835, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES (2022) (describing status of paid family and medical leave in the United States).

<sup>161</sup> Pub. L. No. 116-127, 134 Stat. 177 (2020).

<sup>162</sup> *Id.* §§ 3102, 5109.

<sup>163</sup> *E.g.*, FAMILY Act, S. 248, H.R. 804, 117th Cong. (2021). The FAMILY Act has been introduced in every Congress since 2013. Rosa DeLauro, *Paid Leave: If It's Good Enough for Members of Congress, It's Good Enough for the American People*, MS. MAG. (Nov. 4, 2021), <https://msmagazine.com/2021/11/04/paid-leave-congress-build-back-better> [https://perma.cc/5FCY-5HFD].

<sup>164</sup> *State Family and Medical Leave Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 9, 2022), <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws> [https://perma.cc/94VN-6WUM].

<sup>165</sup> *Paid Family Leave Resources*, NAT'L CONF. ST. LEGISLATURES (July 21, 2020), <https://www.ncsl.org/labor-and-employment/paid-family-leave-resources> [https://perma.cc/C2ST-2NMY].

<sup>166</sup> See sources cited *supra* note 154; *Local Paid Sick Leave Momentum Continues in Bloomington, MN and San Francisco, CA*, BETTER BALANCE (June 23, 2022), <https://www.abetterbalance.org/local-paid-sick-leave-momentum-continues-in-bloomington-mn-and-san-francisco-ca> [https://perma.cc/YK6N-XWQ2].

<sup>167</sup> *E.g.*, S. 208, 102d Gen. Assemb. (Ill. 2023); BLOOMINGTON, MINN., ORDINANCE no. 2022-31 (July 1, 2023). San Francisco, California, also passed a permanent "public health emergency leave" ballot initiative by a wide margin, "reflect[ing] deep support for paid sick leave, including the need to provide additional time off during public health emergencies like COVID-19." *Local Paid Sick Leave Momentum Continues in Bloomington, MN and San Francisco, CA*, *supra* note 166.

<sup>168</sup> *E.g.*, COLO. REV. STAT. § 8-13.3-501 (2022).

measurable effects on family income,<sup>169</sup> public health,<sup>170</sup> and workforce participation.<sup>171</sup>

Similarly, state and local governments have acted to stabilize workers' schedules through "fair workweek" laws,<sup>172</sup> which supplement the FLSA's laissez-faire approach to the regulation of scheduling. As Professors Charlotte Alexander, Anna Haley-Lock, and Nantiya Ruan explain, "inadequate, variable, and unpredictable"<sup>173</sup> schedules create a wealth of problems for workers — from threatening access to employment and public benefits, to imposing substantial last-minute transportation and childcare costs, to interfering with education and secondary employment.<sup>174</sup> These challenges can be partially alleviated by "call-in" and "send-home" pay policies, which guarantee some minimum payment for workers who are called in to work on short notice or excused from work before the end of a scheduled shift.<sup>175</sup> Other policy interventions related to schedule stabilization include "right-to-request" rules prohibiting retaliation against employees requesting a change in schedule or a flexible schedule<sup>176</sup> and mandating advance notice of schedules that provide workers with enough time to create a plan for managing competing obligations.<sup>177</sup>

"Predictive scheduling" or "fair workweek" laws began to proliferate in the last decade,<sup>178</sup> corresponding to the data-driven emergence of just-in-time scheduling.<sup>179</sup> But widespread discussion of the primacy of work over other dimensions of people's lives during the pandemic has facilitated continued momentum behind the movement for schedule stabilization. New fair workweek ordinances have been adopted in major

<sup>169</sup> E.g., Alexandra Boyle Stanczyk, *Does Paid Family Leave Improve Household Economic Security Following a Birth? Evidence from California*, 93 SOC. SERV. REV. 262, 262 (2019).

<sup>170</sup> E.g., Stefan Pichler et al., *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, 39 HEALTH AFFS. 2197, 2197 (2020).

<sup>171</sup> E.g., Arijit Nandi et al., *The Impact of Parental and Medical Leave Policies on Socioeconomic and Health Outcomes in OECD Countries: A Systematic Review of the Empirical Literature*, 96 MILBANK Q. 434, 435 (2018).

<sup>172</sup> Rebecca Rainey & Austin R. Ramsey, *Punching In: Labor Agency Revisits Predictive Scheduling Policy*, BLOOMBERG L. (Oct. 11, 2022, 5:40 AM), <https://news.bloomberglaw.com/daily-labor-report/punching-in-labor-agency-revisits-predictive-scheduling-policy-28> [<https://perma.cc/ACR7-H8BT>] ("In the absence of a national rule, at least seven cities and one state have implemented laws requiring businesses to give workers notice of their work schedule . . .").

<sup>173</sup> Alexander et al., *supra* note 48, at 11.

<sup>174</sup> *Id.* at 11–13. In essence, these laws serve to shift business costs from the employer by imposing significant additional personal costs on employees. *Id.* at 4.

<sup>175</sup> *Id.* at 19–20.

<sup>176</sup> E.g., Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. 1, 28 (2016).

<sup>177</sup> Alexander et al., *supra* note 48, at 37.

<sup>178</sup> Stephanie Wykstra, *The Movement to Make Workers' Schedules More Humane*, VOX (Nov. 5, 2019, 2:06 PM) <https://www.vox.com/future-perfect/2019/10/15/20910297/fair-workweek-laws-unpredictable-scheduling-retail-restaurants> [<https://perma.cc/35JA-VG9F>].

<sup>179</sup> *Shift Change: "Just-in-Time" Scheduling Creates Chaos for Workers*, NBC NEWS (May 10, 2014, 7:04 AM), <https://www.nbcnews.com/feature/in-plain-sight/shift-change-just-in-time-scheduling-creates-chaos-workers-n95881> [<https://perma.cc/TPJ6-EQEV>].

cities in recent months,<sup>180</sup> and New York City took an enforcement action under its Fair Workweek Law that resulted in a \$20 million settlement by Chipotle Mexican Grill, Inc. last year.<sup>181</sup>

Schedule stability and paid time off both support balance by enabling workers to better organize their lives and respond to health and caretaking concerns. But a patchwork of state laws is insufficient to set a more reasonable national baseline around work-life balance, so federal action is still needed.<sup>182</sup> And Congress should not stop there. Rather, the federal legislature should take the reckoning brought about by the pandemic as an opportunity to consider other legal updates that would facilitate work-life balance.

For one, scholars and activists have repeatedly critiqued the FLSA's "white-collar" exemption.<sup>183</sup> In adopting the FLSA, lawmakers had hoped to eliminate "unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do."<sup>184</sup> But because managerial and professional positions were exempted, the work-spreading function of the FLSA has failed to extend to these roles.<sup>185</sup> Subsequent occupational developments and regulatory actions have both expanded the number of workers who fall into the white-collar exemption<sup>186</sup> and permitted employers to pile more hours onto their existing workforces.<sup>187</sup> Those patterns help to explain why trends

<sup>180</sup> BERKELEY, CAL., MUN. CODE ch. 13.102 (2022); L.A., CAL., ADMIN. CODE ch. XCIII, art. 5, §§ 185–188 (2022).

<sup>181</sup> Press Release, Eric Adams, Mayor, New York City, Mayor Adams, Department of Consumer and Worker Protection Announce Settlement with Chipotle Mexican Grill, Securing \$20 Million for Approximately 13,000 Workers (Aug. 9, 2022), <https://www.nyc.gov/office-of-the-mayor/news/581-22/mayor-adams-department-consumer-worker-protection-settlement-chipotle-mexican> [https://perma.cc/6RBN-CZ5E].

<sup>182</sup> Members of Congress have previously proposed the Schedules That Work Act, H.R. 6670, 117th Cong. (2022); and the Part-Time Worker Bill of Rights Act, S. 3641, 117th Cong. (2022). These two bills would aim to expand protections for part-time workers and limit the effects of unpredictable shift scheduling.

<sup>183</sup> See, e.g., Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 140 (1993); Schor, *supra* note 77, at 170–71.

<sup>184</sup> Grossman, *supra* note 54.

<sup>185</sup> Professor Deborah Malamud observes that at the time the FLSA was under development, male white-collar workers "would have found shorter hours . . . inconsistent with the status they sought to maintain in their own and their employers' eyes." Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2224 (1998). But even around the time of the Great Depression and the adoption of the FLSA, political economists and sociologists observed that this class-oriented approach to work was flawed. Scholars noted that the assumptions built into that approach did not necessarily bear out in reality through things like wages or social mobility; rather, they seemed to largely reflect "deeply held cultural distinctions between different types of workers." *Id.* at 2232.

<sup>186</sup> U.S. GEN. ACCT. OFF., FAIR LABOR STANDARDS ACT: WHITE COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 2 (1999); see also Wyatt & Hecker, *supra* note 69, at 36 chart 1 (indicating significant increases in proportional employment in professional and managerial occupations between 1910 and 2000).

<sup>187</sup> Schor, *supra* note 77, at 170 (arguing that the "absence of a financial disincentive for long hours" for salaried employees is an "important reason that employers expect and/or enforce long hours from [such employees]").

like quiet quitting and antiwork resonated with a large number of workers and why many workers sought out new jobs with better hours during the pandemic.

Recent updates to the white-collar exemptions have been limited in scope. The Department of Labor raised the salary minimum to qualify for the exemption in 2019,<sup>188</sup> and the Department is currently working on another update.<sup>189</sup> While raising the salary minimum is a necessary step to cut back overuse of the exemption, many highly paid managers and professionals will remain exempt. As a result, overwork and inequitable access in fields like technology, medicine, and law are likely to remain pervasive issues.<sup>190</sup> Yet commentators point out that many managerial and professional workers' tasks are amenable to the same workspreading function that animated the FLSA's nonexempt rules,<sup>191</sup> so it should be possible to cap total working hours or impose overtime rules for all but the most senior "key personnel."<sup>192</sup>

Recent scholarship and activism also revive the call for a shorter workweek.<sup>193</sup> Prior to the adoption of the FLSA, then-Senator Hugo Black introduced a thirty-hour workweek bill backed by the American Federation of Labor.<sup>194</sup> Two years before that, John Maynard Keynes famously predicted that technological advancement would eventually permit adoption of a fifteen-hour workweek.<sup>195</sup> Echoing those earlier suggestions, the viral trends of the pandemic invite policymakers to reconsider the proportion of their lives that workers should dedicate to paid labor.

Appropos of its title, the Thirty-Two Hour Workweek Act<sup>196</sup> takes up the invitation, suggesting shortening the standard week by eight hours

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<sup>188</sup> See generally Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (Sept. 27, 2019) (codified at 29 C.F.R. 541).

<sup>189</sup> Allen Smith, *No Proposed Overtime Rule Issued Yet*, SHRM (Nov. 10, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/no-proposed-overtime-rule-issued-yet.aspx> [<https://perma.cc/2LL5-E6V8>].

<sup>190</sup> See Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 68–72 (2005) (discussing patterns of overwork in technology, medicine, and law, as well as how overwork patterns are consistent across both white-collar and blue-collar workers).

<sup>191</sup> See, e.g., DeChiara, *supra* note 183, at 155–60 (explaining that many white-collar jobs have become more routinized and simplified and that recent recessions have seen high numbers of professionals laid off).

<sup>192</sup> See Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMP. RTS. & EMP. POL'Y J. 5, 46, 49 (2003).

<sup>193</sup> E.g., 4 DAY WK. GLOB., <https://www.4dayweek.com> [<https://perma.cc/8BG5-H8JG>]; MCCALLUM, *supra* note 22, at 208–09; Jeannette Cox, *Work Hours and Disability Justice*, 111 GEO. L.J. 1, 29 (2022).

<sup>194</sup> Schor, *supra* note 77, at 163.

<sup>195</sup> John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, in ESSAYS IN PERSUASION 321, 321–22, 328–29 (3d ed. 2010). Today, profound technological changes have arrived, but failure to consider adequately how to distribute the benefits has resulted in increasing income inequality rather than decreasing hours of work. See Estlund, *supra* note 87, at 315.

<sup>196</sup> H.R. 1332, 118th Cong. (2023).



so that overtime pay provisions kick in after thirty-two hours rather than forty.<sup>197</sup> Similar legislation was introduced last year in California.<sup>198</sup> Although working out the details of implementing such a change remains a formidable barrier to passage, a shorter workweek could facilitate more equitable sharing of caretaking and housework responsibilities between dual-earning partners.<sup>199</sup> For single-parent households, it could help alleviate strain around finding childcare when school activities fall below forty hours a week.<sup>200</sup> And for all workers, a shorter workweek would increase availability of time for leisure<sup>201</sup> and civic<sup>202</sup> activities.

Finally, revitalizing federal labor law could result in better work-life balance. Historical patterns indicate that the progress toward a shorter workweek achieved during the twentieth century was correlated with higher levels of labor organizing.<sup>203</sup> When organizing related to working hours stagnated toward the end of the century as a result of waning labor power, worktime began creeping up again.<sup>204</sup> Given these observed trends, updating labor laws to facilitate greater union participation<sup>205</sup> seems likely to improve work-life balance, which is a recognized goal for organizers.<sup>206</sup> Stronger labor unions have another benefit as well: they provide important opportunities for workers to participate in political dialogue and civic activities, thus strengthening the democratic system.<sup>207</sup>

These various changes cannot fully solve the American work-life balance problem, which has emerged from a complex combination of

<sup>197</sup> *Id.*

<sup>198</sup> Jason Kandel, *What to Know: Two Bills Propose Shortening the Workweek to 4 Days*, NBC L.A. (Apr. 15, 2022, 6:38 AM), <https://www.nbclosangeles.com/news/local/what-to-know-two-bills-propose-shortening-the-workweek-to-4-days> [<https://perma.cc/S6AT-EVQZ>].

<sup>199</sup> See Schor, *supra* note 77, at 165.

<sup>200</sup> See Joe Pinsker, *The Curse of America's Illogical School-Day Schedule*, THE ATLANTIC (Sept. 19, 2018), <https://www.theatlantic.com/education/archive/2018/09/school-day-sleep-workday/570658> [<https://perma.cc/ZHJ3-QEJJ>], for a discussion of the mismatch between typical work schedules and typical school schedules.

<sup>201</sup> See Bryan Lufkin & Jessica Mudditt, *The Case for a Shorter Workweek*, BBC (Aug. 24, 2021), <https://www.bbc.com/worklife/article/20210819-the-case-for-a-shorter-workweek> [<https://perma.cc/ZRX5-ZN3G>].

<sup>202</sup> See Caruso, *supra* note 32, at 534; Crain, *supra* note 94, at 1948.

<sup>203</sup> MCCALLUM, *supra* note 22, at 33–35.

<sup>204</sup> See *id.*; JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 72–73, 76–78 (1992).

<sup>205</sup> For an overview of a number of proposals toward this end, see BLOCK & SACHS, *supra* note 143, at 1–8.

<sup>206</sup> See *Improving Work-Life Balance*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/work-life-balance> [<https://perma.cc/RG7B-4D5L>].

<sup>207</sup> See ALEXANDER HERTEL-FERNANDEZ, *ECON. POL'Y INST., POWER AND POLITICS IN THE U.S. WORKPLACE 2* (2020) (“Without other places to build civic skills, engage in political discussions, or learn about opportunities to participate in politics, . . . [w]eaker workplace voice has left us with a weaker democracy.”).

factors.<sup>208</sup> But setting the baseline expectation that workers should have paid time off, predictable scheduling, a shorter workweek, and ready access to labor organizing would go a long way toward enabling workers to plan for and enjoy important life activities outside of work. Equally importantly, it would be an investment in the collective and the political system. At a moment when the country is facing a crisis of democracy,<sup>209</sup> members of the American public need time to genuinely engage in community and democratic discussion. In the wake of the pandemic, policymakers should not miss the opportunity to think critically about how to set a new work-life balance baseline that will serve these crucial interests.

### *Conclusion*

The past three years have been marked by widespread discussion about the role of work in employees' lives. As the various trends during the pandemic reveal, many American workers are discontent with the balance their lives currently permit. Whether for family, community, or civic reasons, people desire more flexibility and more time away from work. Recently, some state and local governments have taken it upon themselves to help stabilize workers' schedules and provide access to paid time off. Federal policymakers should follow suit — and in the process, Congress should deliver a vision of work-life balance for the modern economy.

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<sup>208</sup> For example, while this Chapter has focused on interventions related to working time, increasing wages is a critical component of addressing America's work-life balance problem. Sonali Kolhatkar, *What About Work-Life Balance for Low-Wage Women of Color?*, YES! MAG. (Oct. 4, 2021), <https://www.yesmagazine.org/social-justice/2021/10/04/work-life-balance-low-wage-women-of-color> [<https://perma.cc/LEK7-YM3F>].

<sup>209</sup> See, e.g., Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642 (2019) (comparing current economic inequality to the Gilded Age and noting that, at that time, "[n]ot unlike today, American democracy itself seemed to be at risk," as "[w]orkers' lack of basic workplace rights, combined with the disproportionate political power exercised by a few megabusinesses and the wealthy more generally, struck many as incompatible with a republican form of government").

## CHAPTER TWO

### CONSUMER PROTECTION FOR GIG WORK?

Amazon’s business depends on deliveries. Deliveries, in turn, require drivers. In 2015, Amazon piloted a new model: paying drivers per gig to use their own vehicles to drop off time-sensitive deliveries like groceries and same-day orders.<sup>1</sup> Amazon offered \$18 to \$25 per hour<sup>2</sup> and explicitly promised drivers “100% of the tips [they] earn.”<sup>3</sup> But Amazon soon started cutting costs. Without telling drivers, it began diverting tips to cover the base pay rate it promised and changed its app to not show drivers’ tip earnings separately.<sup>4</sup> Amazon continued this practice for several years — representing to both customers and drivers that drivers would receive all tips — until it learned that it was under investigation by the Federal Trade Commission (FTC).<sup>5</sup>

The FTC found “reason to believe”<sup>6</sup> Amazon had violated a statutory prohibition on “unfair or deceptive acts or practices.”<sup>7</sup> The agency settled with Amazon and required the company to return more than \$60 million in improperly diverted tips.<sup>8</sup> Amazon wasn’t the only company to divert tips from gig delivery drivers,<sup>9</sup> but the FTC’s settlement with the company represented a pathbreaking use of the agency’s consumer protection authorities to protect gig workers.<sup>10</sup>

The FTC is now signaling that this case may be just the leading edge of a new wave of enforcement. Last September, the agency formally adopted a policy of prioritizing gig workers in its enforcement efforts, promising to leverage its “full authority” and its “broad-based

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<sup>1</sup> See *Amazon.com, Inc.*, 171 F.T.C. 860, 861, 864 (2021) (complaint); see also AMAZON FLEX, <https://flex.amazon.com> [<https://perma.cc/24JJ-98PU>].

<sup>2</sup> *Amazon.com*, 171 F.T.C. at 863–64.

<sup>3</sup> *Id.* at 862 (emphasis omitted).

<sup>4</sup> *Id.* at 867–68.

<sup>5</sup> *Id.* at 868, 870.

<sup>6</sup> *Id.* at 860.

<sup>7</sup> *Id.* at 871. The 1914 Federal Trade Commission Act, 15 U.S.C. §§ 41–58, established the FTC and its substantive authority, although the agency today enforces a wide range of statutes. See generally *id.* §§ 41–58. Section 5(a) of the Act includes an antitrust prong as well as a consumer protection prong. See *id.* § 45(a).

<sup>8</sup> Press Release, FTC, Amazon to Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers> [<https://perma.cc/5L5K-8W6C>].

<sup>9</sup> DoorDash and Instacart, for example, have been criticized for similar behavior. Kevin Roose, *After Uproar, Instacart Backs Off Controversial Tipping Policy*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/technology/instacart-doordash-tipping-deliveries.html> [<https://perma.cc/CL62-5GPT>].

<sup>10</sup> See Zachary Sorenson, *The FTC Went After Amazon for Withholding Gig Drivers’ Tips. Can Consumer Harm Approaches Be Stretched Even Further to Protect Gig Workers?*, ONLABOR (Mar. 18, 2021), <https://onlabor.org/the-ftc-went-after-amazon-for-withholding-gig-drivers-tips-can-consumer-harm-approaches-be-stretched-even-further-to-protect-gig-workers> [<https://perma.cc/HYH4-GMN2>].

jurisdiction” to protect gig workers “from unfair, deceptive, and anti-competitive practices.”<sup>11</sup>

This sharper approach comes after a decade of explosive growth in the gig economy<sup>12</sup> — and ensuing battles over how gig workers are classified, what benefits they are entitled to, and how to rectify abuses by gig platforms.<sup>13</sup> While “gig work” and the “gig economy” are flexible concepts that can include many work arrangements, the FTC’s policy statement (and this Chapter) focuses on “online gig platform[s]”: corporate middlemen that operate app-based, two-sided platforms that use software to match customers with workers who complete gigs like providing a ride, making a delivery, or running an errand.<sup>14</sup> These platforms — familiar brands like Uber, Lyft, and DoorDash — use a new business model enabled by the rise of smartphones. The proliferation of gig platforms has provided new work for millions of people<sup>15</sup> — work that is touted for the flexibility, independence, and, of course, income it can give workers.<sup>16</sup> But, as with any lopsided power dynamic, the disproportionate power many platforms have in relation to workers opens the door to exploitation, deception, and abuse.

One reason the FTC’s new approach holds promise is that it could cut through the patchwork of laws currently governing gig work. Many gig workers are classified (often incorrectly) as independent contractors rather than employees, making them ineligible for a bevy of benefits. Classification rules are in flux, and proposals to classify gig workers as employees have drawn enormous resistance from platforms.<sup>17</sup> The resulting regulatory vacuum and confusion make the FTC’s consumer protection and competition authorities — at first glance perhaps an odd choice of tool to protect workers — relevant and powerful.

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<sup>11</sup> FTC, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 1 (Sept. 15, 2022) [hereinafter FTC POLICY STATEMENT], <https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work> [<https://perma.cc/7R36-CD4V>].

<sup>12</sup> Greg Iacurci, *The Gig Economy Has Ballooned by 6 Million People Since 2010. Financial Worries May Follow*, CNBC (Feb. 4, 2020, 1:02 PM), <https://www.cnbc.com/2020/02/04/gig-economy-grows-15percent-over-past-decade-adp-report.html> [<https://perma.cc/A754-4JCQ>].

<sup>13</sup> See Kellen Browning, *The Next Battleground for Gig Worker Labor Laws: Massachusetts*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/business/massachusetts-gig-workers-ballot.html> [<https://perma.cc/T4N7-HFQJ>].

<sup>14</sup> See FTC POLICY STATEMENT, *supra* note 11, at 2.

<sup>15</sup> See TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018, 6:30 PM), <https://www.forbes.com/sites/tjmccue/2018/08/31/57-million-u-s-workers-are-part-of-the-gig-economy> [<https://perma.cc/J434-T438>].

<sup>16</sup> See, e.g., Press Release, Dara Khosrowshahi, CEO, Uber, Only on Uber: More Flexibility, Choice, and Support (July 29, 2022), <https://www.uber.com/newsroom/only-on-uber> [<https://perma.cc/4T3T-N796>].

<sup>17</sup> See Browning, *supra* note 13.

The FTC's new policy forces a square peg into a round hole.<sup>18</sup> But the gaps in the prevailing legal framework for gig work and the pushback from platforms against any changes mean that this round hole is roomy, and even a misshapen square peg can fit with space to spare. The FTC's approach (like this metaphor) may be strained, but it nevertheless offers promise to gig workers who are treated unfairly. This Chapter places this new policy in context — exploring the rise of the gig economy, the background employee/contractor framework, and the FTC's authorities — and evaluates its potential.

### A. *The Gig Economy*

Gig work is nothing new. People have always pursued small, one-off jobs through informal arrangements, whether out of convenience or because more stable long-term work was unavailable.<sup>19</sup> For the past half century, temporary work arrangements have increasingly permeated the economy. Professor Louis Hyman traces the origins of today's gig economy to the 1950s, when executives started to outsource certain tasks to short-term “temp” workers in order to cut costs.<sup>20</sup> Staid corporations, initially constrained by solid unions and strong regulators, began to give way to the unrelenting short-term demands of the market (and management consultants); as a result, these kinds of temporary hiring practices accelerated, eroding job security for more and more types of work along the way.<sup>21</sup> When journalist Tina Brown coined the term “gig economy” in 2009, she described how the need to work a series of small “gigs” rather than a single full-time job had spread from lower-income workers living paycheck to paycheck, for whom “the Gig Economy has been old news for years,” to white-collar professionals.<sup>22</sup>

More recently, the meaning of the “gig economy” has sharpened as app-based marketplaces for gig work have sprung up in a range of industries. So far, these gig marketplaces have focused on jobs that are standardized, repeatable, measurable, and divisible into discrete, similar

<sup>18</sup> This is a frequently used image in the gig economy context. *See, e.g.*, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (“[T]he jury . . . will be handed a square peg and asked to choose between two round holes.”); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. LAB. & EMP. L. 53 (2015); Emily C. Atmore, Note, *Killing the Goose that Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 MINN. L. REV. 887, 889 (2017) (“Gig workers are ‘square pegs’ being forced to fit into . . . [‘]round holes.’”).

<sup>19</sup> *See, e.g.*, Tawny Paul, *The Gig Economy of the 18th Century*, BBC (July 22, 2017), <https://www.bbc.com/worklife/article/20170721-the-gig-economy-of-the-18th-century> [<https://perma.cc/48AF-5KEA>] (“[H]istory shows us that the one person, one career model is a relatively recent phenomenon. Prior to industrialisation in the 19th Century, most people worked multiple jobs to piece together a living.”).

<sup>20</sup> *See* LOUIS HYMAN, *TEMP* 2, 52–53 (2018).

<sup>21</sup> *Id.* at 2–9, 210.

<sup>22</sup> Tina Brown, *The Gig Economy*, DAILY BEAST (July 14, 2017, 10:21 AM), <https://www.thedailybeast.com/the-gig-economy> [<https://perma.cc/X5L8-6Y49>] (originally published Jan. 12, 2009, 12:34 AM).

tasks,<sup>23</sup> rather than the white-collar work Brown foresaw being swept up in the “age of Gignomics.”<sup>24</sup> Still, there is no reason to think the concept will not eventually expand to more types of work.<sup>25</sup>

Instead of focusing on a particular industry or type of work, this Chapter focuses on gig work that is orchestrated in a specific way: by online applications that operate automated two-sided networks<sup>26</sup> for gig jobs. Unlike old-school temp agencies, these platforms use software to automatically match workers on one side of the “market” with customers on the other, increasing the speed (and lowering the costs) of matches. This Chapter, like the FTC policy statement, refers to these as “online gig platforms.”<sup>27</sup> Similarly, this Chapter uses “gig worker” to refer specifically to workers on the supply side of these online gig platforms.

Uber, founded in 2009,<sup>28</sup> is the canonical example of an online gig platform. The concept is simple: rider and driver download app, rider requests, driver accepts, app collects payment, Uber skims a fee, and driver takes the rest.<sup>29</sup> And Uber is not the only company to figure out that you can turbocharge the tried-and-true concept of a temp agency by building a “marketplace” that operates on a free mobile app and is targeted to a mass-market service economy<sup>30</sup> — especially if you skirt a slew of laws along the way.<sup>31</sup> The proliferation of gig platforms has led to many more people working gig jobs.<sup>32</sup> According to one survey, 16%

<sup>23</sup> See Sameer Hasija et al., *Will the Pandemic Push Knowledge Work into the Gig Economy?*, HARV. BUS. REV. (June 1, 2020), <https://hbr.org/2020/06/will-the-pandemic-push-knowledge-work-into-the-gig-economy> [<https://perma.cc/4S93-QDT6>].

<sup>24</sup> Brown, *supra* note 22.

<sup>25</sup> See Jack Kelly, *White-Collar Professionals Are Stuck in a Cycle of Contract Roles*, FORBES (Aug. 26, 2022, 12:07 PM), <https://www.forbes.com/sites/jackkelly/2022/08/26/white-collar-professionals-are-stuck-in-a-cycle-of-contract-roles> [<https://perma.cc/6MDK-HK6F>].

<sup>26</sup> A “two-sided market” connects buyers and sellers to exchange a good or service. See Julia Kagan, *Two-Sided Market: Definition and Examples*, INVESTOPEDIA (Apr. 26, 2022), <https://www.investopedia.com/terms/t/two-sidedmarket.asp> [<https://perma.cc/P2MZ-UEL2>]. Many gig platforms can be thought of as operating restricted forms of a two-sided market, because the platform operator sets the prices instead of matching bids from buyers and sellers.

<sup>27</sup> FTC POLICY STATEMENT, *supra* note 11, at 7.

<sup>28</sup> *The History of Uber*, UBER, <https://www.uber.com/newsroom/history> [<https://perma.cc/FYN4-3QHM>].

<sup>29</sup> See *How to Use the Uber App*, UBER, <https://www.uber.com/us/en/about/how-does-uber-work> [<https://perma.cc/DE2M-P3RU>].

<sup>30</sup> See Meaghan Yuen, *A List of the Top Gig Economy Companies and Apps in 2023*, INSIDER INTEL. (Jan. 7, 2023), <https://www.insiderintelligence.com/insights/gig-economy-companies-startups> [<https://perma.cc/ZE88-H4C3>].

<sup>31</sup> See, e.g., Harry Davies et al., *Uber Broke Laws, Duped Police and Secretly Lobbied Governments, Leak Reveals*, THE GUARDIAN (July 11, 2022, 12:11 PM), <https://www.theguardian.com/news/2022/jul/10/uber-files-leak-reveals-global-lobbying-campaign> [<https://perma.cc/63P2-6QCV>] (quoting Uber executives saying that they had become “pirates” and conceding that “[w]e’re just fucking illegal”); Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017, 4:11 AM), <https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning> [<https://perma.cc/PA9N-HG8B>]. For a lengthy but nonexhaustive collection of alleged transgressions, see UBER SCANDALS, <https://www.uberscandals.org> [<https://perma.cc/42Z9-HBBB>].

<sup>32</sup> Iacurci, *supra* note 12.

of Americans report having earned money through gig work.<sup>33</sup> The proportions are even higher for lower-income (25%), young (30%), Black (20%), and Hispanic (30%) workers.<sup>34</sup> The gig economy is expected to more than double — to \$455 billion — between 2018 and 2023.<sup>35</sup>

Gig platforms claim to offer work that is flexible and independent in ways not possible without app-based mediation.<sup>36</sup> Skeptics counter that much of the efficiency platforms supposedly unlock is simply a result of dubious “regulatory arbitrage.”<sup>37</sup> Studies show that many gig workers experience poor working conditions, with around one in seven who responded to a recent survey earning less than the federal minimum wage, and one in four earning less than the applicable state minimum wage.<sup>38</sup>

Whatever degree of independence gig workers do exercise, they do it entirely within the terms dictated by platforms. Platforms recruit workers, set participation requirements, control the worker and customer app experiences, set the market mechanics, process payments, and make a host of other decisions — hiring, matching, termination, and more — with minimal human involvement.<sup>39</sup> These practices seek to unlock efficiency, but they also involve a power imbalance that opens the door for abuse. Some platform behaviors entail outright deception that is clearly unlawful, like Uber falsely claiming that drivers’ median income was as high as \$90,000 in some cities,<sup>40</sup> or Amazon telling customers that tips would be passed on to drivers when it in fact withheld them for itself.<sup>41</sup> Other behaviors exemplify platforms trying to have it both ways: asserting that workers are independent (to avoid providing

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<sup>33</sup> MONICA ANDERSON ET AL., PEW RSCH. CTR., *THE STATE OF GIG WORK IN 2021*, at 3 (2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021> [<https://perma.cc/T9TV-RKDP>].

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Projected Gross Volume of the Gig Economy from 2018 to 2023*, STATISTA (Sept. 30, 2022), <https://www.statista.com/statistics/1034564/gig-economy-projected-gross-volume> [<https://perma.cc/7WJC-WL3D>].

<sup>36</sup> *Cf.*, e.g., Dom Taylor, *Drivers Put Flexibility First in Gig Economy Reform*, UBER NEWSROOM (June 17, 2022), <https://www.uber.com/en-AU/newsroom/ipsosau> [<https://perma.cc/YT8U-SR5B>].

<sup>37</sup> *See*, e.g., WILLIAM GORE-RANDALL, LAZARD ASSET MGMT., *UNDERSTANDING THE INVESTMENT IMPLICATIONS OF THE GIG ECONOMY 2* (2020), [https://www.lazardassetmanagement.com/docs/-/mo-/92068/understandingtheinvestmentimplicationsof\\_lazardresearch\\_en.pdf](https://www.lazardassetmanagement.com/docs/-/mo-/92068/understandingtheinvestmentimplicationsof_lazardresearch_en.pdf) [<https://perma.cc/Z9M9-B86L>].

<sup>38</sup> BEN ZIPPERER ET AL., ECON. POL’Y INST., *NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY 2* (2022), <https://files.epi.org/uploads/250647.pdf> [<https://perma.cc/M4FL-6LCV>].

<sup>39</sup> *See*, e.g., Natasha Lomas, *Gig Platform Report Calls for Transparency to Fix Abuse*, TECHCRUNCH (Dec. 13, 2021, 9:09 AM), <https://techcrunch.com/2021/12/13/gig-platform-transparency-report> [<https://perma.cc/MZ5A-JNQM>].

<sup>40</sup> Press Release, FTC, *FTC to Send Refund Checks to Uber Drivers as Part of FTC Settlement* (July 16, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/07/ftc-send-refund-checks-uber-drivers-part-ftc-settlement> [<https://perma.cc/K2WE-N2SR>].

<sup>41</sup> Press Release, FTC, *supra* note 8.

benefits), while still exerting significant control over how they operate.<sup>42</sup> Some practices are simple, like having algorithms rather than drivers set prices, while others are more nuanced, like providing bonuses for completing a target number of rides instead of higher baseline fares to disincentivize mixing gigs from competing platforms.<sup>43</sup>

The foothold gig platforms have established in today's economy and the ensuing array of potential abuses mean the task of crafting an enforcement approach to ensure that the benefits of this new economy are shared and that workers are protected is increasingly urgent.

### B. Gig Work and Employment Law

A succession of state and federal laws providing standards, protections, and benefits for workers have passed over the last century — each the culmination of advocacy and organizing by workers, unions, and progressive reformers.<sup>44</sup> But many gig workers do not receive these benefits because they are not classified as employees. The protections they do have can be further limited by contract restrictions like arbitration clauses. Platforms are fighting tooth and nail to avoid providing the full benefits of employment status. These battles set the scene — and raise the stakes — for the FTC's foray into the gig world.

*i. Employment and Labor Laws Protect Many Workers.* — Many laws govern the relationship between employers and workers. At the federal level, the Department of Labor administers more than 180 statutes.<sup>45</sup> These include minimum wage and overtime requirements,<sup>46</sup> penalties for not providing health insurance,<sup>47</sup> requirements to split Social Security and Medicare taxes with employees,<sup>48</sup> protections for workplace health and safety,<sup>49</sup> regulations governing employer-provided pension or retirement benefit plans,<sup>50</sup> and unpaid leave requirements for childbirth and serious illness.<sup>51</sup> Civil rights laws protect employees from

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<sup>42</sup> Class Action Complaint ¶¶ 3–12, *Gill v. Uber Techs., Inc.*, No. 22-600284 (Cal. Super. Ct. filed June 21, 2022) (“Defendants label their drivers independent contractors, yet deprive those drivers of economic independence by fixing the prices . . . for rides.” *Id.* ¶ 3.).

<sup>43</sup> *Id.* ¶¶ 3–5.

<sup>44</sup> See generally, e.g., Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

<sup>45</sup> *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T LAB., <https://www.dol.gov/general/aboutdol/majorlaws> [<https://perma.cc/64WP-V9GG>].

<sup>46</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206–207.

<sup>47</sup> 26 U.S.C. § 4980H.

<sup>48</sup> *Id.* § 3111.

<sup>49</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–675, 677–678, 42 U.S.C. § 3142-1.

<sup>50</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

<sup>51</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).



discrimination based on race, color, religion, sex, and national origin<sup>52</sup> and require many employers to make workplaces accessible and provide reasonable accommodations to employees who have disabilities.<sup>53</sup> Finally, labor laws empower covered workers through unions and collective bargaining.<sup>54</sup>

States have their own comprehensive laws governing employment. To start, many programs, like unemployment insurance, are federally funded but implemented by states.<sup>55</sup> Many states have employment statutes that parallel federal ones, often with additional protection. For example, thirty states require a minimum wage higher than the federal baseline.<sup>56</sup> Other regulations have no federal counterpart, like voting-leave requirements and guns-at-work laws.<sup>57</sup> State employment law often involves a mix of statutory and common law rules. And crucially, states can generally regulate *all* workplaces (unless preempted), while Congress is limited to those it can reach via its Commerce Clause power or some other constitutional hook.

2. *Independent Contractors Receive Fewer Protections and Benefits.* — Employment protections are great for the workers who receive them. But most of these protections are only available to workers classified as “employees.”<sup>58</sup> Statutory regimes have varying tests for determining which workers are employees, but many gig platforms classify workers as independent contractors across the board, thereby excluding them from the full host of employee entitlements. Without employee status, workers are left with little more than whatever their contract happens to include. And they may face additional restrictions, too: it is contested whether antitrust laws, for example, restrict independent contractors’ ability to bargain collectively.<sup>59</sup> Gig workers are of course not the first to be excluded; all labor and employment laws delineate who is protected, and these lines have frequently been drawn to exclude racial

<sup>52</sup> Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-15.

<sup>53</sup> Americans with Disabilities Act of 1990, tit. I, 42 U.S.C. §§ 12111–12112.

<sup>54</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169.

<sup>55</sup> See, e.g., 26 U.S.C. § 3304.

<sup>56</sup> See *State Minimum Wage Laws*, U.S. DEP’T LAB. (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/minimum-wage/state> [<https://perma.cc/5X4A-QALE>].

<sup>57</sup> See Joseph P. Shelton & Joseph L. Wilson, *State Voting Leave Laws Chart: Overview*, THOMSON REUTERS PRACTICAL L., <https://us.practicallaw.thomsonreuters.com/2-522-2146> [<https://perma.cc/SGC4-J59C>]; Jonathan Hancock & Joann Coston-Holloway, *State Guns-at-Work Laws Chart: Overview*, THOMSON REUTERS PRACTICAL L., <https://us.practicallaw.thomsonreuters.com/9-521-5091> [<https://perma.cc/S5UV-RZU9>].

<sup>58</sup> The Fair Labor Standards Act, 29 U.S.C. § 206(a), for example, specifies minimum wage rates that employers shall pay to their “employees.” *Id.* (emphasis added).

<sup>59</sup> The First Circuit recently held that a labor exception to antitrust law protects independent contractors who organize for higher wages. *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314–16 (1st Cir. 2022). But the question remains contested, and absent decisive resolution, even the threat of liability could chill gig workers from organizing. For more on this question, see generally Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016).

minorities and women.<sup>60</sup> Today, classification of millions of gig workers cuts across many of these same lines.<sup>61</sup>

In short: a lot hinges on how workers are classified. Platforms have strong incentives to (mis)classify workers as contractors.<sup>62</sup> Nearly a third of employee costs come from non-wage, non-salary expenses,<sup>63</sup> and contractor classification allows businesses to offload these costs.<sup>64</sup> Other rules, like overtime, provide similar incentives. Classifying workers as independent contractors can also prevent them from collectively bargaining, staving off further demands for better conditions.<sup>65</sup>

A variety of tests exist to distinguish employees from contractors. Some federal statutes use a multifactor test derived from tort,<sup>66</sup> while others use a simpler “economic reality” test<sup>67</sup> or even a hybrid of these common law–based approaches.<sup>68</sup> States use these tests too, but many also use the more expansive “ABC” test,<sup>69</sup> which classifies more workers as employees.

Broadly speaking, two ways to increase the protections available to gig workers under existing laws are (1) to ensure that misclassified workers (potentially a sizeable group) are classified correctly and receive the

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<sup>60</sup> See, e.g., *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.*, 117th Cong. 3 (2021) (statement of Rep. Adams, Chairwoman, Subcomm. on Workforce Prots.).

<sup>61</sup> See ANDERSON ET AL., *supra* note 33, at 4–5.

<sup>62</sup> See, e.g., Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 351–52 (2016); *The Effects of Misclassifying Workers as Independent Contractors: Joint Hearing Before the Subcomm. on Income Sec. & Fam. Support and Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 110th Cong. 12 (2007) [hereinafter *Misclassification Hearing*] (statement of Sigurd R. Nilsen, Director, Education, Workforce, and Income Security, Government Accountability Office).

<sup>63</sup> U.S. DEP’T OF THE TREASURY, *THE STATE OF LABOR MARKET COMPETITION* 12 (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf> [<https://perma.cc/XD2F-UR4R>].

<sup>64</sup> *Misclassification Hearing*, *supra* note 62, at 2 (hearing background); see also *id.* at 4 (statement of Rep. McDermott, Chairman, Subcomm. on Income Sec. & Fam. Support).

<sup>65</sup> See *supra* note 59 and accompanying text.

<sup>66</sup> E.g., *Independent Contractor (Self-Employed) or Employee?*, IRS (Jan. 27, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/44WF-L99X>].

<sup>67</sup> E.g., *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB. (Mar. 2022), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> [<https://perma.cc/X45L-3KNT>].

<sup>68</sup> See, e.g., *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994).

<sup>69</sup> Under the ABC test, to classify a worker as a contractor, an employer must show: “(A) that the worker is free from . . . control and direction . . . ; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.” *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 7 (Cal. 2018).

benefits they are already entitled to under existing law, or (2) to change the classification tests so that more workers qualify in the first place.<sup>70</sup>

The first approach offers limited potential. Litigation is expensive, uncertain, and by definition a piecemeal approach to a systemic problem. Even lawsuits that avoid being redirected into arbitration often end in monetary settlements that do not require prospective changes.<sup>71</sup> Governments could do more to ensure that workers who are entitled to employment protections are classified accordingly,<sup>72</sup> but resources<sup>73</sup> and political will can be limited.

A few states have tried the second approach, changing laws to clarify that gig workers qualify. But platforms spend hugely to fight changes.<sup>74</sup> Even in states that have given gig workers employee status by statute, platforms have fought back. California, for example, passed a law to classify rideshare and delivery gig workers as employees.<sup>75</sup> In response, Uber and Lyft wrote a ballot measure to give themselves a special exemption.<sup>76</sup> Platforms spent more than \$200 million to support the initiative, which passed.<sup>77</sup> Similar fights are playing out in other states.<sup>78</sup>

Classification is a critical issue, and fights over its application to gig workers will continue. But this Chapter sets the classification question

<sup>70</sup> Of course, a third option is to look beyond *existing* employment laws and to pass new laws that either add new protections for contractors or create a new, third category of workers in addition to contractors and employees. See, e.g., Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 64–69 (2017).

<sup>71</sup> See, e.g., Chris Marr, *The Art of Settling but Not Resolving Gig Worker Status Disputes*, BLOOMBERG L. (Sept. 20, 2022, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/the-art-of-settling-but-not-resolving-gig-worker-status-disputes> [<https://perma.cc/H9EU-XSAE>].

<sup>72</sup> See, e.g., NAT'L EMP. L. PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 3–5 (2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf> [<https://perma.cc/KC5P-F5BJ>].

<sup>73</sup> DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 5–8 (2010), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf> [<https://perma.cc/XJQ6-6XBH>].

<sup>74</sup> See, e.g., Wilfred Chan, “*Insidious and Seductive*”: Uber Funds New Lobbying Group to Deny Rights for Gig Workers, THE GUARDIAN (Mar. 11, 2022, 2:15 PM), <https://www.theguardian.com/business/2022/mar/11/uber-funds-new-lobbying-group-to-deny-rights-for-gig-workers> [<https://perma.cc/9B2M-93YB>].

<sup>75</sup> CAL. LAB. CODE § 2750.3(a) (West 2020) (effective from Jan. 1, 2020, to Sept. 3, 2020), repealed by Act of Sept. 4, 2020, ch. 38, § 1, 2020 Cal. Stat. 1836.

<sup>76</sup> See Brian Melley, *Some Uber, Lyft Drivers Sue over California Ballot Measure*, AP NEWS (Jan. 12, 2021), <https://apnews.com/article/uber-lyft-drivers-sue-california-prop-22-98f296965bb67d327693af785548fb57> [<https://perma.cc/L6JF-LW8L>].

<sup>77</sup> Taryn Luna, *California Voters Approve Prop. 22, Allowing Uber and Lyft Drivers to Remain Independent Contractors*, L.A. TIMES (Nov. 3, 2020, 11:45 PM), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22> [<https://perma.cc/P5DH-VH43>]. However, Proposition 22 is still being challenged in court. See Zachary Sorenson, *What's Next for California Drivers' Challenge to Prop. 22?*, ONLABOR (Feb. 19, 2021), <https://onlabor.org/whats-next-for-california-drivers-challenge-to-prop-22> [<https://perma.cc/K7Z4-DR7X>].

<sup>78</sup> See, e.g., Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot Measure*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html> [<https://perma.cc/37EU-BWHT>].

aside to focus on the potential offered by consumer protection laws that are not traditionally thought to relate to the workplace. The consumer law approach suggested by the FTC<sup>79</sup> sidesteps the classification problem: the law and remedies do not depend on how a platform classifies its workers and apply to employees as well as contractors.<sup>80</sup>

3. *Gig Work Contracts Can Further Limit Relief.* — In theory, even a gig worker who is (mis)classified as a contractor could, well, *contract* for the benefits and protections statutorily offered by employment law. In practice, though, gig workers do not have this opportunity. Gig platforms tend to offer “take-it-or-leave-it” contracts that include lopsided terms that favor themselves.<sup>81</sup> Restrictive employment agreements are a widespread challenge — limiting the competitiveness of labor markets and reducing compensation that goes to workers — even where workers are classified as employees.<sup>82</sup> But employees have the baseline protections of employment and labor law to fall back on; independent contractors, by definition, have little more than the terms of their contracts.

Restrictive contracts can bind workers even after their work ends and can limit their ability to use the legal system. Contracts might include noncompete, nonsolicitation, nonrecruitment, nondisclosure, or no-poach agreements<sup>83</sup> and might also require workers to agree to arbitration (giving up their right to go to court) and to waive their ability to seek redress as part of a class.<sup>84</sup> Courts routinely enforce these provisions.<sup>85</sup>

Of course, employers can — and often do — impose restrictive terms in contracts with *employees*.<sup>86</sup> But the effects are particularly pernicious for independent contractors. Contractors have none of the baseline protections made available by law to employees. And contract restrictions — especially mandatory arbitration and class action waivers — can make it difficult for misclassified contractors to challenge their misclassification in the first place, since their employer has

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<sup>79</sup> See *infra* section C.4, pp. 1643–44.

<sup>80</sup> Of course, these approaches may still offer greater relative benefits to contractors than employees because contractors do not have the existing employment law framework as a backstop.

<sup>81</sup> FTC POLICY STATEMENT, *supra* note 11, at 11; *accord id.* at 11–12.

<sup>82</sup> See U.S. DEP’T OF THE TREASURY, *supra* note 63, at 13–14.

<sup>83</sup> See *id.* at 13; Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987 (July 14, 2021).

<sup>84</sup> See U.S. DEP’T OF THE TREASURY, *supra* note 63, at 18 (finding that “about 60 million [U.S.] workers” are subject to mandatory arbitration agreements). The Supreme Court has specifically held that employers can legally require class action waivers. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

<sup>85</sup> See, e.g., Memorandum and Order on Defendant’s Motion to Compel Arbitration at 1–3, *Wickberg v. Lyft, Inc.*, No. 18-12094 (D. Mass. Dec. 19, 2018) (granting Lyft’s motion to compel arbitration based on the arbitration clause in its contract with its drivers); Memorandum and Order on Defendant’s Motion to Compel at 1, *Immediato v. Postmates, Inc.*, No. 20-12308 (D. Mass. Mar. 4, 2021), 2021 WL 828381, at \*1 (granting Postmates’ motion to compel arbitration). *But see Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 907 (9th Cir. 2020) (affirming district court’s denial of Amazon’s motion to compel arbitration based on similar contractual clause).

<sup>86</sup> See U.S. DEP’T OF THE TREASURY, *supra* note 63, at 13–14.

not only misclassified them but also required them to waive their ability to go to court to challenge that determination.<sup>87</sup> Moreover, state agencies typically cannot bring class actions on behalf of these workers unless empowered by statute.<sup>88</sup> And even when contracts include terms that a court would not enforce, workers may not venture a challenge and may therefore never discover that terms were unenforceable to begin with.

Ultimately, the minimal protections provided to independent workers, coupled with the obstacles to challenging restrictive terms in contracts and the difficulty of negotiating on an even footing for better terms, mean that gig platforms' classification and treatment of their workers are ripe for regulatory oversight and intervention.

### C. Federal Consumer Protection: Law and Institutions

1. *The Federal Trade Commission.* — Creating an independent commission to combat corporate concentration was a crowning achievement of the turn-of-the-twentieth-century antitrust movement. Responding to the late Gilded Age's increasing concentrations of corporate power, Congress passed the Sherman Act<sup>89</sup> in 1890 to prohibit "contract[s], combination[s] . . . , or conspirac[ies], in restraint of trade or commerce."<sup>90</sup> But a conservative Supreme Court soon narrowed this new law's reach: in *Standard Oil Co. of New Jersey v. United States*,<sup>91</sup> the Court found that the Rockefeller family's Standard Oil Company — long one of the antitrust movement's bogeymen — was an illegal combination in restraint of trade and ordered that it be split up.<sup>92</sup> But in doing so, the Court shrank the scope of the Sherman Act by stipulating that its sweeping language should be held to the "standard of reason."<sup>93</sup> Balancing the law's broad objectives against the "freedom of contract,"<sup>94</sup> it held that not every "restraint of trade" is prohibited — only those that are

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<sup>87</sup> See generally Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 205–06; *No Due Process, No Rights: How Forced Arbitration Enables Misclassification in the Gig Economy*, NAT'L INST. FOR WORKERS' RTS. (Aug. 11, 2021), <https://niwr.org/2021/08/11/no-due-process-no-rights> [<https://perma.cc/2LQZ-X5WA>].

<sup>88</sup> States can bring *parens patriae* suits on behalf of citizens but must show a "quasi-sovereign interest," *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982), or must be explicitly permitted to do so by statute, e.g., 15 U.S.C. § 15c(a)(1). But such suits may cause unforeseen harms by binding citizens to judgments from proceedings with weaker protections. See, e.g., Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 503, 512 (1995).

<sup>89</sup> 15 U.S.C. §§ 1–7.

<sup>90</sup> *Id.* § 1.

<sup>91</sup> 221 U.S. 1 (1911).

<sup>92</sup> *Id.* at 75–82.

<sup>93</sup> *Id.* at 60.

<sup>94</sup> *Id.* at 69.

not reasonable.<sup>95</sup> The resulting “rule of reason”<sup>96</sup> delighted businesses.<sup>97</sup> Stocks jumped.<sup>98</sup>

The FTC was conceived in response — part of a “frontal[] attack”<sup>99</sup> by President Wilson and Congress against the Supreme Court’s restrictive “rule of reason.”<sup>100</sup> The Federal Trade Commission Act<sup>101</sup> (FTC Act), signed by President Wilson in 1914,<sup>102</sup> created an independent, five-member commission with a “broad and flexible mandate” and a “wide-ranging” combination of both investigatory and prosecutorial powers.<sup>103</sup>

In addition to creating the FTC, the law banned “unfair methods of competition.”<sup>104</sup> This prohibition was specifically crafted to be broader than the Sherman Act as construed in *Standard Oil*.<sup>105</sup> But Congress left it to the FTC to fill in the statute’s substance and “determine what practices were unfair.”<sup>106</sup> As the Senate Report explained, “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”<sup>107</sup>

Over the ensuing decades, the FTC began building out this broad authority, including by targeting corporate practices that were unfair to or deceived consumers.<sup>108</sup> But the Court again stepped in to limit a statute’s scope in favor of business, holding in *FTC v. Raladam Co.*<sup>109</sup> that only unfair acts that harmed “present or potential competitors,” as opposed to members of the public, were prohibited by the FTC Act.<sup>110</sup> So Congress responded once more,<sup>111</sup> amending the FTC Act to

<sup>95</sup> *The Antitrust Laws*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/R795-ARAS>].

<sup>96</sup> *Standard Oil*, 221 U.S. at 62. See generally H.L. Wilgus, *The Standard Oil Decision; The Rule of Reason*, 9 MICH. L. REV. 643 (1911).

<sup>97</sup> See *Business Likes Oil Decision: Corporations Look Forward to a Prosperous Period on Settled Basis*, N.Y. TIMES, May 17, 1911, at 1.

<sup>98</sup> Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 13 (2003) (exploring the FTC’s evolution from 1921 to 1961).

<sup>99</sup> *Id.* at 55.

<sup>100</sup> *Id.* at 55–56.

<sup>101</sup> Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

<sup>102</sup> *Our History*, FTC, <https://www.ftc.gov/about-ftc/history> [<https://perma.cc/QT6P-BXSB>].

<sup>103</sup> Winerman, *supra* note 98, at 5–6; see also *id.* at 97.

<sup>104</sup> Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–21 (1914).

<sup>105</sup> Indeed, “[t]he Supreme Court has said that all violations of the Sherman Act” also “violate the FTC Act.” *The Antitrust Laws*, *supra* note 95; see, e.g., *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (citing, inter alia, *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 463, 466 (1941)).

<sup>106</sup> S. REP. NO. 63-597, at 13 (1914).

<sup>107</sup> *Id.*

<sup>108</sup> See generally Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871, 877–85 (2005).

<sup>109</sup> 283 U.S. 643 (1931).

<sup>110</sup> *Id.* at 649.

<sup>111</sup> See Robert E. Freer, Comm’r, FTC, Address Before the Annual Convention of the Proprietary Association: The Wheeler-Lea Act (May 17, 1938), [https://www.ftc.gov/system/files/documents/public\\_statements/676351/19380517\\_freer\\_whe\\_wheeler-lea\\_act.pdf](https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf) [<https://perma.cc/EQ4F-C6TM>].

explicitly prohibit “unfair or deceptive acts or practices” in 1938.<sup>112</sup> Like the original FTC Act, this provision was designed to expand statutory authority that had been narrowed by the Court, in this case to give the FTC broad power to “prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors.”<sup>113</sup>

Today, the FTC pursues its antitrust and consumer protection missions in parallel,<sup>114</sup> and its policy statement on the gig economy contemplates leveraging *both* of these authorities.<sup>115</sup> The antitrust angle is beyond the scope of this Chapter. Instead, the remaining sections focus specifically on the FTC’s unique consumer protection authorities, which have inspired similar statutes in many states.

2. *Unfair or Deceptive Acts or Practices.* — As amended in 1938, the FTC Act now widely prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>116</sup> This language sweeps broadly, but the FTC and courts have refined its scope over the intervening decades.

Originally, “injury to consumers” was but one factor the FTC considered to determine whether a practice was unfair.<sup>117</sup> In 1972, the Supreme Court upheld the agency’s broad leeway to “measur[e] a practice against the elusive, but congressionally mandated standard of fairness” and to “consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”<sup>118</sup> But during the Reagan Administration, the FTC limited itself by adopting a narrower test,<sup>119</sup> which Congress later codified.<sup>120</sup> Accordingly, to be deemed unfair under current law, a practice must cause or be likely to cause consumer injury that is (1) “substantial,” (2) “not reasonably avoidable by consumers themselves,” and (3) “not outweighed by countervailing benefits to consumers or to competition.”<sup>121</sup>

<sup>112</sup> Wheeling-Lea Act, Amendments, Pub. L. No. 75-447, sec. 3, § 5(a), 52 Stat. 111, 111 (1938).

<sup>113</sup> H.R. REP. NO. 75-1613, at 3 (1937).

<sup>114</sup> *Mission*, FTC, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/XDE9-5PJC>].

<sup>115</sup> See FTC POLICY STATEMENT, *supra* note 11, at 8–15.

<sup>116</sup> 15 U.S.C. § 45(a)(1). As a hook for federal jurisdiction, the prohibition covers only acts or practices “in or affecting commerce.” *Id.*

<sup>117</sup> The FTC had three original factors for unfairness: “(1) whether the practice . . . offends public policy . . . [;] (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408).

<sup>118</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

<sup>119</sup> See Letter from Michael Pertschuk, Chairman, FTC, et al. to Wendell H. Ford, Chairman, Consumer Subcomm. of the S. Comm. on Com., Sci. & Transp. & John C. Danforth, Ranking Member, Consumer Subcomm. of the S. Comm. on Com., Sci. & Transp. (Dec. 17, 1980) (policy statement on unfairness), *in Int’l Harvester Co.*, 104 F.T.C. 949 app. at 1070–76 (1984).

<sup>120</sup> See J. Howard Beales, Former Dir., Bureau of Consumer Prot., *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003), <https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection> [<https://perma.cc/HM4H-E3JK>].

<sup>121</sup> 15 U.S.C. § 45(n).

The FTC has similarly expounded its interpretation of the “deceptive” prong of its authority under section 5 of the FTC Act. In a 1983 policy statement, it explained that deception must involve (1) “a representation, omission or practice that is likely to mislead” a consumer who (2) is “acting reasonably in the circumstances,” and (3) the deception must be “material.”<sup>122</sup>

In addition to these broad authorities, the FTC Act also regulates some specific acts and practices. Some provisions declare specified acts or practices to be unlawful and unfair or deceptive.<sup>123</sup> Others reiterate the FTC’s enforcement authority in specific contexts.<sup>124</sup>

Unlike the Sherman Act’s substantive provisions, which the Supreme Court has held “took their origin in the common law,”<sup>125</sup> the restrictions on unfair or deceptive acts or practices created entirely *new* substantive rights, designed by Congress to go beyond the protections previously available under common law or statutes.<sup>126</sup> After Congress gave this new power to the FTC in 1938, many states followed suit beginning in the 1960s, creating their own equivalent “Unfair and Deceptive Acts and Practices,” or “UDAP,” statutes.<sup>127</sup> Some of these statutes now go beyond the federal equivalent, while others are narrower.<sup>128</sup> Because such authorities all had their origins with the 1938 FTC Act amendments (also known as the Wheeler-Lea Act) and the FTC, understanding the scope of the FTC’s authority can be instructive for state enforcement as well.

Finally, while the FTC Act both created the Commission and set out substantive provisions of law for it to enforce, the FTC now has responsibility for enforcing a host of other statutes as well — more than seventy in total.<sup>129</sup>

### 3. *The FTC Enforcement Process.* —

(a) *Investigations.* — The FTC can conduct investigations to inform its enforcement and rulemaking. The FTC Act authorizes the

<sup>122</sup> Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, H. Comm. on Energy & Com. (Oct. 14, 1983) (policy statement on deception), *in* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 175 (1984).

<sup>123</sup> *See, e.g.*, 15 U.S.C. § 52 (false advertisements).

<sup>124</sup> *See, e.g., id.* § 45b(d) (form contracts, but notably not employment contracts, *id.* § 45b(a)(3)(B)); *id.* § 45d(a)–(b) (substance use disorder treatment services and products).

<sup>125</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 51 (1911).

<sup>126</sup> *See* James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 ANTITRUST L.J. 947, 947 (2017).

<sup>127</sup> *Id.* at 953–54. Many of these statutes were modeled on the 1964 Uniform Deceptive Trade Practices Act and the 1967 Model Unfair Trade Practices and Consumer Protection Law. Jeffrey Naimon et al., *Under the Microscope: A Brief History of UDAP Laws and Predictions for Post-Dodd Frank Developments*, CONSUMER FIN. SERVS. L. REP., Oct. 27, 2010, at 3, 4.

<sup>128</sup> *See generally* NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES app. C (2018), <https://www.nclc.org/wp-content/uploads/2022/08/udap-appC.pdf> [<https://perma.cc/7WSC-LL7M>].

<sup>129</sup> *See Legal Library: Statutes*, FTC, <https://www.ftc.gov/legal-library/browse/statutes> [<https://perma.cc/U6DF-SXSL>].



agency to “prosecute any inquiry necessary to its duties”<sup>130</sup> and allows investigations using various types of compulsory process including civil investigative demands.<sup>131</sup> The agency can publicize results of targeted or general investigations where disclosure serves the public interest.<sup>132</sup>

(b) *Enforcement.* — If an investigation gives the FTC reason to believe a target has violated the law, the agency can intervene, either by initiating internal administrative proceedings or suing in federal district court.<sup>133</sup> Internal proceedings are conducted by an administrative law judge and are appealable to a federal court of appeals.<sup>134</sup>

(c) *Rulemaking.* — The FTC can promulgate interpretive rules, policy statements, and rules defining specific acts and practices as “unfair or deceptive.”<sup>135</sup> However, the FTC Act imposes rulemaking requirements that are much more burdensome than is the standard Administrative Procedure Act process.<sup>136</sup> As a result, FTC rulemaking takes nearly six years on average, while the few rules that the FTC is allowed to make through standard notice-and-comment rulemaking average less than one year to promulgate.<sup>137</sup> The FTC has also imposed additional limitations through its own internal rules and structure.<sup>138</sup> Recently, though, the agency has foreshadowed a greater appetite to use its rulemaking power, streamlining its internal process for rulemaking<sup>139</sup> and creating a rulemaking group within its general counsel’s office.<sup>140</sup>

(d) *Remedies.* — Under section 5(b) of the FTC Act, the agency can obtain only prospective, injunctive relief, as opposed to money damages, when it is administratively enforcing against first-time violations of

<sup>130</sup> 15 U.S.C. § 43.

<sup>131</sup> *Id.* §§ 46, 49, 57b-1; see also *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021) [hereinafter *FTC Authorities*], <https://www.ftc.gov/about-ftc/mission/enforcement-authority> [<https://perma.cc/DNH3-V4KC>].

<sup>132</sup> *FTC Authorities*, *supra* note 131 (quoting 15 U.S.C. § 46(f)).

<sup>133</sup> 15 U.S.C. § 45(b), (m)(1)(A).

<sup>134</sup> *FTC Authorities*, *supra* note 131.

<sup>135</sup> 15 U.S.C. § 57a(a)(1).

<sup>136</sup> For a distillation of the additional requirements imposed on the FTC’s rulemaking process by the federal Lemon Law, 15 U.S.C. §§ 2301–2312, see Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–84 (2015).

<sup>137</sup> Lubbers, *supra* note 136, at 1988–89, 1995.

<sup>138</sup> Statement, Rebecca Kelly Slaughter, Comm’r, FTC, Statement Regarding the Adoption of Revised Section 18 Rulemaking Procedures 1–2 (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591522/joint\\_rules\\_of\\_practice\\_statement\\_final\\_7121\\_1131am.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf) [<https://perma.cc/U5XV-LAWV>] (noting that in the 1980s, the FTC “radically reduce[d]” its own rulemaking capacity).

<sup>139</sup> Press Release, FTC, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct> [<https://perma.cc/CCY9-FQJE>].

<sup>140</sup> Press Release, FTC, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> [<https://perma.cc/Z5B5-CTKF>].

section 5's prohibition on unfair or deceptive acts or practices.<sup>141</sup> As a general matter, in order for monetary restitution or punitive damages to be available, a party must violate a final FTC order or a specific rule promulgated to define a practice as unfair or deceptive.<sup>142</sup>

4. *The FTC's Foray into the Gig Economy.* — The FTC has already taken individual enforcement action against gig platforms (like Amazon) that violate the law. But recently, the agency has signaled its intent to take a more comprehensive and strategic approach. In March 2022, the Commission sought comment on “how it can most effectively . . . address certain deceptive or unfair acts or practices involving the use of false, unsubstantiated, or otherwise misleading earnings claims” by gig platforms and in various other contexts.<sup>143</sup> In July 2022, the FTC formalized an agreement with the National Labor Relations Board, setting out various gig platform practices as an area of shared concern.<sup>144</sup> And most recently, in its September 2022 policy statement, the FTC announced plans to take comprehensive aim at gig platforms.<sup>145</sup> Citing concerns about working conditions in this rapidly expanding industry, the Commission announced its intent to use its full authority to “[p]rotect[] these workers from unfair, deceptive, and anticompetitive practices.”<sup>146</sup>

The statement identified three areas of concern: (1) control without responsibility, (2) diminished bargaining power, and (3) concentrated markets.<sup>147</sup> The FTC explained that while many platforms advertise gigs as flexible and independent, in reality workers are subject to a

<sup>141</sup> 15 U.S.C. § 45(b); Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71, 82 (2021). However, monetary relief may be available as part of a settlement agreement, even for first-time violations. *See id.*

<sup>142</sup> Chopra & Levine, *supra* note 141, at 82–83. Rohit Chopra and Samuel Levine, former and current senior FTC officials, lay out a helpful table of the various sources of statutory authority under which the FTC can seek monetary relief, the requirements for triggering such relief, and the remedies available. *See id.* at 84–85 tbl.1. Before 2021, the FTC could seek monetary relief through its section 13(b) authority — an important method by which the FTC brings enforcement actions in federal court. Statement, Rebecca Kelly Slaughter, Acting Chairwoman, FTC, Statement on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC* (Apr. 22, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-ruling-amg-capital> [<https://perma.cc/U939-KY6R>]. However, in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court largely defanged the FTC's enforcement power by ruling that the agency cannot use section 13(b) to seek monetary relief. *Id.* at 1347–49, 1352.

<sup>143</sup> Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,953 (proposed Mar. 11, 2022) (to be codified at 16 C.F.R. pt. 462).

<sup>144</sup> Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest 1 (July 19, 2022), <https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/ftcnlrb-mou-71922.pdf> [<https://perma.cc/7GTP-KMRD>].

<sup>145</sup> FTC POLICY STATEMENT, *supra* note 11, at 1.

<sup>146</sup> *Id.*; *see also* Statement, Rebecca Kelly Slaughter, Comm'r, FTC, Statement on FTC Policy on Enforcement Related to Gig Work (Sept. 15, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/rks-gig-worker-policy-statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/rks-gig-worker-policy-statement.pdf) [<https://perma.cc/TSN5-BNA8>].

<sup>147</sup> FTC POLICY STATEMENT, *supra* note 11, at 4–6.

significant degree of employer control over their work — characteristic of an employer-employee relationship.<sup>148</sup> The conduct the agency intends to scrutinize includes the “promises gig platforms make, or information they fail to disclose, about the financial proposition of gig work.”<sup>149</sup>

The two remaining areas were not framed as unfair or deceptive practices. Instead, the inability of gig workers to challenge platforms in court or through collective bargaining (exacerbated by the power imbalance between gig platforms and gig workers) and the relative lack of competition in the concentrated gig markets make gig workers more vulnerable to unfair and deceptive practices.<sup>150</sup> Moreover, concentration in gig markets can enable platforms to “exert market power,” including by “suppress[ing] wages . . . , reduc[ing] job quality, or impos[ing] onerous terms.”<sup>151</sup>

The FTC identified a variety of practices that may fall within its consumer protection authority, including making “[f]alse, misleading, or unsubstantiated claims about earnings,”<sup>152</sup> “withholding money owed to workers without consent,”<sup>153</sup> and using “nonnegotiable contracts [with] lopsided provisions.”<sup>154</sup> Crucially, the FTC asserted that protections do not depend on how gig companies classify their workers.<sup>155</sup>

#### D. Consumer Protection and the Gig Economy

The FTC can use the full scope of its authorities to clamp down on gig platforms that take advantage of their workers. This could include a mix of investigations, individual enforcement actions, and rulemaking.

The FTC can investigate gig platforms, leveraging compulsory process to explore practices that are often not transparent to workers. Not only can the FTC obtain information that can later be used in enforcement actions, but the agency can also publicize what it discovers. Publication alone might help put workers in a better bargaining position; it could also spur enforcement by other government actors and elicit more pointed criticism from customers and workers. And even “naming and shaming” platforms might encourage changes.<sup>156</sup>

<sup>148</sup> *Id.* at 4. In 2014, FedEx Ground workers prevailed with a similar argument in the Ninth Circuit, albeit in the context of a misclassification dispute. The court reversed an MDL court’s finding that the workers were employees in spite of FedEx’s assurances of independence and flexibility. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984–88, 991 (9th Cir. 2014).

<sup>149</sup> FTC POLICY STATEMENT, *supra* note 11, at 5.

<sup>150</sup> *Id.* at 5–6. For discussion of the potential limits antitrust laws might impose on gig workers who are classified as independent contractors, see *supra* note 59 and accompanying text.

<sup>151</sup> FTC POLICY STATEMENT, *supra* note 11, at 6.

<sup>152</sup> *Id.* at 8.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 11.

<sup>155</sup> *Id.* at 7 (“[C]onsumer’ in the FTC Act ‘is to be read in its broadest sense.’” *Id.* at 7 n.28. (quoting S. REP. NO. 93-151, at 27 (1973))).

<sup>156</sup> *Cf.* Sharon Yadin, *Regulatory Shaming*, 49 ENV’T L. 407, 410–11, 410 n.16 (2019).

Of course, the real bite will come once the FTC develops substantive rules for gig platforms, whether iteratively through individual enforcement actions or broadly through rulemaking. Already, its cases and settlements with Amazon and Uber provide examples. While these actions were inherently limited to the individual platforms that were their subjects, the nationwide nature of the gig economy and the fact that many gig industries are dominated by a small number of players mean that even a limited number of enforcement actions could lead to improvements for large numbers of gig workers nationwide. Enforcement also creates precedent that can later be used as the basis for monetary relief, even if initial remedies are only prospective.

Finally, though more burdensome, rulemaking to declare certain acts unfair or deceptive could offer broader protections. Already, the FTC has initiated one such proceeding to target misleading money-making claims by gig platforms and other companies.<sup>157</sup> If the FTC finalizes this rule and others like it, it could seek monetary relief directly.

Still, it may seem odd for an agency conceived to protect markets and consumers to leverage its authorities on behalf of workers. How well might these tools work? The remainder of this section surveys the potential this new focus might offer gig workers, as well as limitations inherent in the FTC's structure and authorities that the agency must overcome.

*I. Limitations.* — While enforcement against gig platforms offers great potential, the FTC must overcome several legal, conceptual, and practical limitations.

*(a) Legal Limitations.* — The threshold hurdle the FTC must clear is its consumer harm standards. Section 5 of the FTC Act simply prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>158</sup> And while the legal tests for “unfair” practices and “deceptive” practices are separate, both have evolved to specifically hinge on harm to consumers.<sup>159</sup> To be unfair, an act or practice must cause or be likely to cause substantial injury to consumers.<sup>160</sup> To be deceptive, an act or practice must materially mislead or be likely to materially mislead consumers.<sup>161</sup> But in the context of a gig platform, many practices that might seem unfair or deceptive in the colloquial sense might harm gig workers but not the end customers. Of course, there may be instances where *both* workers and customers are deceived or treated unfairly, in

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<sup>157</sup> Press Release, FTC, FTC Takes Action to Combat Bogus Money-Making Claims Used to Lure People into Dead-End Debt Traps (Feb. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-takes-action-combat-bogus-money-making-claims-used-lure-people-dead-end-debt-traps> [https://perma.cc/6MEY-XX55].

<sup>158</sup> 15 U.S.C. § 45(a)(1).

<sup>159</sup> See FED. RSRV., CONSUMER COMPLIANCE HANDBOOK I (2016), <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf> [https://perma.cc/N5QD-KDLL].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

which case the analysis is simpler.<sup>162</sup> But if the FTC wants to go after unfair or deceptive practices where customers are not harmed directly, it must still find a consumer harm hook.

One approach is to interpret “consumer” broadly to capture more than just the end customers who are using platforms. The FTC seemed to adopt this approach in its policy statement: in footnotes, the agency emphasized that “misconduct against *any consumer* — customers who use services offered through the platform, workers who supply labor, and businesses on or off the platform — is prohibited”<sup>163</sup> and that “the word ‘consumer’ in the FTC Act ‘is to be read in its broadest sense.’”<sup>164</sup> The FTC offered some examples to support this broad reading in the gig economy context,<sup>165</sup> including its settlement with Amazon over its tipping mechanism (which misled both customers and drivers)<sup>166</sup> and a complaint against Uber that characterized drivers as “consumers who use the [Uber] App to locate Riders in need of transportation.”<sup>167</sup> However, if the FTC is serious about pursuing more of these kinds of cases, this broad reading of “consumer” will likely be challenged, and it’s not clear whether courts will uphold it.

Alternatively, the FTC could pursue a theory of indirect harm. Even if gig workers are the ones most directly injured as a result of an unfair act or practice, and assuming the workers are not considered “consumers” for purposes of the relevant test, the FTC could argue that the direct harm to workers ends up harming consumers indirectly. This is an inherently more attenuated position, and there may be circumstances where harm to workers arguably benefits customers more than it hurts them. For example, platforms may deceive workers about the pay they can expect. While lower pay is a clear detriment to gig workers, it may offer consumers benefits like depressed prices for gig services.

In the antitrust context, the FTC reinterpreted its section 5 authority to no longer be limited by the consumer welfare standard (which underpins other antitrust laws, including the Sherman Act).<sup>168</sup> Subsection 5(a)(1) includes both the antitrust and the consumer protection prongs of the FTC’s section 5 authority under the FTC Act — the prohibitions on “unfair methods of competition in or affecting commerce” and “unfair or deceptive acts or practices in or affecting

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<sup>162</sup> See, e.g., Press Release, FTC, *supra* note 8; Sorenson, *supra* note 10.

<sup>163</sup> FTC POLICY STATEMENT, *supra* note 11, at 1 n.3 (emphasis added).

<sup>164</sup> *Id.* at 7 n.28 (quoting S. REP. NO. 93-151, at 27 (1973)).

<sup>165</sup> *Id.* at 1 n.3.

<sup>166</sup> See Press Release, FTC, *supra* note 8.

<sup>167</sup> Uber Techs., Inc., 166 F.T.C. 203, 204 (2018).

<sup>168</sup> See Statement, Lina M. Khan, Chair, FTC, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591498/final\\_statement\\_of\\_chair\\_khan\\_joined\\_by\\_rc\\_and\\_rks\\_on\\_section\\_5\\_o.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_o.pdf) [https://perma.cc/NWD9-TCKK].

commerce,” respectively.<sup>169</sup> Neither of these provisions explicitly incorporates consumer harm or welfare standards. In 1994, however, Congress explicitly codified the consumer injury standard for the FTC’s unfair practices authority under section 5 but did not do the same for its competition authority.<sup>170</sup> As a result, the FTC does not have the same leeway to reinterpret the unfair acts or practices component of section 5 as it might for unfair competition or deception.

(b) *Conceptual Limitations.* — Even if the FTC can show that a challenged practice clears the relevant legal test, there is a broader, conceptual limitation to how effective this sort of enforcement can be. By design, the FTC Act prohibits only conduct that is unfair (resulting in substantial and unavoidable injury) or deceptive (materially misleading). Enforcement actions to address this sort of conduct are an important step and may well serve to stamp out some of the most “outrageous”<sup>171</sup> conduct. But there is an entire world of practices that deprive workers of benefits they would be entitled to if classified as employees — and even though requiring these benefits could be valuable as a matter of policy, it may not be “unfair” or “deceptive” for a gig platform not to provide them absent such a requirement. For example, a platform might pay a gig worker less than the equivalent of the federal minimum wage but be transparent about the amount of pay and therefore not violate the prohibition on deception. Gig workers might be deprived of a valuable and important benefit when platforms don’t automatically withhold their income taxes or provide subsidized health insurance, but these failures might not constitute a substantial injury that would make the practice unfair. In short, FTC enforcement might be more suitable as a negative rather than an affirmative policy tool: better tailored to counter abuses than to provide new, affirmative *improvements* for workers along the lines of the landmark Progressive Era employment laws.

(c) *Practical Limitations.* — Finally, the FTC faces practical limitations as it considers more robust enforcement. Unless the FTC embarks on a potentially arduous rulemaking, which would likely extend at least into the next presidential term, it will be able to address only violations that have already been committed. The same case-by-case approach that enables the FTC to iteratively shape policy also relegates the agency to a reactive stance. This stance limits its ability to prescribe standards of conduct for platforms and means the agency can only address violations that have already been committed, at least in the near term.

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<sup>169</sup> 15 U.S.C. § 45(a).

<sup>170</sup> See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, sec. 9, § 5(n), 108 Stat. 1691, 1695.

<sup>171</sup> Statement, Noah Joshua Phillips, Comm’r, FTC & Rebecca Kelly Slaughter, Acting Chairwoman, FTC, Statement on Amazon Flex Settlement (Feb. 2, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1586967/192\\_3123\\_amaon\\_flex\\_njp\\_and\\_rks\\_joint\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1586967/192_3123_amaon_flex_njp_and_rks_joint_statement.pdf) [<https://perma.cc/C27Q-UGG7>].

Further, the FTC is notably underresourced — a pain point for generations of FTC leaders.<sup>172</sup> As one former FTC official observed, “even though the FTC now enforces eighty statutes in addition to the FTC Act, the FTC is significantly smaller today — in both funding and staffing — than it was in 1980.”<sup>173</sup> While the FTC is of course not alone among government agencies in its desire for more funding, staffing and resource constraints will be a major practical limitation as the agency considers taking on a new enforcement portfolio on top of its existing work.

Finally, the FTC Act limits the penalties that can be awarded in enforcement cases. The Supreme Court’s ruling in *AMG Capital Management, LLC v. FTC*<sup>174</sup> cabined the FTC’s previously expansive reading of its authority to obtain monetary awards.<sup>175</sup> The agency can no longer seek “the return of illegally obtained funds” under its authority to seek a permanent injunction.<sup>176</sup> Now, the FTC can receive civil penalties only *after* it “has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive *and* has issued a final cease and desist order.”<sup>177</sup> If the subject of the order knowingly violates the order, and certain mens rea and temporal conditions are met, the FTC may pursue civil penalties.<sup>178</sup> Because the FTC cannot exact financial penalties when it finds a violation in the first instance, many of its judgments bear no direct costs beyond attorneys’ fees, negative publicity, and compliance costs. Of course, the FTC can extract greater penalties in settlement agreements<sup>179</sup> and can punish subsequent violations more severely. Nevertheless, initial enforcement actions may have some deterrent effect but will probably be inadequate on their own.

2. *Potential.* — Even with these limitations in mind, FTC enforcement offers several potential benefits beyond the relief already available under current law. One baseline upside is obvious — in a world of dramatic underenforcement (and hamstrung enforcers), any additional scrutiny adds a layer of protection. This observation is particularly true because the FTC can take gig platforms to task where other agencies and workers themselves might not be permitted or practically able to.

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<sup>172</sup> See, e.g., David C. Vladeck, Former Dir., FTC Bureau of Consumer Prot., Prepared Testimony at Protecting Consumer Privacy: Hearing Before the S. Comm. on Com., Sci. & Transp. 3–9 (Sept. 29, 2021), <https://www.commerce.senate.gov/services/files/FBC44208-86C3-4C17-8058-4D7BCFCA03F8> [https://perma.cc/TCH7-P5HD].

<sup>173</sup> *Id.* at 1.

<sup>174</sup> 141 S. Ct. 1341 (2021).

<sup>175</sup> *Id.* at 1347–49.

<sup>176</sup> *Id.* at 1347 (quoting Brief for the Federal Trade Commission at 8, *AMG Cap. Mgmt.* (No. 19-508)).

<sup>177</sup> *FTC Authorities*, *supra* note 131 (emphasis added).

<sup>178</sup> *AMG Cap. Mgmt.*, 141 S. Ct. at 1349 (citing 15 U.S.C. §§ 45(m)(1)(B)(2), 57b(a)(2), 57b(d)).

<sup>179</sup> See, e.g., Lesley Fair, *FTC’s \$5 Billion Facebook Settlement: Record-Breaking and History-Making*, FTC (July 24, 2019), <https://www.ftc.gov/business-guidance/blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-and-history-making> [https://perma.cc/3VLF-YQMT].

But the FTC's unique structure and authorities also offer distinct substantive and structural advantages both separate from and on top of traditional employment law and enforcement mechanisms.

(a) *Substantive Possibilities.* — FTC action could offer several substantive advantages. Its case-by-case approach could enable it to develop precedents for what practices are prohibited as unfair or deceptive that are specifically tailored to the gig economy. In doing so, the FTC could establish a floor for how platforms treat workers.

One way the FTC might do this is by holding platforms to their promises. Given the independent and atomized nature of gig work, platforms must make claims about the jobs they offer in order to recruit and retain workers. Platforms may frame gig jobs as an alternative<sup>180</sup> to traditional employment that provides choice, independence, flexibility, and, perhaps most significantly, earnings.<sup>181</sup> At minimum, FTC authorities can ensure that platforms follow through on these claims and that such pitches are not made in a deceptive manner. Claims about compensation are an obvious example. The FTC's Amazon settlement offers a striking example of particularly egregious deception about compensation and illustrates how the FTC can hold platforms accountable. But more nuanced forms of deception are possible too. For example, both Uber and Lyft use surge pricing to entice drivers to come to areas with high passenger demand.<sup>182</sup> However, incentive pay rates can disappear during the time it takes drivers to get to the surge location, meaning drivers acted on the platform's representations about compensation but did not receive the additional pay.<sup>183</sup>

But compensation isn't the only aspect of the job that platforms may make deceptive or misleading claims about. For example, the FTC's policy statement highlights how gig platforms often shift many of the costs and risks of their business onto workers — costs like startup expenses, training fees, and insurance.<sup>184</sup> Another underexplored angle the FTC might consider is holding platforms to the claims about independence that they need to make in order to justify classifying workers as contractors rather than employees. While we might typically think of classification as being something that is determined after the fact based on the nature of a job, the order of operations can be flipped: if a platform classifies a worker as a contractor, that could be thought of as a promise that the worker will have the independence and flexibility that contractor status requires. Any deception related to, for example,

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<sup>180</sup> *Drive*, UBER, <https://www.uber.com/us/en/drive> [<https://perma.cc/5CYD-WKRE>].

<sup>181</sup> *See, e.g., id.*

<sup>182</sup> Class Action Complaint, *supra* note 42, ¶¶ 51–61.

<sup>183</sup> *Id.*

<sup>184</sup> FTC POLICY STATEMENT, *supra* note 11, at 4, 9–10.



the flexibility and choice<sup>185</sup> afforded to workers would stand unfavorably against a backdrop of unfulfilled promises. A settlement in this context might require a platform to give drivers the ability to set their own fares, for example. Finally, the FTC might argue that in certain contexts, withholding information from gig workers is unfair or deceptive.

How much the FTC might be able to leverage either case-by-case actions or broader rulemaking to craft substantive regulations for gig platforms is unclear. But the agency has clear authority to go after particularly egregious behavior, like lying about tipping mechanisms,<sup>186</sup> where action by gig workers or government actors may otherwise be precluded. And though it is untested how broadly the FTC could read “unfair and deceptive,” the agency would likely have significant leeway. After all, these authorities were specifically crafted to give huge discretion to the agency — the FTC was empowered to start *from scratch* to create entirely new protections beyond those offered by the common law and to prevent injury to any part of the “general public.”<sup>187</sup>

(b) *Structural Benefits.* — The FTC also has unique structural advantages over existing protection mechanisms. First, the FTC’s authority to regulate, investigate, or bring an enforcement action is tied to *practices* rather than *people*. Many employment laws create individual entitlements or benefits, which employers must then provide. But the FTC can focus on whether specific systemic practices themselves are unfair or deceptive, leapfrogging questions of how individual workers are classified or what protections they are entitled by law to receive. And if the agency reaches a conclusion that is upheld, the practice itself can be directly regulated, rather than requiring litigation over the practice’s application to individual workers or cases.

Second, the unfair and deceptive standard is indefinite and flexible<sup>188</sup> — by design. Not only is the FTC’s jurisdiction under this authority flexible, but the agency is also tasked with interpreting the overall scope of its authorities in the first instance. Unlike some employment laws, like the statutorily codified minimum wage, the FTC Act enables the FTC to adapt to an evolving gig industry. This open-endedness also makes it more difficult for platforms to evade the law. Regulatory attention is not mandated by explicit terms in the statute; instead, the FTC has discretion in deciding which acts to bring within its authority.

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<sup>185</sup> See, e.g., Mike Robinson, Commentary, *I’ve Been a Full-Time Lyft Driver Since 2017. Here’s How “Flexibility” and “Choice” Just Don’t Apply to Underpaid “Gig Work” that Requires 50 Hours a Week*, FORTUNE (Aug. 17, 2022, 5:35 AM), <https://fortune.com/2022/08/17/full-time-lyft-driver-flexibility-choice-act-underpaid-gig-work-pay-workers-rideshare-mike-robinson> [https://perma.cc/96S2-MS5M].

<sup>186</sup> See generally, e.g., Amazon.com, Inc., 171 F.T.C. 860, 871–77 (2021) (decision and order).

<sup>187</sup> H.R. REP. NO. 75-1613, at 3 (1937).

<sup>188</sup> See Chris Jay Hoofnagle et al., *The FTC Can Rise to the Privacy Challenge, But Not Without Help from Congress*, BROOKINGS INST.: TECHTANK (Aug. 8, 2019), <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress> [https://perma.cc/4N8Z-WVD4].

Third, concentration in the gig economy could enable systemic enforcement. Because the gig industry is dominated by a handful of players, enforcement against one of these companies could yield changes that affect many workers. For example, if the FTC were to successfully challenge Uber's practice of not allowing drivers to set their own prices or not showing drivers the destination of the ride, Uber would have to change the policy nationwide, immediately reshaping work arrangements for thousands of workers. And similarities between how competing platforms operate mean that competitors would be motivated to follow suit, even without follow-on enforcement.

Fourth, while the FTC's case-by-case approach limits its ability to quickly effect broad change, it mirrors the iterative development of common law. This cumulative approach could address nuances between platforms, industries, and work structures and allow for flexibility and evolution without locking particular requirements into statute.

Finally, while the FTC is inherently more limited than Congress in its ability to effect nationwide changes, most of the legal changes being proposed in the gig economy context are statutes at the state level. Even comprehensive state legislation is (of course) geographically limited, and platforms can pit states against one another to try to keep the bar low. This backdrop highlights the benefits of FTC action over existing alternatives — even if FTC action is more limited in scope than what Congress might accomplish by statute, it can still have far-reaching benefits.

### *Conclusion*

Federal consumer protection law offers a promising but limited solution to provide relief for gig workers. The FTC could target some of the more serious abuses gig workers face through enforcement proceedings, but legal and practical challenges remain: the agency's legal interpretations are likely to face scrutiny, and its enforcement approach is necessarily circumscribed to the parties before it.

Nevertheless, the FTC's entrance into the gig industry presents gig workers with an avenue to relief in a legal space that otherwise offers few if any protections. It also provides a model for states struggling to protect their gig workers. As the limited gig worker protections on the state level continue to falter in the face of challenges from gig platforms, states could mimic the FTC's approach under their own unfair and deceptive acts and practices laws<sup>189</sup> — which may be even broader than the FTC Act.<sup>190</sup> And state legislatures could act to explicitly incorporate workers (regardless of classification) into their consumer protection laws.

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<sup>189</sup> For a summary of state UDAP laws, see NAT'L CONSUMER L. CTR., *supra* note 128, at app. C.

<sup>190</sup> See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 174–75 (2011).

## CHAPTER THREE

### THE ENFORCEMENT OPPORTUNITY: FROM MASS ARBITRATION TO MASS ORGANIZING

Over the past thirty years, mandatory arbitration clauses have proliferated in employment contracts, preventing more than sixty million American workers from vindicating their civil rights in a courtroom and forcing them to pursue legal claims in private, confidential forums.<sup>1</sup> Nearly twenty-five million workers are also subject to waivers of class or collective actions, rendering many claims, especially low-value wage-and-hour claims, economically irrational.<sup>2</sup> Proponents portray arbitration as merely a shift in forum that promotes more efficient dispute resolution.<sup>3</sup> But the claim-suppressive effects of forced arbitration have eliminated up to ninety-eight percent of all employment claims and virtually insulated employers from liability altogether.<sup>4</sup>

In a poetic turn, mass arbitration has renewed the counteroffensive against arbitration. Mass arbitration is a strategy in which plaintiff-side attorneys file hundreds of near-identical arbitration claims against a single defendant, pressuring them to settle under the weight of significant filing fees.<sup>5</sup> The strategy has recovered more than \$300 million for workers and consumers,<sup>6</sup> caused some companies to eliminate arbitration clauses altogether,<sup>7</sup> and, critically, revived the “market” for employment litigation to hold defendants accountable.

Yet mass arbitration does not change the litigation system and working conditions that enabled arbitration clauses to be so devastating in the first place. The private framework of rights enforcement, in which the plaintiffs’ and defense bars are engaged in “procedural warfare”<sup>8</sup> and the workers’ claims are worthwhile only if profitable, remains the same. The typical employer-employee power structure is disrupted only temporarily, if at all. And as gratifying as it feels to see defendants

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<sup>1</sup> ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2, 10 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/8CV3-UCTP>].

<sup>2</sup> *Id.* at 11.

<sup>3</sup> See *infra* notes 17–21 and accompanying text.

<sup>4</sup> See *infra* notes 26–32 and accompanying text.

<sup>5</sup> See J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022).

<sup>6</sup> See Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [<https://perma.cc/WUT7-7J9R>].

<sup>7</sup> See *id.*

<sup>8</sup> Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), <https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827> [<https://perma.cc/YW8N-89VV>].

“hoisted by [their] own petard,”<sup>9</sup> mass arbitration is likely fleeting: defense firms have released guidance to mitigate mass-arbitration risk,<sup>10</sup> and private arbitration service providers (ASPs) are restructuring payment models, rendering arbitration less effective.<sup>11</sup>

But just beyond mass arbitration lies an opportunity to ensure that even a fleeting phenomenon has lasting structural impact, particularly within low-wage and gig-work industries. This Chapter proposes a novel model of leveraging mass arbitration to facilitate worker organizing, called “mass organizing.” Under mass organizing, the culmination of all the effort put into developing and pursuing a mass-arbitration claim is not a settlement. Rather, the ideal outcome is for plaintiff-side attorneys to, through the mass-arbitration process, partner with organizers to fuel the development of collective platforms, enabling continuous worker-centered rights enforcement and political organizing.

Section A provides context regarding how arbitration agreements and class waivers have stymied employment-rights enforcement, and traces the burgeoning phenomenon of mass arbitration, its limits, and the opportunities that plaintiff-side attorneys are leaving on the table. Section B proposes that plaintiff-side attorneys adopt a “mass-organizing model” and outlines how mass arbitration, a significant economic win achievable only through collective power, can be leveraged to catalyze collective action. A mass-organizing coalition would then build around litigation, education, and organizing by partnering with existing platforms like unions and worker centers. Section C considers the benefits of mass organizing, as well as ethical concerns and legal challenges.

Shifting workers’ rights enforcement from litigation to organizing is an effort of herculean proportions that requires collaboration among traditionally disconnected groups. But the success of mass arbitration has shown that to win big, the plaintiffs’ bar must be creative and rewrite the typical playbook. Mass organizing would fulfill the true potential of mass arbitration and make the most of an enforcement opportunity that may not last long.

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<sup>9</sup> Alison Frankel, *Judge Breyer Rejects \$40 Million Intuit Class Settlement amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM), <https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5> [<https://perma.cc/Y9BW-XZMP>] (quoting Judge Breyer).

<sup>10</sup> See, e.g., Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, GIBSON DUNN (May 24, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/05/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them.pdf> [<https://perma.cc/VGE3-MRQ8>]; Benjamin K. Jacobs et al., *Class Action Roundtable: Cutting Edge Issues Around Mass Arbitration*, MORGAN LEWIS (Sept. 21, 2021), [https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2021/morganlewisbockiusllpwebinar\\_classactionroundtablecuttingedgeissuesaroundmassarbitration.pdf](https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2021/morganlewisbockiusllpwebinar_classactionroundtablecuttingedgeissuesaroundmassarbitration.pdf) [<https://perma.cc/Y2RA-DVZK>].

<sup>11</sup> See Mark J. Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, BALLARD SPAHR (Mar. 1, 2021), <https://www.consumerfinancemonitor.com/2021/03/01/new-aaa-consumer-fee-schedule-addresses-mass-arbitration-costs> [<https://perma.cc/PYJ2-TMEY>].

### A. *The Enforcement Crisis*

To understand why arbitration clauses and class waivers have devastated employment law and why mass arbitration is no silver bullet, it is necessary to contextualize the system of private law enforcement, which is deeply vulnerable to hurdles that make litigation economically irrational. While mass arbitration has revived employment law, it has two crucial flaws: the strategy does not build resilience against the structural conditions that empowered arbitration agreements, and it may be in danger of being foreclosed by defense-bar and ASP strategies.

1. *The Rise of Arbitration and the Death of Employment Law.* — The American system of individual-rights enforcement through private litigation rather than centralized state enforcement arose by political design in the 1960s and 1970s, when Congress passed statutes creating private causes of action, including those vindicating workers' rights, such as Title VII of the Civil Rights Act of 1964.<sup>12</sup> This system requires that plaintiffs have the capacity and resources to pursue litigation and that attorneys have the economic incentive to file claims. Congress addressed these limitations in part through fee-shifting provisions, heightened-damages schemes, and claim-aggregation mechanisms.<sup>13</sup> But, almost immediately, the system of so-called "free market" private rights enforcement became a target of political ire and distrust, with special ire reserved for "ambulance chas[ing]" lawyers<sup>14</sup> and the "for-profit civil rights bar."<sup>15</sup> Rather than rescinding statutory substantive rights, the conservative movement imposed procedural roadblocks against rights enforcement through the legislature and a conservative judiciary.<sup>16</sup>

Arbitration has been a highly successful strategy of this conservative judicial project, promoted, supposedly, to combat inefficient and wasteful litigation driven by greedy lawyers.<sup>17</sup> Forced arbitration in consumer and employment contracts prohibits plaintiffs from pursuing claims in court in front of a judge; instead, plaintiffs must pursue their

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<sup>12</sup> 42 U.S.C. §§ 2000e to 2000e-17; see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 4–6, 8–9 (2017); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148–49 (2012).

<sup>13</sup> See Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963–1976*, 23 STUD. AM. POL. DEV. 23, 38, 51 (2009); Glover, *supra* note 12, at 1162–63.

<sup>14</sup> Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 379.

<sup>15</sup> *Id.* at 378; see SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 60 (2015) ("[W]e may well be on our way to a society overrun by hords of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated." (quoting Chief Justice Burger)); Farhang, *supra* note 13, at 32–34.

<sup>16</sup> See BURBANK & FARHANG, *supra* note 12, at 3; Gilles, *supra* note 14, at 389–90; Glover, *supra* note 12, at 1160–75.

<sup>17</sup> See STASZAK, *supra* note 15, at 52–53.

claims in a private forum in front of a private arbitrator.<sup>18</sup> Because proceedings take place confidentially and often impose nondisclosure agreements, offenders avoid public accountability for their actions and alienate employees who may be undergoing similar workplace abuses at the hands of a particular employer.<sup>19</sup> Class waivers, which are often embedded within arbitration agreements and prohibit access to class actions, collective actions, or even class arbitration, go even further to make pursuing low-value claims economically irrational.<sup>20</sup>

Early discussions presented arbitration as a more efficient alternative, available in parallel with litigation.<sup>21</sup> But under the weight of Supreme Court precedent that has consistently upheld arbitration agreements and class waivers under the Federal Arbitration Act<sup>22</sup> (FAA) even in adhesive consumer and employment contracts,<sup>23</sup> arbitration has altogether replaced access to the public judicial forum.<sup>24</sup> Legal scholars have extensively criticized arbitration clauses and catalogued their many harms, including not only the structural implications of outsourcing public rights to private arbitration, but also their deleterious impact on a plaintiff's chances of winning a claim, prohibitive fee provisions, troubling lack of transparency, and removal of potentially precedent-setting litigation from the courtroom.<sup>25</sup> Most concerning, arbitration clauses and class waivers have effectively enabled defendants to avoid accountability altogether; debates regarding the relative cost or efficiency of arbitration compared to litigation are moot when data shows almost no

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<sup>18</sup> See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018).

<sup>19</sup> See David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 8–9 (2022). Although weaponizing arbitration to avoid public accountability has been particularly well documented in cases of sexual assault and harassment, similar concerns apply for other forms of discrimination and wage theft. See, e.g., HUGH BARAN & ELISABETH CAMPBELL, NAT'L EMP. L. PROJECT, FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET \$9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS 1–2 (2021), <https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf> [<https://perma.cc/KP28-77S2>].

<sup>20</sup> “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.)).

<sup>21</sup> STASZAK, *supra* note 15, at 62–63.

<sup>22</sup> 9 U.S.C. §§ 1–16.

<sup>23</sup> See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1426–28 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468–71 (2015); *Concepcion*, 563 U.S. at 344–47; *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

<sup>24</sup> See STASZAK, *supra* note 15, at 62–73.

<sup>25</sup> See Gilles, *supra* note 14, at 409–22; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2811 (2015).

consumers or employees actually *do* arbitration.<sup>26</sup> Arbitration clauses suppress claims and thus transform what was a free market for litigation into a *nonexistent* market for arbitration.

Particularly in employment law, the impact of arbitration clauses is staggering and multifold, as the enforcement regime is highly privatized, structurally underenforced, and dependent upon class proceedings. More than ninety-five percent of all federal employment-discrimination or wage-and-hour claims are brought through private litigation rather than government agencies.<sup>27</sup> Employees in nonunionized workplaces face significant enforcement challenges given the costs of bringing a lawsuit, including monetary, time, and opportunity costs, as well as the fear of retaliation, job loss, and stigma from future employers.<sup>28</sup> Individual costs may be so high that pursuing litigation is economically irrational, even if the collective workplace- or society-wide benefits would significantly outweigh individual costs.<sup>29</sup> Collective actions and class actions are therefore critical to make lawsuits more economically rational, especially for wage-and-hour claims in low-wage work.<sup>30</sup>

Arbitration clauses are estimated to have eliminated up to ninety-eight percent of employment claims from being pursued at all.<sup>31</sup> Employers have taken advantage of this claim-suppressive effect: today, more than half of nonunion, private-sector employers mandate arbitration.<sup>32</sup> Consequently, more than half of all workers are now subject to mandatory arbitration, up from as low as two percent in the 1990s.<sup>33</sup> By combining arbitration clauses and class waivers, employers can commit labor violations with impunity, contributing to the estimated fifty billion dollars that are stolen from American workers each year.<sup>34</sup> It is no coincidence that arbitration clauses in employment contracts are particularly prevalent in low-wage work and thereby disproportionately

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<sup>26</sup> Resnik, *supra* note 25, at 2812. Professor Judith Resnik attributes the claim-suppressive effects of arbitration to “the minimal oversight of arbitration’s fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions requisite to augmenting complainants’ resources, and the limited access accorded third parties to the claims filed, the proceedings, and the results.” *Id.* at 2815.

<sup>27</sup> See Glover, *supra* note 12, at 1149–50.

<sup>28</sup> See generally David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets?* (Nat’l Bureau of Econ. Rsch., Working Paper No. 9565, 2003) (contending that unions and other labor organizations not only assist with implementing labor policies but also reduce the marginal cost of exercising workers’ rights).

<sup>29</sup> *Id.* at 11.

<sup>30</sup> See Glover, *supra* note 12, at 1184–85.

<sup>31</sup> Glover, *supra* note 5, at 1305; Estlund, *supra* note 18, at 696–97.

<sup>32</sup> COLVIN, *supra* note 1, at 2.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> BRADY MEIXELL & ROSS EISENBREY, ECON. POL’Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), <https://files.epi.org/2014/wage-theft.pdf> [<https://perma.cc/YWK8-KL3X>].

affect women and Black people,<sup>35</sup> stealing wealth and exacerbating economic inequality.<sup>36</sup>

2. *Finding a Way to “Do” Arbitration.* — Corporations designed arbitration clauses and class waivers with the assumption that they would suppress claims altogether.<sup>37</sup> To circumvent claims that arbitration agreements are unconscionable, corporations frequently promise they will pay the lion’s share of upfront, mandatory arbitration fees charged by ASPs.<sup>38</sup> These fee-shifting-style provisions made arbitration *appear* fairer to courts — but in reality, since so few plaintiffs actually pursue arbitration, corporations rarely incurred these fees.<sup>39</sup> Thus, the arbitration system was not designed to handle the volume of claims actually reflective of the volume of violations.

As Professor J. Maria Glover explains in her seminal paper on mass arbitration, in 2018, the firm Keller Postman<sup>40</sup> began exploiting this weakness by filing thousands of individual arbitration claims at once.<sup>41</sup> Often, the facts pleaded within each claim are nearly identical, but each claim is distinct and traceable to an individual plaintiff.<sup>42</sup> Thus, mass arbitration is particularly time and resource intensive, as attorneys must individually identify each claimant and pay their share of upfront arbitration fees, if any.<sup>43</sup> But, mass arbitration is also more onerous for defendants than class actions, as defendants are exposed to not only massive liability but also tens of millions of dollars in upfront fees alone, without access to an appeal as of right, creating immense pressure to settle.<sup>44</sup> Plaintiff-side attorneys have successfully pursued mass arbitration against gig-economy companies such as DoorDash, brick-and-mortar stores and restaurants such as Family Dollar and Chipotle, and online services businesses such as Peloton.<sup>45</sup> Even a few hundred claimants can impose sufficient pressure to force a settlement, as was

<sup>35</sup> COLVIN, *supra* note 1, at 2.

<sup>36</sup> See Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 510–13 (2017).

<sup>37</sup> Estlund, *supra* note 18, at 682 (“Mandatory arbitration is less of an ‘alternative dispute resolution’ mechanism than it is a magician’s disappearing trick or a mirage.”).

<sup>38</sup> See Glover, *supra* note 12, at 1166–67, 1166 n.136 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011)).

<sup>39</sup> See COLVIN, *supra* note 1, at 11 (“[O]nly 1 in 10,400 employees subject to [arbitration agreements] actually files a claim under them each year.”).

<sup>40</sup> Formerly known as Keller Lenkner. Sara Merken, *Keller Lenkner Co-founder Departs from Plaintiffs’ Law Firm*, REUTERS (Apr. 25, 2022, 4:42 PM), <https://www.reuters.com/legal/legalindustry/keller-lenkner-co-founder-departs-plaintiffs-law-firm-2022-04-25> [https://perma.cc/9FJM-WB4Q].

<sup>41</sup> Glover, *supra* note 5, at 1323–24.

<sup>42</sup> See *id.* at 1334–35.

<sup>43</sup> See *id.* at 1288–89, 1334–35.

<sup>44</sup> *Id.* at 1328–31; see also Joan C. Grafstein, *Yes, You Can Appeal an Arbitration Award*, JAMS (Jan. 28, 2015), <https://www.jamsadr.com/publications/2015/yes-you-can-appeal-an-arbitration-award> [https://perma.cc/2N4P-8WJC] (clarifying that the grounds for appeal are narrow).

<sup>45</sup> See Glover, *supra* note 5, at 1323–24.



true with the approximately four hundred individual wage-and-hour claims filed against Buffalo Wild Wings.<sup>46</sup>

Companies have tried various strategies to avoid mass arbitration, including alleging that ASP fees are exorbitant or that the company would prefer to be sued in a class action.<sup>47</sup> The irony that defendants, which have for decades insisted that arbitration agreements should be upheld, now seek to evade arbitration has not been lost on judges, who have expressed little sympathy.<sup>48</sup> Defendants have gone so far as to pursue litigation against ASPs as well.<sup>49</sup> Nonetheless, Keller Postman has reportedly earned more than \$375 million in settlements within just a few years.<sup>50</sup>

3. *Limitations and Concerns of Mass Arbitration.* — Even as mass arbitration has been gaining steam, there are signs the approach is both short lived and structurally flawed. Specifically, restructured arbitration clauses and judicial backlash threaten the potency and viability of mass arbitration. Moreover, the strategy does not go far enough to protect workers' rights against procedural barriers.

As market-driven organizations, ASPs are likely to restructure their fees to accommodate for mass arbitration, as corporate clients will otherwise remove arbitration clauses from contracts altogether or switch to a competitor. DoorDash did exactly this by switching ASPs, upon the advice of Gibson Dunn, when facing a mass arbitration.<sup>51</sup> DoorDash's new ASP, the International Institute for Conflict Prevention & Resolution (CPR), implemented "bellwether protocols" that force random individual claims to be arbitrated, supposedly to screen out frivolous claims from the mass arbitration.<sup>52</sup> The American Arbitration Association, too, has released a new sliding scale that charges lower fees per arbitration claim as the number of claims increases.<sup>53</sup>

Defendants have also begun to restructure their arbitration clauses to alleviate the risk of mass arbitration; law firms recommend strategies such as levying deterrent fee-shifting provisions against frivolous claims

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<sup>46</sup> Ben Penn, *Buffalo Wild Wings Case Tests Future of Class Action Waivers*, BLOOMBERG L. (July 12, 2018, 6:16 AM), <https://news.bloomberglaw.com/daily-labor-report/buffalo-wild-wings-case-tests-future-of-class-action-waivers> [<https://perma.cc/6SAW-UZP4>]; see also Glover, *supra* note 5, at 1346 ("[I]t might only take about 150 cases to generate significant [settlement] pressure for all claims.").

<sup>47</sup> See Glover, *supra* note 5, at 1344–46, 1350.

<sup>48</sup> See, e.g., Frankel, *supra* note 9.

<sup>49</sup> See, e.g., Glover, *supra* note 5, at 1347–49.

<sup>50</sup> Randazzo, *supra* note 6.

<sup>51</sup> See Susan Antilla, *Arbitration Storm at DoorDash*, AM. PROSPECT (Feb. 27, 2020), <https://prospect.org/labor/door-dash-company-arbitration-storm-workers> [<https://perma.cc/QKJ2-N3BV>].

<sup>52</sup> See Glover, *supra* note 5, at 1368–70; Mitchell L. Marinello, *CPR Issues New Employment Rules and Updates Mass Claims Protocol*, ABA (June 25, 2021), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2021/cpr-issues-new-employment-rules-and-updates-mass-claims-protocol> [<https://perma.cc/B37A-EPE8>].

<sup>53</sup> Levin, *supra* note 11.

and adding premediation requirements with built-in waiting periods.<sup>54</sup> It remains to be seen if any of these strategies would be preempted by the FAA or circumvented through state legislation.<sup>55</sup>

While the judiciary is currently sympathetic to mass arbitration, plaintiff-side attorneys may soon face judicial backlash. First, mass arbitration raises legitimate ethical issues because arbitral settlements lack the oversight of judicially enforced settlements, which ensure attorneys achieve fair outcomes for clients.<sup>56</sup> A defendant could leverage just one unfortunate example of abuse to convince a court to invalidate the scheme altogether. Second, since settlements are based largely on fee pressure, the frequent defense-bar talking point that mass arbitration raises concerns of sham lawsuits has some truth to it. For example, Uber was recently ordered to pay more than \$90 million in arbitration fees as a result of thirty-one thousand customers alleging reverse discrimination because Uber Eats had discounted delivery fees only for Black-owned restaurants.<sup>57</sup> Ironically, the customers were represented by a typical defense firm — the same one fighting affirmative action at the Supreme Court in the October Term 2022<sup>58</sup> — and the attorneys defending Uber alleged that the claims sought merely to “prove a political point.”<sup>59</sup> The Uber Eats case offers two lessons: first, that like litigation, mass arbitration is not an inherently progressive phenomenon but merely a tool; second, that judges who have previously lauded mass arbitration might, upon seeing more conservatively tilted cases, become increasingly concerned about meritless lawsuits. Regardless of how the judiciary responds, this case is a warning shot to plaintiff-side attorneys that the defense bar, too, can exploit mass arbitration.

Most concerningly, however, mass arbitration does not solve the structural issues that make barriers like class waivers and arbitration clauses so devastating in the first place. As Glover notes, defendants’

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<sup>54</sup> See Michael E. McCarthy et al., *Stemming the Tide of Mass Arbitration*, GREENBERG TRAURIG (June 7, 2021), <https://www.gtlaw.com/en/insights/2021/6/stepping-the-tide-of-mass-arbitration> [<https://perma.cc/9577-PEZF>]; Jacobs et al., *supra* note 10; Holecek, *supra* note 10.

<sup>55</sup> California, for example, has mandated pursuant to state legislation that defendants pay arbitration fees within a certain timeline of a claim being filed or else forfeit arbitration as a mandatory forum. See Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 4:49 PM), <https://www.reuters.com/article/us-otc-postmates-idUKKBN29P2S3> [<https://perma.cc/N4N5-Y9YF>].

<sup>56</sup> See JASON C. MARSILI, ETHICAL CONSIDERATIONS IN NEGOTIATING AGGREGATE SETTLEMENTS 7–9 (2022), [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2022/midwinter/flsl/ethical-considerations-in-negotiating-aggregate-settlements/ethical-considerations-negotiating-aggregate-settlements.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2022/midwinter/flsl/ethical-considerations-in-negotiating-aggregate-settlements/ethical-considerations-negotiating-aggregate-settlements.pdf) [<https://perma.cc/JA2K-NG2B>].

<sup>57</sup> Alison Frankel, *Uber Loses Appeal to Block \$92 Million in Mass Arbitration Fees*, REUTERS (Apr. 18, 2022, 4:54 PM), <https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18> [<https://perma.cc/4APH-GSZ4>].

<sup>58</sup> *Id.*; see Stephanie Saul, *A Look at the Lawyers Who Are Arguing in the U.N.C. Case*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-lawyers-supreme-court.html> [<https://perma.cc/VV8C-YZUY>].

<sup>59</sup> Frankel, *supra* note 57.

strategies “raise the prospect of protracted procedural warfare — an expensive game of whack-a-mole that . . . consumers, employees, and small businesses are likely to lose.”<sup>60</sup> Thus, even if mass arbitration has achieved short-term change, workers’ substantive rights remain highly vulnerable to procedural manipulation. And, if the relentless assault on class actions is any indication of where mass arbitration is headed, plaintiff-side attorneys should be worried about its long-term viability.<sup>61</sup> Arbitration clauses are merely the latest iteration of procedural barriers used to steal wealth — and mass arbitration does not build resilience against the next barrier.<sup>62</sup> Admittedly, these flaws are not unique to mass arbitration but reflect the shortcomings of litigation — and as the subsequent section explains, they are flaws that plaintiff-side lawyers can overcome by taking mass arbitration one step further.

### B. *The Mass-Organizing Model*

Mass arbitration finds a way to vindicate workers’ rights in a system designed to suppress claims — but it has the potential to do even more to transform workers’ rights enforcement altogether. This Chapter posits that the ideal method of legal protection resides in building systems of collective worker power, fueling continuous structural economic and political change.<sup>63</sup> This is not to say that mass arbitration is unhelpful or necessarily counterproductive; public interest practitioners should welcome tangible incremental change as well as more aspirational transformative change. Critically, mass arbitration provides an opportunity to shift practices from the former to the latter.

In what this Chapter refers to as “mass organizing,” a successful mass arbitration would not end with a settlement but instead would facilitate continuous rights enforcement by creating collective worker platforms supported by attorneys and organizers. The mass-organizing strategy aims to ensure there is a constant and real guarantor of accountability against an employer for workers’ rights violations, including not only ex post consequences for violations but also incentives for ex ante compliance. Mass organizing, thus, has two central goals: first, to ensure enforcement of workers’ rights as they currently exist in statutory employment law at the state and federal level; second, to overcome the procedural and structural barriers to bringing a suit.

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<sup>60</sup> Medintz, *supra* note 8.

<sup>61</sup> See, e.g., *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 333, 341–42 (2021).

<sup>62</sup> See Gilles, *supra* note 14, at 374–77. See generally Gupta & Khan, *supra* note 36.

<sup>63</sup> See generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) (documenting the relationship between law and organizing through the typical practices of poverty lawyers and discussing the practical and ethical implications of such practices); Gerald P. López, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041 (2005) (advancing a “rebellious” paradigm of legal practice that prioritizes community-based problem solving, *see id.* at 2048).

The model this Chapter proposes is flexible and encourages partnering with existing organizations like unions, worker centers, or other employment-focused, community-based organizations. There may be different models of collectives, stretching from industry wide (such as gig workers' organizations) to employer specific (such as a collective of Chipotle workers). The engagement and commitment of plaintiff-side attorneys will likely vary; some attorneys may be highly committed and partner with organizers early in the mass-arbitration process, while others may take a more hands-off approach by contacting plaintiffs, post settlement, to connect them with organizers. While the particulars may differ, the key is that plaintiff-side attorneys and organizers, together, ensure claimants can develop a collective platform that is explicitly and strategically tilted toward organizing further economic action, including pursuing subsequent legal action and political advocacy.

Given the potentially short life of mass arbitration's success, it is all the more critical to ensure plaintiff-side lawyers take full advantage of this fleeting opportunity to transform rights enforcement and prevent the defense bar from erecting ever more procedural hurdles. And even more than typical class proceedings, mass arbitration is particularly well suited to shifting to mass organizing and empowering workers to overcome the traditional collective-agent issues, information gaps, and irrational economics that hinder private rights enforcement.<sup>64</sup>

*I. The Hidden Potential of Mass Arbitration.* — Mass-organizing models that bud out of mass arbitration will likely have key differences from existing union or worker-center models. Nonetheless, existing collective platforms serve as a source of comparison and inspiration for how well-positioned mass arbitration is to facilitate mass organizing. First, mass arbitration builds a potential membership base by leveraging technological infrastructure that could be transformative for organizing. Second, mass-arbitration claimants are likely to be highly engaged organizers, as they have made it all the way through a lengthy arbitration process and are motivated by a legal win. Finally, mass arbitration has managed to succeed in ubiquitous industries like gig work and low-wage work that have been exceedingly difficult to organize using traditional tools, heightening the stakes of mass organizing as an opportunity.

*(a) Building Membership Base and Identifying Potential Organizers.* — The earliest, and one of the most difficult, aspects of organizing workers is building a membership body. Worker centers, for example, often need to engage in campaigns using “word-of-mouth, radio and TV ads, flyers, door-to-door campaigns in target neighborhoods, and announcements at churches or religious centers.”<sup>65</sup> Additionally,

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<sup>64</sup> See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8–9 (1984) (arguing that workers' rights present a public-good problem); Weil, *supra* note 28, at 11 (same).

<sup>65</sup> Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 HARV. LATINO L. REV. 91, 98 (2010).

organizers must identify workers who are well known, knowledgeable, and able to connect with and organize their coworkers.<sup>66</sup>

The process of identifying claimants, the most expensive and time-consuming aspect of mass arbitration, is thus also its most valuable for organizing purposes. Unlike class actions, mass arbitration requires attorneys to invest significant effort, upfront, to “identify, notify, contact, and ultimately retain” clients.<sup>67</sup> In addition to merely finding plaintiffs, then, attorneys must persuade plaintiffs of the strength of their claims and convince them to undergo the lengthy filing process.<sup>68</sup> Moreover, attorneys must harness highly sophisticated social media targeting tools to identify claimants and leverage proprietary software for claim management.<sup>69</sup> While many mass arbitrations in employment thus far have built off of Fair Labor Standards Act<sup>70</sup> (FLSA) collective actions, providing at least a starting base of claimants, there are notable exceptions.<sup>71</sup> For example, the mass arbitration against Family Dollar began organically; Glover attributes this success to workers being “connected and vocally disgruntled about wage theft.”<sup>72</sup> Disparate minimum-wage workers at a brick-and-mortar, national-chain dollar store aren’t typically workers considered to be “well connected” — but marketing and technology brought together nearly two thousand claimants.<sup>73</sup>

Beyond the difficulties from the attorney’s side in the needle-in-a-haystack marketing search, individual workers also face time and opportunity costs, in addition to retaliation concerns. Under these conditions, an image emerges of the types of workers who are willing to join mass arbitrations. First, these workers are more likely to be concerned about employers violating their rights. Second, the lengthy timeline and various steps involved indicate these workers are engaged in the process of holding their employers accountable; they are not simply passively filling out an online form as in a class action but engaging directly with attorneys and tracking their claims.<sup>74</sup> Third, these workers are more likely to be willing to stick their necks out and take on the costs associated with pursuing litigation, as they have already done so in arbitration.

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<sup>66</sup> See, e.g., Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 141, 170–72; Jane McAlevey, *The Crisis of New Labor and Alinsky’s Legacy: Revisiting the Role of the Organic Grassroots Leaders in Building Powerful Organizations and Movements*, 43 POL. & SOC’Y 415, 424–25 (2015); see also Sam Gindin, *The Power of Deep Organizing*, JACOBIN (Dec. 8, 2016), <https://www.jacobinmag.com/2016/12/jane-mcalevey-unions-organizing-workers-socialism> [<https://perma.cc/T4SM-AUPR>] (summarizing Jane McAlevey’s approach to organizing, which requires reaching indifferent workers, centering class struggle, and identifying organic leaders).

<sup>67</sup> Glover, *supra* note 5, at 1330.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.* at 1336, 1338–39.

<sup>70</sup> 29 U.S.C. §§ 201–219.

<sup>71</sup> Glover, *supra* note 5, at 1333.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1348 n.344.

<sup>74</sup> See *id.* at 1336 n.282.

Thus, mass-arbitration claimants are more likely to be open to forming organizations — and perhaps organizing others.

Plaintiff-side attorneys' technological tools would also be invaluable for organizers who, based on their expertise,<sup>75</sup> might trade best practices with attorneys on how to increase the number of workers engaged in mass arbitrations. The mutual expertise that attorneys and organizers can share is thus critical not only to increasing the potency of any individual mass arbitration but also to ensuring a sustainable platform with growing membership and growing strength beyond initial litigation.

(b) *Winning Early, and Winning Together.* — Mass arbitration is successful through the collective power of hundreds of individual claims, manifesting the value of collaborating with coworkers and organizing as a tactic. As a result, organizing momentum could be fueled from the start by an inspiring, collective win with economic, social, moral, and political consequences. And, in the world of organizing, “success breeds success and failure breeds failure.”<sup>76</sup> Leveraging early legal wins as a platform for organizing “increases not only the chances that those nascent efforts will succeed but also the likelihood that workers will engage in and be able to succeed at subsequent and stronger forms of collective action.”<sup>77</sup> As some worker centers have recognized, it can also be helpful to leverage litigation in early stages of organizing to identify and develop key worker-organizers' leadership skills.<sup>78</sup> There are limits, however, to the parallels between participation in a mass arbitration and participation in a true organizing campaign. From any one worker's perspective, pursuing their individual arbitration claim may not *feel* collective, especially if attorneys do not stress how the success of their claim depends on the aggregation of violations across their coworkers. As described in section C.1, some of these limitations may be mitigated if attorneys and organizers forge strong relationships early in the litigation process.

Successful organizing campaigns require moral, symbolic, and social capital; workers must demonstrate that their campaigns support important moral norms and gain the attention of important players like legislators and the media.<sup>79</sup> By beginning organizing with a legal win, workers have already gained moral capital by leveraging the expressive censure of the law against their employer. State courts and legislatures that disagree with the Supreme Court's decidedly proarbitration

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<sup>75</sup> See McAlevey, *supra* note 66, at 424–28 (describing organizers' role in motivating workers and identifying organic leaders).

<sup>76</sup> Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2690 (2008).

<sup>77</sup> *Id.*

<sup>78</sup> Ashar & Fisk, *supra* note 66, at 159–60.

<sup>79</sup> See César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 415–21 (2018).

jurisprudence have long tried to skirt the FAA,<sup>80</sup> and even Congress has demonstrated it is willing to reconsider the merits of arbitration with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.<sup>81</sup> Coupled with the headline-grabbing dollar amounts that mass arbitration often wins,<sup>82</sup> the momentum from a mass-arbitration victory enhances not only worker support for organizing but also critical public and political support.

(c) *Reaching Historically Challenging Workplaces.* — Mass arbitrations have managed to engage workers in industries that are traditionally very difficult to organize, including minimum-wage retail work and gig work.<sup>83</sup> For gig work in particular, the lack of a traditional workplace not only hinders workers from interfacing but also prevents workers from being able to demonstrate their displeasure at a physical worksite and inspire further boycotting.<sup>84</sup> It is unclear if previous attempts at gig-work boycotts and strikes have been effective.<sup>85</sup> To hinder organizing and rights enforcement, tech companies have also orchestrated multiple campaigns to ensure drivers are classified as “independent contractors” and hence unable to access the legal protections that are available for employees.<sup>86</sup>

While these barriers have quashed traditional organizing methods, mass arbitrations have proliferated against companies like Doordash and Postmates.<sup>87</sup> Gig-economy work is ubiquitous: from August 2020 to August 2021, nine percent of U.S. adults engaged in gig work, and sixteen percent of adults reported having ever done gig work.<sup>88</sup> Even the largest employer in the nation, Walmart, employed only around one

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<sup>80</sup> See Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–65 (2015).

<sup>81</sup> 9 U.S.C. §§ 401–402.

<sup>82</sup> See *supra* note 50 and accompanying text.

<sup>83</sup> See Avery Hartmans, *A Surge in Retail Union Organizing Is the Surest Sign Yet that Workers Are Fed Up*, INSIDER (Mar. 26, 2022, 7:25 AM), <https://www.businessinsider.com/retail-unions-rise-worker-frustration-covid-pandemic-2022-3> [<https://perma.cc/EAZ3-CHZM>]; Ken Green, *Unionizing the Gig Economy: A Path Forward for Gig Workers*, UNIONTRACK: BLOG (Aug. 30, 2021), <https://uniontrack.com/blog/unionizing-the-gig-economy> [<https://perma.cc/5R7C-XSVY>].

<sup>84</sup> See Whitney Kimball, *The Case for Virtual Picket Lines*, GIZMODO (Apr. 12, 2021), <https://gizmodo.com/the-case-for-virtual-picket-lines-1846654139> [<https://perma.cc/UGN2-HFX7>]; Green, *supra* note 83.

<sup>85</sup> See *WCP: The Challenges of Organizing “Gig” Workers*, KALMANOVITZ INITIATIVE FOR LAB. & WORKING POOR (Apr. 29, 2019), <https://lwp.georgetown.edu/visiting-scholars/wcp-the-challenges-of-organizing-gig-workers> [<https://perma.cc/EJP2-5BLV>].

<sup>86</sup> See, e.g., John Kingston, *East Coast’s Prop 22? Massachusetts Facing Potential Vote on Gig Driver Status*, FREIGHTWAVES (Feb. 22, 2022), <https://www.freightwaves.com/news/east-coasts-prop-22-massachusetts-facing-potential-vote-on-gig-driver-status> [<https://perma.cc/MNP9-A6BC>].

<sup>87</sup> Glover, *supra* note 5, at 1327.

<sup>88</sup> Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021> [<https://perma.cc/8DTY-QBGP>].

percent of the U.S. labor force in 2022.<sup>89</sup> Evidently, whichever group cracks the code on organizing gig work could have massive (and perhaps international) potential to transform the economy in favor of worker power.<sup>90</sup> Moreover, social media posts indicate that at least some mass-arbitration claimants work across multiple gig-work platforms, indicating a potential for sectoral organizing.<sup>91</sup>

The success of mass arbitration at Family Dollar is perhaps even more shocking. Two serious and publicly visible attempts to organize workers at dollar stores within the past five years were both unsuccessful.<sup>92</sup> There is incredible potential in organizing dollar stores, which have more physical locations than Walmart and McDonald's combined,<sup>93</sup> and frequently have misclassification and workplace-safety violations.<sup>94</sup> Given the success of mass arbitration in large industries that are traditionally difficult to organize, plaintiff-side attorneys should ensure that it is leveraged to transform rights enforcement sustainably.

### C. Strategy of a Mass-Organizing Platform

Through mass arbitration as it exists today, plaintiff-side attorneys have already identified highly engaged worker-organizers, particularly in high-potential industries, and energized them with early wins. Mass organizing takes these efforts a step further to create a sustainable platform for continual rights enforcement, lowering the typically high tangible and intangible costs of raising workplace claims.<sup>95</sup> Mass-organizing platforms would leverage three primary strategies: first, rights enforcement through litigation, including mass or individual arbitration, and class actions or individual lawsuits;<sup>96</sup> second,

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<sup>89</sup> Compare Melissa Repko, *Walmart Lays Off Corporate Employees After Slashing Forecast*, CNBC (Aug. 4, 2022, 10:44 AM), <https://www.cnbc.com/2022/08/03/walmart-lays-off-corporate-employees-after-slashing-forecast.html> [<https://perma.cc/T3NV-GG5E>] (“Walmart is the largest employer in the country, with nearly 1.6 million workers in the U.S.”), with *Civilian Labor Force Level*, FED. RSRV. ECON. DATA, <https://fred.stlouisfed.org/series/CLF16OV> [<https://perma.cc/Z9ZC-M6WB>] (tallying the labor force at roughly one hundred and sixty million workers in 2021).

<sup>90</sup> See *WCP: The Challenges of Organizing “Gig” Workers*, *supra* note 85.

<sup>91</sup> See [u/devildug1\\_, REDDIT: R/POSTMATES](https://www.reddit.com/r/postmates/comments/nvk5ei/hey_everyone_hope_all_is_well_just_got_an_email) (June 8, 2021, 9:38 PM), [https://www.reddit.com/r/postmates/comments/nvk5ei/hey\\_everyone\\_hope\\_all\\_is\\_well\\_just\\_got\\_an\\_email](https://www.reddit.com/r/postmates/comments/nvk5ei/hey_everyone_hope_all_is_well_just_got_an_email) [<https://perma.cc/328S-WDP3>] (featuring commenters sharing their experiences with actions against several gig platforms at once).

<sup>92</sup> See Greg Jaffe, *The Worker Revolt Comes to a Dollar General in Connecticut*, WASH. POST (Dec. 11, 2021), <https://www.washingtonpost.com/nation/interactive/2021/worker-revolt-comes-dollar-general-connecticut/> [<https://perma.cc/ZMZ2-NYZQ>].

<sup>93</sup> *Id.*

<sup>94</sup> *Senator Murray Pushes to Protect Workers at Dollar Store Chains, After Reports of Egregious Labor Violations*, U.S. SENATE COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Apr. 22, 2022), <https://www.help.senate.gov/chair/newsroom/press/senator-murray-pushes-to-protect-workers-at-dollar-store-chains-after-reports-of-egregious-labor-violations-> [<https://perma.cc/MS9V-WA8D>].

<sup>95</sup> See *supra* notes 27–29 and accompanying text.

<sup>96</sup> The nature of litigation would depend on what options are available. For example, an employer might eliminate arbitration clauses and class waivers after an initial mass arbitration, which would enable pursuing class actions.



worker-rights education and dialogue between workers, uncovering potentially illegal employer actions; and third, political organizing, particularly as it relates to enforcing workers' rights.

The combination of litigation, training, and political organizing draws from union and worker-center models,<sup>97</sup> and is intended to build solidarity among workers while helping uncover rights-enforcement needs and opportunities. Within a particular industry or among a particular group of workers in low-wage work or gig work, there are likely various potential claims under state and federal employment law, and perhaps opportunities to include consumer-based<sup>98</sup> or antitrust lawsuits.<sup>99</sup> However, some of these claims may become apparent only through engagement between organizers, workers, and attorneys, such as through rights education and training.<sup>100</sup> By understanding what workers are aiming to achieve, attorneys can achieve more ethical and more helpful remedies. For example, in Lyft's 2016, \$12 million settlement with workers, plaintiff-side attorneys at Outten & Golden secured important injunctive wins, such as limiting Lyft's at-will termination policy, based on workers' concerns.<sup>101</sup> In the political prong of mass organizing, the primary goal should be to organize against procedural hurdles that hinder rights enforcement, such as worker-classification legislation funded by Uber and Lyft,<sup>102</sup> and in favor of state and federal legislation that can meaningfully increase the success of potential claims, such as the Forced Arbitration Injustice Repeal Act.<sup>103</sup>

Political organizing, educational trainings, and demonstration capabilities can also be important to combat tactics corporations are leveraging to skirt the law and avoid the consequences of mass arbitration, such as DoorDash's attempts to change its ASP in the middle of a mass-arbitration campaign.<sup>104</sup> Employees may be more motivated to organize when they know of the great lengths employers take to avoid accountability. Moments like this would be ideal for mobilization of workers through direct actions, boycotts, and awareness campaigns to incense politicians and the public. Ideally, political organizing would help spur

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<sup>97</sup> See, e.g., Ashar & Fisk, *supra* note 66, at 159–62; Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 152–53 (2013).

<sup>98</sup> See, e.g., Press Release, U.S. Dep't of Just., Justice Department Sues Uber for Overcharging People with Disabilities (Nov. 10, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-uber-overcharging-people-disabilities> [<https://perma.cc/X7L4-GHER>].

<sup>99</sup> See, e.g., Mike Leonard, *Uber Appears to Settle Last Major Antitrust Challenge by a Rival*, BLOOMBERG L. (Aug. 27, 2021, 11:40 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/uber-appears-to-settle-last-major-antitrust-challenge-by-a-rival> [<https://perma.cc/W8PS-BE2V>].

<sup>100</sup> See Cummings & Eagly, *supra* note 63, at 483–84.

<sup>101</sup> Benjamin Sachs, Editorial, *Liss-Riordan Statement on Lyft Settlement*, ONLABOR (Jan. 29, 2016), <https://onlabor.org/liss-riordan-statement-on-lyft-settlement> [<https://perma.cc/38RD-7TRN>].

<sup>102</sup> Jacob Silverman, *The Battle over the Future of Gig Work Isn't Even Close to Finished*, NEW REPUBLIC (Aug. 23, 2021), <https://newrepublic.com/article/163343/proposition-22-uber-lyft-drivers-labor-wages> [<https://perma.cc/TP7C-S38A>].

<sup>103</sup> H.R. 963, 117th Cong. (2021).

<sup>104</sup> See *supra* notes 51–52 and accompanying text.

the “significant policy reforms” necessary to protect rights enforcement, including eliminating arbitration and class waivers altogether and preventing other procedural barriers from cropping up.<sup>105</sup>

*I. Structure, Partnership, and Co-optation versus Cooperation.* — Partnerships between plaintiff-side attorneys and grassroots organizations raise concerns of striking the right balance between law and organizing. Developing the structure of mass organizing thus implicates intertwined challenges across what the role and engagement of plaintiff-side attorneys should be, which organizations attorneys should partner with, and how concerns of co-optation versus collaboration between attorneys, organizers, and workers should be managed.

Law-and-organizing strategies, especially when led by attorneys who may be from elite backgrounds and often lack prior organizing experience, are frequently criticized for their inability to build trust among low-wage workers; yet, at the same time, lawyers are also uniquely positioned to navigate the procedural hurdles necessary to lead economically successful legal campaigns.<sup>106</sup> Mass organizing proposes to bridge this gap by placing attorneys in a position to do what they do best: achieve legal wins amid procedural complexity. This would help overcome the traditional distrust of lawyers by grassroots organizations and deliver tangible economic benefit to workers — and energize lawyers by magnifying their impact.<sup>107</sup> Organizing, by contrast, should be led by those with experience and expertise, through partnerships with unions and worker centers, and by empowering worker-organizers.

There is a wide array of plaintiff-side firms, with varying levels of investment in pursuing more sustainable change for workers. In the most robust vision of mass organizing, plaintiff-side attorneys in the early stages of a mass arbitration would partner with organizers when identifying potential claimants and trade best practices across technology and worker mobilization; early partnerships are likely to lead to more robust collective platforms. Even in the weakest form of mass organizing, however, attorneys may assist organizers by “handing off” the group of workers following a mass-arbitration settlement and sharing the contact information of consenting workers, accompanied by potential leads of which workers might be targets for longer-term organizing. Mass organizing is experimental and flexible rather than a one-size-fits-all approach; the perfect need not be the enemy of the good.

The organizations that plaintiff-side attorneys can partner with, whether unions or worker centers, are flexible as well. Both organizational forms employ similar strategies in organizing, particularly leveraging momentum from successful employment litigation to mobilize

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<sup>105</sup> See Medintz, *supra* note 8 (quoting Professor Glover).

<sup>106</sup> See Cummings & Eagly, *supra* note 63, at 493–94 (discussing the “contradictory picture” that law-and-organizing proponents paint of lawyering, *id.* at 494).

<sup>107</sup> See *id.* at 494–95.

workers.<sup>108</sup> However, there are key differences between unions and worker centers *post*-organizing that are important for plaintiff-side attorneys to consider beforehand, to ensure appropriate fit with their group of claimant-workers.<sup>109</sup> Typically, unions are most successful in high-density industries where workers can achieve collective bargaining agreements guaranteeing rights, wages, and benefits above the statutorily set floor, and create a continuous threat of enforcement through a grievance mechanism.<sup>110</sup> Organizing through nontraditional platforms, like worker centers, can be preferable to unionizing. First, not all workers are necessarily interested in collective bargaining, even if they want their *minimum* substantive rights to be respected.<sup>111</sup> Second, several of the primary benefits of unionization, like increased stability and job security, may be less important to gig work or low-wage industries;<sup>112</sup> instead, this type of work is typically plagued with wage-and-hour violations and harassment — protections that are guaranteed by traditional employment law rather than labor law.<sup>113</sup> Third, unionizing campaigns are particularly prone to managerial attacks, whereas models that focus on enforcing statutory rights rather than collective bargaining may be less likely to suffer from such concentrated attacks.<sup>114</sup> Finally, the National Labor Relations Board<sup>115</sup> (NLRB) is notorious for working at a glacial pace, particularly compared to courts in the private-enforcement model.<sup>116</sup> Unlike unions, however, worker centers tend to be organized more loosely, with fewer members and less institutional knowledge and expertise, which can decrease their political and economic leverage.<sup>117</sup>

Worker centers, which have typically been popular among immigrant communities working in informal industries and among highly subcontracted workforces, are community-based, worker-led organizations that “engage in a combination of service, advocacy, and organizing to provide support to low-wage workers”;<sup>118</sup> they emphasize worker empowerment and “developing a base of workers to take action on their

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<sup>108</sup> See Jennifer Hill, *Can Unions Use Worker Center Strategies? In an Age of Doing More with Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. REV. 551, 568–72 (2010).

<sup>109</sup> See *id.* at 572–76.

<sup>110</sup> See *id.* at 573; see also Charles O. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U. L.Q. 3, 18; 29 U.S.C. § 158(d).

<sup>111</sup> See Sachs, *supra* note 97, at 153.

<sup>112</sup> KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 203 (2004).

<sup>113</sup> See Sachs, *supra* note 76, at 2701–02.

<sup>114</sup> See Sachs, *supra* note 97, at 156–57.

<sup>115</sup> 29 U.S.C. § 153.

<sup>116</sup> See Sachs, *supra* note 76, at 2707–08.

<sup>117</sup> See JANICE FINE, ECON. POL’Y INST., WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 19 (2005), <https://files.epi.org/page/-/old/briefingpapers/159/bp159.pdf> [<https://perma.cc/5XCM-PM8X>].

<sup>118</sup> *Id.* at 3; see also Janice Fine, *New Forms to Settle Old Scores*, 66 INDUS. RELS. 604, 609 (2011).

own behalves.”<sup>119</sup> Worker centers vary greatly. Some models are industry wide, while others focus on a particular geography or ethnic community, address abusive practices at individual companies, or lead individual one-off campaigns.<sup>120</sup> There are several organizations already dedicated to organizing low-wage workers and gig workers. For example, both Gig Workers Rising and Rideshare United were founded in 2018 with the explicit goal of organizing workers and engaging in demonstrations, such as against Proposition 22 in California,<sup>121</sup> and the New York Taxi Workers Alliance, a long-standing worker center that has organized drivers for more than two decades, has achieved significant wins in medallion debt forgiveness and unemployment insurance for rideshare drivers.<sup>122</sup> Restaurant Opportunities Center, United (ROC) has been politically successful by engaging in litigation and policy strategies across the nation.<sup>123</sup> In recent years, labor unions, too, have established formal ties with worker centers, strengthening their national and global reach.<sup>124</sup>

Partnership between plaintiff-side attorneys and organizers raises questions of mission and ethics. Generally, the strongest worker centers and unions are highly democratic institutions in which “workers directly participate in decision-making.”<sup>125</sup> Existing grassroots organizations may be hesitant to partner with attorneys who are somewhat “resistant to the idea of workers learning to resolve problems on their own, *without* relying on a lawyer.”<sup>126</sup> Mass organizing as a strategy, then, is in limbo between a traditional firm model, which may be antithetical to grassroots organizing, and a worker-center model, which is often committed to putting workers in the driver’s seat. One can imagine that mass organizing might be attacked from the right *and* the left for co-opting radical language and some of the structure of worker centers and unions, while potentially limiting democratic practices due to its focus on litigation. Still, plaintiff-side attorneys and worker centers likely have the potential to learn from each other and collaborate in creative partnerships that achieve both short-term economic gains for workers and long-term aspirational change.<sup>127</sup>

<sup>119</sup> Fine, *supra* note 118, at 607; *see* FINE, *supra* note 117, at 5–7.

<sup>120</sup> *See* FINE, *supra* note 117, at 5–7.

<sup>121</sup> *About Us: Building a Movement for All Gig Workers*, GIG WORKERS RISING, <https://gigworkersrising.org/get-informed> [<https://perma.cc/D8JP-YN4P>]; *About Us*, RIDESHARE DRIVERS UNITED, <https://www.drivers-united.org/about-us> [<https://perma.cc/228G-F4MN>].

<sup>122</sup> *Our Victories*, N.Y. TAXI WORKER’S ALL., <https://www.nytw.org/our-victories> [<https://perma.cc/F4BL-63R5>].

<sup>123</sup> *See* Boudin & Scholtz, *supra* note 65, at 103.

<sup>124</sup> *See* Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, 20 NEW LAB. F. 44, 48 (2011).

<sup>125</sup> Boudin & Scholtz, *supra* note 65, at 98; *see also* Hill, *supra* note 108, at 582.

<sup>126</sup> Saru Jayaraman, *Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers*, 27 N.Y.U. REV. L. & SOC. CHANGE 103, 105 (2001) (emphasis added).

<sup>127</sup> *See, e.g.*, *supra* notes 75–78 and accompanying text.

2. *Funding Models, Membership, and Ethical Concerns.* — Attorneys and organizers are likely to face conflicting goals and must address tradeoffs between financial incentives and the strength of the collective organization they are building. For example, organizers may want to mandate that claimants commit a certain amount of time or effort to furthering the worker collective as a condition of joining the mass arbitration. This could potentially dissuade workers from joining, thereby decreasing the financial returns from mass arbitration, while furthering the strength of the organization in the long term. These concerns are salient for movement lawyers, who are careful to grapple with the ethical concerns of client representation much more deeply than traditional legal conflict-of-interest principles envision.<sup>128</sup> Although “no existing legal ethics principle holds movement lawyers accountable for the choice of whom to represent in the first instance,”<sup>129</sup> organizers and attorneys should ideally work through these concerns early in their partnership.

Funding for the ongoing collective platform also raises practical challenges and highlights the ethical concerns with which movement lawyers frequently grapple.<sup>130</sup> Unions typically collect dues as a small percentage of the wage premium they achieve for workers.<sup>131</sup> Beyond funding organizations, dues payments also serve an important practical function of building stronger relationships between the worker and the union; dues payments ensure that workers feel as though they are owed something by the organization and that they have a right to be served.<sup>132</sup> This creates a more robust link between the organization and the workers and motivates workers to hold the organization accountable to recoup their investment.<sup>133</sup> However, most worker centers do not collect dues: “Some groups aren’t sure they believe in it on principle, some groups just don’t think it is realistic, and others believe in it but haven’t figured out how to do it consistently.”<sup>134</sup> Instead, worker centers have largely depended on grant funding from foundations, which can at times lead to unstable budgeting.<sup>135</sup> Funding has historically been challenging for worker centers, and some scholars have suggested they partner with established unions, which typically have more funding resources because of dues collection.<sup>136</sup> At the same time, cementing membership through dues has drawbacks as well: “[T]he time that activists spen[d] organizing formal organizations (e.g., ‘collecting dues cards’ and

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<sup>128</sup> See Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 460–61 (2018).

<sup>129</sup> *Id.* at 461.

<sup>130</sup> See Cummings & Eagly, *supra* note 63, at 502–13.

<sup>131</sup> See MARSHALL GANZ, *WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT* 99 (2009).

<sup>132</sup> See *id.* at 99–101.

<sup>133</sup> See *id.*

<sup>134</sup> FINE, *supra* note 117, at 16.

<sup>135</sup> *Id.* at 17.

<sup>136</sup> See Boudin & Scholtz, *supra* note 65, at 121–22.

‘writing constitutions’) could [be] spent maximizing disruption and forcing concessions.”<sup>137</sup> The mass-organizing model has a third option beyond dues and grants: payment via settlement fees, in which case ethical concerns regarding dues may be compounded with those around settlement.<sup>138</sup> Mass arbitration has produced significant settlements, and an appropriate middle ground may be requiring that workers provide a certain percentage of the recouped settlements specifically toward paying organizers and other nonattorneys contributing to mass organizing.

#### D. *The Benefits and Legal Limitations of Mass Organizing*

With a model of mass organizing sketched out, it’s important to tally the scorecard of how it compares to mass arbitration alone. This section also begins to explore its legal implications, including legal regimes that can protect workers who engage in mass organizing, and the potential restrictions that hinder them from pursuing collective action.

1. *Benefits of Mass Organizing.* — The mass-organizing model delivers tangible and intangible benefits to workers incremental to those achieved through mass arbitration alone, and offers a win-win for attorneys and organizers. In the legal world, and particularly in the workers’ rights arena, litigation and organizing have traditionally been considered polar opposites, as the former regime is controlled by private enforcement in employment law, while the latter is typically done via unionization under the National Labor Relations Act<sup>139</sup> (NLRA).<sup>140</sup> Mass organizing pulls from the best of each of these practices, and aligns with a growing body of scholarship arguing there is immense potential for change through the combination of collective action and employment litigation, absent traditional unionization.<sup>141</sup>

Worker-centered and worker-led enforcement through mass organizing provides an optimal middle ground between fully private and fully public enforcement. While public enforcement is subject to interest-group capture and political swings,<sup>142</sup> workers always have their own interests in mind in terms of rights enforcement.<sup>143</sup> And particularly in employment contexts, the best source for understanding harms that have occurred is often the workers themselves<sup>144</sup> — although these workers may not know their legal rights or have the

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<sup>137</sup> Rosado Marzán, *supra* note 79, at 416 (quoting FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL*, at xxi–xxii (1979)).

<sup>138</sup> See generally Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL’Y REV. 1 (2018) (contending that in public interest suits, clients may irrationally refuse settlement as they do not pay legal fees, straining the limited resources of public interest attorneys).

<sup>139</sup> 29 U.S.C. §§ 151–169.

<sup>140</sup> See Sachs, *supra* note 76, at 2685–90.

<sup>141</sup> See *id.*

<sup>142</sup> See Glover, *supra* note 12, at 1153–55.

<sup>143</sup> See Weil, *supra* note 28, at 23–27.

<sup>144</sup> See Glover, *supra* note 12, at 1154.

capacity to vindicate their interests.<sup>145</sup> Organized workers overcome the information gap, individual costs, and retaliation fears that traditionally suppress claims through a collective agent that gathers and disseminates information, engages in advocacy and litigation, and protects individuals from blowback, equipped with the protective power of the employment law antiretaliation scheme that threatens hefty fines.<sup>146</sup> Most importantly, collective enforcement returns the threat of employer accountability, heightens the chance of ex ante compliance with the law, and increases the likelihood of achieving critical policy change.<sup>147</sup>

Although not necessarily under a formal union model, the ethos of mass organizing, with a focus on collective power, is similar to that driving unions. Notably, the paradigm shift from public enforcement of individual rights to private enforcement coincided with the beginning of the slow decline of labor power.<sup>148</sup> The decline in union membership<sup>149</sup> and Congress's inability to reform labor laws<sup>150</sup> have correlated with increasing wealth inequality,<sup>151</sup> wage stagnation,<sup>152</sup> and racial or gender-based wealth gaps.<sup>153</sup> Mass organizing seeks to contribute to reviving the tradition of collective action with society-wide impact.

Mass organizing must benefit plaintiff-side attorneys as well in order to incentivize shifting away from the current model of individual litigation. Such incentives may be economic: by building a stronger relationship with grassroots organizations and workers, plaintiff-side attorneys have access to engaged, informed, and organized workers who can recognize violations of their rights and more easily raise claims to be pursued in mass arbitration, class or collective actions, or even individual arbitrations.<sup>154</sup> If engaged early in the process, organizers may assist

<sup>145</sup> See Weil, *supra* note 28, at 8–11.

<sup>146</sup> See *id.* at 12–13.

<sup>147</sup> See FREEMAN & MEDOFF, *supra* note 64, at 10–11, 20–22.

<sup>148</sup> See DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 293–97 (2003).

<sup>149</sup> See *id.*; Barnes & Thornburg LLP, *Unions by the Numbers: 2022 Edition*, NAT'L L. REV. (Jan. 24, 2022), <https://www.natlawreview.com/article/unions-numbers-2022-edition> [<https://perma.cc/3JFJ-BAW3>]; Quoc Trung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015, 11:04 AM), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [<https://perma.cc/25UB-DQFK>].

<sup>150</sup> Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [<https://perma.cc/5FMT-YGR4>].

<sup>151</sup> RYAN NUNN ET AL., HAMILTON PROJECT, *THE SHIFT IN PRIVATE SECTOR UNION PARTICIPATION: EXPLANATION AND EFFECTS* 3 (2019) (“[T]he decline of union participation was an important driver of the increase in wage inequality and wage stagnation for some workers.”).

<sup>152</sup> *Id.*

<sup>153</sup> See Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 3, 2017, 8:00 AM), <https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap> [<https://perma.cc/4QXS-U79U>]; ECON. POL'Y INST., *UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY* 1–3, 6 (2021), <https://files.epi.org/uploads/226030.pdf> [<https://perma.cc/2Z5B-KJWD>].

<sup>154</sup> See *supra* notes 118–24 and accompanying text.

with increasing the number of workers involved in a mass arbitration.<sup>155</sup> Plaintiff-side attorneys therefore achieve greater returns from the significant investments necessary for mass arbitration. Moreover, plaintiff-side attorneys' businesses are under continuous pressure from legislative and judicial efforts to hinder rights enforcement,<sup>156</sup> so organizing workers against these barriers economically benefits attorneys in the long run.

Beyond economic benefits, expansion into political organizing improves the image of attorney ethics. Critics deride plaintiff-side attorneys for profiting from frivolous lawsuits without benefiting vulnerable populations.<sup>157</sup> For example, the U.S. Chamber of Commerce has criticized mass arbitration by stating “[w]e shouldn’t let plaintiffs’ lawyers abuse the arbitration system to reap massive legal fees at the expense of workers and consumers, and the business community.”<sup>158</sup> By engaging in mobilization and organizing, plaintiff-side attorneys can demonstrate a genuine commitment to workers’ rights. This won’t stop corporations from maligning plaintiff-side attorneys — but it does paint a more sympathetic picture for politicians. That there may be some “political-image” benefits for attorneys does not undermine the fact that mass organizing is also critically important work to bridge the traditional gap between litigation and organizing to build worker power.

Finally, employment law firms must invest in organizing for the health of the long-term labor movement. The defense bar already organizes and lobbies on behalf of corporations quite successfully,<sup>159</sup> and educates corporations on plaintiff-side tactics.<sup>160</sup> Indeed, the rapid proliferation of arbitration as a defense strategy should signal to plaintiff-side attorneys that they, too, must organize more effectively.

2. *Legal Protections, Legal Challenges.* — Of the many legal challenges mass organizing might face, this section considers some of the most pressing, including protections and concerns under the NLRA and the force of confidentiality agreements akin to “gag orders,” which prohibit workers from discussing their mass-arbitration settlements.

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<sup>155</sup> See McAlevey, *supra* note 66, at 424–28.

<sup>156</sup> See *supra* notes 15–20 and accompanying text.

<sup>157</sup> See *supra* notes 14–16 and accompanying text.

<sup>158</sup> *Mass Arbitration Is an Abuse of the Arbitration System*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (June 4, 2021), <https://instituteforlegalreform.com/mass-arbitration-is-an-abuse-of-the-arbitration-system> [<https://perma.cc/2QUC-D42Y>].

<sup>159</sup> See, e.g., *Eimer Stahl Attorneys File Amicus Brief on Behalf of the U.S. Chamber of Commerce*, EIMER STAHL (Jan. 6, 2022), <https://www.eimerstahl.com/news-eimer-stahl-attorneys-file-amicus-brief-on-behalf-of-the-us-chamber-of-commerce> [<https://perma.cc/2YFA-KPTS>]; Stephen R. Williams, *The Tricks Biglaw Firms Use When Selling Lobbying Services*, ABOVE L. (Jan. 18, 2018, 10:44 AM), <https://abovethelaw.com/2018/01/the-tricks-biglaw-firms-use-when-selling-lobbying-services> [<https://perma.cc/AXK9-SREM>].

<sup>160</sup> See, e.g., sources cited *supra* note 10.



Though worker centers lack formal legal status, some scholars have argued they enjoy NLRA section 7 collective-action protections.<sup>161</sup> But, there are important limitations and considerations: First, independent contractors do not enjoy section 7 rights. Second, defendants are likely to argue that mass-organizing platforms should be subject to the same legal limitations in the NLRA that are placed on unions.

While section 7 of the NLRA protects employees “engag[ing] in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection,”<sup>162</sup> it excludes independent contractors.<sup>163</sup> Whether gig workers are considered independent contractors under the Act has varied by administration, and NLRB General Counsel Jennifer Abruzzo has expressed interest in returning to a more worker-favorable definition.<sup>164</sup> Regardless, “worker organizations composed entirely of independent contractors” have organized successfully.<sup>165</sup> Additionally, workers bringing employment suits are frequently protected by statutory antiretaliation provisions.<sup>166</sup>

More concerning, however, are allegations that the NLRA limits mass-organizing platforms. Defendants have accused worker centers of constituting “labor organizations” under the NLRA, which would limit direct actions like picketing and secondary boycotts and open platforms to unfair labor practice charges and member lawsuits.<sup>167</sup> Although these threats have not yet seriously materialized, as recently as 2019, the U.S. Chamber of Commerce encouraged defendants to challenge the status of worker centers under the NLRA.<sup>168</sup> Mass-organizing coalitions, therefore, must avoid the typical activities that define a labor organization, such as acting as the exclusive representative of the workers.<sup>169</sup> However, engaging primarily in litigation and litigation-related organizing is unlikely to compromise the mass-organizing coalition’s status under the NLRA; indeed, this strategy has permitted the ROC to avoid “labor organization” status thus far.<sup>170</sup>

Nondisclosure or confidentiality agreements in arbitration clauses or settlements are another significant but as-yet-untested legal obstacle to

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<sup>161</sup> See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 241 (2009).

<sup>162</sup> 29 U.S.C. § 157.

<sup>163</sup> *Id.* § 152.

<sup>164</sup> See *Atlanta Opera, Inc.*, 371 N.L.R.B. No. 45, 45 (Dec. 27, 2021) (inviting briefs regarding the independent-contractor standard).

<sup>165</sup> Naduris-Weissman, *supra* note 161, at 258 n.96 (referencing the New York Taxi Workers Alliance).

<sup>166</sup> See Sachs, *supra* note 76, at 2708–09.

<sup>167</sup> See Naduris-Weissman, *supra* note 161, at 261–69.

<sup>168</sup> EMP. POL’Y DIV., U.S. CHAMBER OF COM., *THE STATUS OF WORKER CENTERS AS LABOR ORGANIZATIONS UNDER THE NATIONAL LABOR RELATIONS ACT 20* (2019), [https://www.uschamber.com/assets/archived/images/epd\\_worker\\_centers\\_report\\_april\\_2019.pdf](https://www.uschamber.com/assets/archived/images/epd_worker_centers_report_april_2019.pdf) [<https://perma.cc/D2GH-4K79>].

<sup>169</sup> See *id.* at 12.

<sup>170</sup> See Naduris-Weissman, *supra* note 161, at 322–23.

mass organizing.<sup>171</sup> Regardless of enforcement, these agreements have a chilling effect on coworkers' discussions of legal rights; even on Reddit threads regarding mass arbitrations, drivers chastise one another for publicizing settlements, and several posters appear to have deleted comments, perhaps from fear of becoming ineligible.<sup>172</sup> Whether these communication bans violate the NLRA remains an open legal question, and one that may fluctuate with political alignment in the executive branch: Abruzzo has expressed interest in prohibiting confidentiality provisions in separation agreements.<sup>173</sup> Of course, the same exclusions and considerations for independent contractors still apply given that these protections are pursuant to the NLRA.

### Conclusion

Mass organizing seeks to realize partnerships that have been historically uncommon and to bring together ideas that have been traditionally dichotomous. The strategy aims to continue the innovation of mass arbitration and realize its true potential, guided by the belief that plaintiff-side attorneys must think outside traditional paths.

Worker power and rights enforcement are having a moment. Congress is finally interested in legislative efforts to end arbitration in employment,<sup>174</sup> the NLRB is seeking to fulfill President Biden's promise of being the most pro-union President ever,<sup>175</sup> and major wins by organizers at Amazon and Starbucks<sup>176</sup> may signal the renaissance of the labor movement. Plaintiff-side attorneys have the opportunity to carve out a role for themselves in this movement of collective enforcement by pushing mass arbitration into mass organizing. It won't be an easy process, but absent organizing, procedural barriers will continue to multiply and hinder rights enforcement.

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<sup>171</sup> See Glover, *supra* note 5, at 1338.

<sup>172</sup> See, e.g., u/steezefabreeze, REDDIT: R/POSTMATES (June 8, 2021, 5:19 PM), [https://www.reddit.com/r/postmates/comments/nvipoq/hey\\_all\\_ive\\_received\\_and\\_email\\_from\\_keller](https://www.reddit.com/r/postmates/comments/nvipoq/hey_all_ive_received_and_email_from_keller) [<https://perma.cc/M4W7-6SZ9>]; u/Missqtouyou, Comment to u/steezefabreeze, *supra* (June 15, 2021, 3:39 PM), <https://www.reddit.com/r/postmates/comments/nvipoq/comment/h1vuxbe> [<https://perma.cc/C9ME-F82U>].

<sup>173</sup> See NLRB Gen. Couns. Mem. GC 21-04, at 2 (Aug. 12, 2021).

<sup>174</sup> See *supra* note 81 and accompanying text.

<sup>175</sup> See Timothy Noah, *Jennifer Abruzzo Has Become One of the Quiet Heroes of the Biden Administration*, NEW REPUBLIC (Apr. 20, 2022), <https://newrepublic.com/article/166143/jennifer-abruzzo-nlr-quiet-hero-biden-administration> [<https://perma.cc/2GB9-M39R>].

<sup>176</sup> See John Logan, *Amazon, Starbucks and the Sparking of a New American Union Movement*, THE CONVERSATION (Apr. 4, 2022, 8:29 AM), <https://theconversation.com/amazon-starbucks-and-the-sparking-of-a-new-american-union-movement-180293> [<https://perma.cc/FSH4-8JYY>].

## CHAPTER FOUR

### THE LABOR AND DELIVERY OF REPRODUCTIVE JUSTICE FOR WORKERS: THE POST-*DOBBS* WORKFORCE

Reproductive injustice affects who can get work, who can go to work, and who can stay at work.

It is October 2022. A human resources worker in Arizona is deciding which candidate will best fit the middle-management position that just opened at a bath products company. They look at the files in front of them. One is a profile of a slightly more qualified woman of color who is single and age thirty. One is a profile of a slightly less qualified white man, age forty-five, who has a wife and two teenage children. Though there are a hundred levels of unconscious bias at play in this scenario, the argument the human resources worker makes to their department head is that they cannot possibly know whether the woman will get pregnant — by her own choice or not. She carries the liability of potential leaves and inconsistency. The woman candidate could not make any promises to the contrary in her interview. As bitter as that might have tasted, those promises were impossible to make. She knows that she could be assaulted and impregnated. And she knows that if she doesn't realize that she is pregnant within a narrow timeframe<sup>1</sup> — because she is reckoning with trauma and working at her job — carrying her forced pregnancy to term will not be her choice.<sup>2</sup> It will be a government mandate.<sup>3</sup>

On June 24, 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization*<sup>4</sup> held that the Constitution of the United States does not confer a right to abortion.<sup>5</sup> Never before had the Court revoked a right so fundamental to people's lives.<sup>6</sup> The opinion, authored by

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<sup>1</sup> Many laws passed to restrict abortion access do not account for menstrual realities and the amount of time it takes to determine if a person is pregnant. See Jennifer Weiss-Wolf, *When "Six Weeks" Is Actually Two: Understanding Periods Is Essential to Fighting Abortion Bans*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/when-six-weeks-actually-two-understanding-periods-essential-fighting> [https://perma.cc/76CL-YYNE]. Menstrual and reproductive illiteracy hampers the inclusion of women in the workplace.

<sup>2</sup> See Maeve Reston, *Arizona Judge Rules State Can Enforce Near-Total Abortion Ban*, CNN (Sept. 24, 2022, 10:16 AM), <https://www.cnn.com/2022/09/23/politics/arizona-abortion-ban-ruling/index.html> [https://perma.cc/GMV6-FRSL].

<sup>3</sup> See, e.g., Ashton Pittman, *12-Year-Old Incest Victims Should Birth Dad's Child, House Speaker Gunn Says*, MISS. FREE PRESS (June 29, 2022), <https://www.mississippifreepress.org/25273/12-year-old-incest-victims-should-birth-dads-child-house-speaker-gunn-says> [https://perma.cc/N5AS-WDXU].

<sup>4</sup> 142 S. Ct. 2228 (2022).

<sup>5</sup> *Id.* at 2242.

<sup>6</sup> Marjorie Cohn, *For the First Time, Supreme Court Is Poised to Retract a Fundamental Right*, TRUTHOUT (Dec. 3, 2021), <https://truthout.org/articles/for-the-first-time-supreme-court-is-poised-to-retract-a-fundamental-right> [https://perma.cc/PE2F-6282]; see also *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting).

Justice Alito, argued that the right was not “deeply rooted in this Nation’s history and traditions” and thus should be at the discretion of individual states.<sup>7</sup> A variegation at this scale creates a dearth of abortion access in half the country.<sup>8</sup> By August 2022, “1 in 3 American women ha[d] already lost abortion access.”<sup>9</sup> By the end of 2022, most abortions were banned in at least thirteen states.<sup>10</sup> *Dobbs* entrenches and exacerbates the oppressions that exclude reproductive subjects from the job market. Corporate action has been sought as a solution, but workers with reproductive needs must be protected by the state. Section A of this Chapter examines how reproductive health care access affects who can enter the workforce. Section B lays out the potential corporate solutions that employers have offered and argues that they are stopgap measures and do not offer a true protection of reproductive freedom. Section C argues that solutions must come from the states and local governments, examining a familiar history of federal antidiscrimination law alongside an unfamiliar contemporary surge of support for pro-choice, direct-democracy measures as roadmaps for potential solutions.

#### A. *Who Gets Hired? And Who Doesn’t Get Fired?*

Access to abortion, contraception, and reproductive care affects who works. A dearth of abortion access disproportionately affects people of color and gender minorities (a term this Chapter uses to refer specifically to non-cis women who can get pregnant).<sup>11</sup> Black, Brown, and Indigenous communities deal with higher rates of unintended pregnancy due to a lack of access to contraception and sex education; higher rates of forced pregnancy have been and will be imposed on racially marginalized people.<sup>12</sup> Trans\*, nonbinary, and gender-nonconforming people who can become pregnant face intersecting barriers to health care that are compounded by a dearth of access to reproductive care.<sup>13</sup> People who are already marginalized across multiple axes face compounding

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<sup>7</sup> *Dobbs*, 142 S. Ct. at 2242, 2283–84.

<sup>8</sup> *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [https://perma.cc/B85J-K3V7].

<sup>9</sup> Katie Shepherd et al., *1 in 3 American Women Have Already Lost Abortion Access. More Restrictive Laws Are Coming.*, WASH. POST (Aug. 22, 2022, 3:36 PM), <https://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe> [https://perma.cc/MMV9-CCJU].

<sup>10</sup> *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/S4RK-KRWE].

<sup>11</sup> Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of Roe, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), <https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe> [https://perma.cc/3ER9-HVXA].

<sup>12</sup> See generally Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL’Y REV., Summer 2008, at 2.

<sup>13</sup> See Olivia McCormack, *Transgender Advocates Say the End of Roe Would Have Dire Consequences*, WASH. POST (May 6, 2022, 11:37 AM), <https://www.washingtonpost.com/politics/2022/05/06/transgender-men-nonbinary-people-abortion-roe> [https://perma.cc/2LF3-8BFQ].

oppressions that limit their economic mobility. Workers who are active contributors to reproductive care — or who facilitate access to such care through advocacy or funding — face compounding conflicts and barriers to work in a post-*Dobbs* labor landscape.

1. *Disproportionate Exclusion of People of Color.* — Restricting access to abortion will disproportionately affect people of color. Due to discrimination against pregnant workers<sup>14</sup> and the negative impacts of forced births on socioeconomic outcomes and career prospects,<sup>15</sup> people of color will be disproportionately excluded from the workforce. Many states that have passed outright or extreme bans on abortion are in the South, where nearly half of the country's Black population lives.<sup>16</sup> The South has a disproportionately high percentage of the Black<sup>17</sup> and Latinx<sup>18</sup> populations, despite being the regional home to less than forty percent of the total U.S. population.<sup>19</sup> A lack of access also unduly burdens poor people, who cannot afford to cross state lines or access nonsurgical abortion pills and whose employment is less likely to provide opportunities for leave.<sup>20</sup> Abortion access as an economic justice issue runs together with racial justice questions. Black and Brown people are 1.8 and 1.5 times more likely than white people to be in poverty, respectively.<sup>21</sup> The average abortion patient already has one or more children, is in their late twenties, is low income, is unmarried, is in the first six weeks of their pregnancy, and is having their first abortion.<sup>22</sup>

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<sup>14</sup> See, e.g., Emily Martin, Opinion, *Pregnant Workers Are Pushed Out of Work, And It's Time to Finally Protect Them*, THE HILL (Oct. 21, 2022, 4:30 PM), <https://thehill.com/opinion/finance/3698877-pregnant-workers-are-pushed-out-of-work-and-its-time-to-finally-protect-them> [<https://perma.cc/F4M8-UVSZ>].

<sup>15</sup> See Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 410–12 (2018).

<sup>16</sup> Anastasia Moloney, *Why Black Women Bear Brunt of Strict U.S. Abortion Laws*, CONTEXT (Sept. 23, 2022), <https://www.context.news/socioeconomic-inclusion/why-black-women-bear-brunt-of-strict-us-abortion-laws> [<https://perma.cc/APG3-PWXT>].

<sup>17</sup> See *id.*

<sup>18</sup> See Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010> [<https://perma.cc/C4ZK-Z2G9>] (noting that half of the Latinx population in the United States live in border states in the Southwest).

<sup>19</sup> *United States Population Growth by Region*, U.S. CENSUS BUREAU, [https://www.census.gov/popclock/data\\_tables.php?component=growth](https://www.census.gov/popclock/data_tables.php?component=growth) [<https://perma.cc/ZQL4-FKN2>].

<sup>20</sup> See Karen Attiah, Opinion, *As Abortion Rights Collapse, Black and Brown Women Will Suffer Most*, WASH. POST (July 1, 2022, 3:33 PM), <https://www.washingtonpost.com/opinions/2022/07/01/abortion-rights-loss-black-hispanic-women-suffer-most> [<https://perma.cc/3APB-WPCM>].

<sup>21</sup> Kiara Alfonseca, *Why Abortion Restrictions Disproportionately Impact People of Color*, ABC NEWS (June 24, 2022, 10:43 AM), <https://abcnews.go.com/Health/abortion-restrictions-disproportionately-impact-people-color/story?id=84467809> [<https://perma.cc/FZB3-9UT6>].

<sup>22</sup> Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortion-in-america.html> [<https://perma.cc/G6GL-RWY7>].

The later the abortion happens in a pregnancy, the more it costs.<sup>23</sup> The further one must travel, the more it costs.<sup>24</sup> The more complicated the procedure, the more it costs.<sup>25</sup> The more legal barriers there are (that is, the potential for patients or providers to be sued or arrested), the more it costs.<sup>26</sup> All of these factors mean that carrying a (safe) pregnancy is expensive, and, for many, unaffordable.<sup>27</sup> In the United States, maternal morbidity is off par with other developed countries,<sup>28</sup> costing society billions of dollars.<sup>29</sup> In another aspect of reproductive injustice intersecting inextricably with racial injustice, maternal mortality<sup>30</sup> and injury<sup>31</sup> rates are extremely high for Black, Brown, and Indigenous people who can get pregnant. Even if a person can stay at work while pregnant, facing one of the most traumatic health outcomes of one's life can take an immense toll on one's overall life and ability to work because of the lingering effects from the intense physical pain.<sup>32</sup> A forced pregnancy is not only the imposition of grave violations of bodily

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<sup>23</sup> See Jennifer Gerson Uffalussy & Ana Escalante, *Here's the Cost of an Abortion: Different Types, Insurance Plans, and More*, GLAMOUR MAG. (Aug. 16, 2022), <https://www.glamour.com/story/how-much-does-an-abortion-cost> [<https://perma.cc/8QKL-LZCP>] (explaining that medication and aspiration abortions cost \$504 and \$750 on average respectively, but up to \$1500 later in pregnancy).

<sup>24</sup> Allison McCann, *What It Costs to Get an Abortion Now*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html> [<https://perma.cc/YC5N-NAVJ>].

<sup>25</sup> See Gerson Uffalussy & Escalante, *supra* note 23.

<sup>26</sup> McCann, *supra* note 24.

<sup>27</sup> See *Evidence Summary: Prevent Unintended Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2022), <https://www.cdc.gov/sixteenthsixtyeighteen/pregnancy/index.htm> [<https://perma.cc/H299-YUP2>].

<sup>28</sup> Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [<https://perma.cc/Z3MU-JDWM>].

<sup>29</sup> So O'Neil et al., *The High Costs of Maternal Morbidity Show Why We Need Greater Investment in Maternal Health*, COMMONWEALTH FUND (Nov. 12, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/nov/high-costs-maternal-morbidity-need-investment-maternal-health> [<https://perma.cc/L65S-9PAV>].

<sup>30</sup> *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/disparities-pregnancy-related-deaths/infographic.html> [<https://perma.cc/M9DK-CDWE>] (“Data confirms significantly higher pregnancy-related mortality ratios among Black and American Indian/Alaskan Native women.”).

<sup>31</sup> Black and Latinx women experience pregnancy and health complications at higher rates than white women, and this gap is increasing. See Press Release, Blue Cross Blue Shield, *Blue Cross Blue Shield Association Study Reports Higher Childbirth Complication Rates for Black and Hispanic Women Regardless of Age* (May 20, 2021), <https://www.bcbs.com/press-releases/blue-cross-blue-shield-association-study-reports-higher-childbirth-complication> [<https://perma.cc/362N-Z9JA>].

<sup>32</sup> See, e.g., Tressie McMillan Cottom, *I Was Pregnant and in Crisis. All the Doctors and Nurses Saw Was an Incompetent Black Woman*, TIME (Jan. 8, 2019, 7:57 AM), <https://time.com/5494404/tressie-mcmillan-cottom-thick-pregnancy-competent> [<https://perma.cc/4SUT-TNEM>].

autonomy and dignity, but also a massive economic burden<sup>33</sup> — especially considering how the capacity to be pregnant can affect even prospective employment. In hiring for nontemporary positions, even the vaguest impression that a worker may be “vulnerable” to pregnancy can affect a decision at the outset. There is an implicit bias about “hyperfertility”<sup>34</sup> in Brown and Black women that has been cultivated over centuries, stemming from a history of reproductive oppression and the use of Brown and Black bodies to reproduce a workforce that upheld racialized capitalism.<sup>35</sup> Without the possibility of abortion, and with limitations on contraception on the horizon, this implicit bias concerning fertility cannot be overridden by promises or reassurance from Brown and Black individuals in job interviews.<sup>36</sup>

Due to gaps in the scope and enforceability of federal laws protecting pregnant people, pregnant workers are often discriminated against in the workplace and in hiring decisions. This fact reflects the acute need for choice about when one becomes pregnant, as well as for broader enforceable protections for pregnant people. The protections of the Pregnancy Discrimination Act of 1978<sup>37</sup> (PDA), designed to prevent employer discrimination on the basis of pregnancy, do not require accommodations that are not provided to workers with different disability-based needs<sup>38</sup>: workers from Oregon to South Carolina report being assigned tasks that they are physically hindered from doing (such as standing constantly or heavy lifting), then being suspended without pay when they cannot perform them.<sup>39</sup> In spite of the legal obligations of employers, there is no enforcement unless overburdened pregnant workers expend time and money on a civil suit. After requesting

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<sup>33</sup> See Press Release, Mount Sinai, New Parents Risk Financial Burden Because of the Costs of Pregnancy and Delivery, Study Finds (Mar. 11, 2022), <https://www.mountsinai.org/about/newsroom/2022/new-parents-risk-financial-burden-because-of-the-costs-of-pregnancy-and-delivery-study-finds> [https://perma.cc/SSZ4-N7QT] (“Birthing parents risk being financially burdened by the out-of-pocket medical costs of pregnancy and delivery, which cost some low-income parents close to 20 percent of their annual income.”).

<sup>34</sup> Edna Bonhomme, Opinion, *How the Myth of Black Hyper-Fertility Harms Us*, AL JAZEERA (Aug. 16, 2020), <https://www.aljazeera.com/opinions/2020/8/16/how-the-myth-of-black-hyper-fertility-harms-us> [https://perma.cc/8M3S-MHSE].

<sup>35</sup> See JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 69–106 (2011).

<sup>36</sup> See, e.g., LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 74 (2013) (discussing the implicit bias against Latinx women in a chapter titled “Latina Sexuality, Reproduction, and Fertility as Threats to the Nation”).

<sup>37</sup> 42 U.S.C. § 2000(e)(k).

<sup>38</sup> *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015) (holding that an employer’s policy must be judged by whether it treats pregnant workers less satisfactorily than nonpregnant workers with similar work-related disabilities, such that if there are no legitimate reasons to differentiate, the employer must accommodate the pregnant worker under the PDA); see also Dina Bakst, *Peggy Young’s Victory Is Not Enough*, U.S. NEWS (Mar. 26, 2015, 1:00 PM), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers> [https://perma.cc/R5AK-33Y2].

<sup>39</sup> Martin, *supra* note 14.

medical accommodations during a high-risk pregnancy, one worker was explicitly told, contrary to the law of the land: “You don’t get special treatment just for being pregnant.”<sup>40</sup> Many workers are not legally trained and would not recognize this for the blatant lie that it is.

Twenty-three percent of parents report that they have “considered leaving a job because of discrimination or lack of reasonable accommodations during a pregnancy.”<sup>41</sup> For several decades, the limited rules of the PDA were the only federal antidiscrimination and accommodation protections available to pregnant workers.<sup>42</sup> The PDA applies only to employers with fifteen or more employees,<sup>43</sup> and even in larger workplaces, it has often proven insufficient.<sup>44</sup> Asking for a stool, to lift less weight, to cut delivery routes, or to have access to water or a bathroom must be justified by pointing to analogous accommodations provided for nonpregnant workers.<sup>45</sup> This limits pregnant workers’ potential accommodations and also disincentivizes employers from offering *any* minor or major accommodations at all for any worker with a disability that is not mandated by law.

The negative effects resulting from avoiding compliance with these laws are especially severe for minimum-wage and temporary workers. Many of the jobs that hire on a temporally limited basis — such as secretaries, flight attendants, and clerical assistants — predominantly hire young women.<sup>46</sup> Among employed women, sixty percent of Latinx and fifty-four percent of Black women work in service or sales/office occupations, sectors that are more likely to retain minimum wage and temporary workers.<sup>47</sup> Nearly half of all women in the growing technology

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<sup>40</sup> *Id.*

<sup>41</sup> *Voter Opinions on the Pregnant Workers Fairness Act*, NAT’L WOMEN’S L. CTR. (Oct. 2022), <https://nwlc.org/wp-content/uploads/2022/10/NWLC-Pregnant-Workers-Fairness-Act-Morning-Consult-PPT-10.21.pdf> [<https://perma.cc/4KLQ-NR8Z>].

<sup>42</sup> See Andrea Johnson, *40 Years After the Pregnancy Discrimination Act, An Opportunity for Congress to Get Its Common Sense Back*, NAT’L WOMEN’S L. CTR. (Oct. 31, 2018), <https://nwlc.org/40-years-after-the-pregnancy-discrimination-act-an-opportunity-for-congress-to-get-its-common-sense-back> [<https://perma.cc/T3BC-L9GP>].

<sup>43</sup> 42 U.S.C. § 2000e(k).

<sup>44</sup> See Bakst, *supra* note 38.

<sup>45</sup> See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

<sup>46</sup> See Brenda E. Chabot, *Discrimination Is Still Haunting the Flight Attendant Profession*, MS. MAG. (July 8, 2021, 9:45 AM), <https://msmagazine.com/2021/07/08/discrimination-sexism-flight-attendant-women> [<https://perma.cc/F7ZU-693A>]; Jessica Williams, “*Secretaries Are Women, That’s How It’s Always Been*”—*How I Call Out “Acceptable” Sexism*, THE GUARDIAN (Oct. 17, 2016, 3:17 AM), <https://www.theguardian.com/small-business-network/2016/oct/17/secretaries-acceptable-sexism-women-workplace> [<https://perma.cc/8B9B-92JS>].

<sup>47</sup> U.S. BUREAU OF LAB. STAT., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2019, at 5 (2020), <https://www.bls.gov/opub/reports/race-and-ethnicity/2019/pdf/home.pdf> [<https://perma.cc/CD5E-GYET>]; see also Sonali Kolhatkar, *What About Work-Life Balance for Low-Wage Women of Color?*, YES! MAG. (Oct. 4, 2021), <https://www.yesmagazine.org/social-justice/2021/10/04/work-life-balance-low-wage-women-of-color> [<https://perma.cc/629S-NGJP>].



sector are on fixed-term contracts.<sup>48</sup> These contracts increase an overall sense of job insecurity, especially for women.<sup>49</sup> They make it easier to not renew a contract when a person becomes pregnant. They put pressure on family planning for workers who do wish to renew a contract.

Studies report stark differences in socioeconomic outcomes between women in the United States who received the abortion they sought and those who were denied access.<sup>50</sup> Women who were denied abortions due to state restrictions (such as gestational limits) had higher odds of poverty six months after denial than those who were able to access the necessary care.<sup>51</sup> The same study measured long-term effects, finding that women denied abortions were also more likely to remain in subjective poverty and to receive public assistance for five years after being denied care.<sup>52</sup> Extending the analysis beyond poverty, women who were denied abortions were also more likely to experience multiple years of “economic hardship and insecurity.”<sup>53</sup>

Access to abortion also affects workers’ planning in a statistically significant way by enabling long-term educational and employment planning; by contrast, a lack of access abrogates even *imagined* possibilities.<sup>54</sup> In a study of the one-year plans of women seeking abortions, ensuring access to abortion enabled the women to articulate and execute their plans.<sup>55</sup> A positive future outlook and implementation of educational, employment, and residential plans were more feasible for women who were able to attain the abortion they sought than those who were not.<sup>56</sup> In a world where abortion will be significantly harder to access, regardless of a continued need for the procedure, these statistics merit close attention, especially when considering who will lose access most immediately. Some of the Black, Brown, and Indigenous people who will be affected in these ways are gender minorities, another

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<sup>48</sup> *Close the Gap Research Finds that Fixed Term Contracts Are Amplifying the Inequalities and Disadvantage that Women Face in the Tech Industry*, CLOSE THE GAP: BLOG (Feb. 5, 2020), <https://www.closesthegap.org.uk/news/blog/close-the-gap-research-finds-that-fixed-term-contracts-are-amplifying-the-inequalities-and> [https://perma.cc/XYU6-QBYS] (reporting that forty-seven percent of women in the tech sector had been on a fixed-term contract and fifty percent of women on fixed-term contracts in tech had experienced unwanted gaps in employment).

<sup>49</sup> Nicolas Morgenroth et al., *Are Men or Women More Unsettled by Fixed-Term Contracts? Gender Differences in Affective Job Insecurity and the Role of Household Context and Labour Market Positions*, 38 EUR. SOCIO. REV. 560, 570 (2022) (“Women are substantially more unsettled by fixed-term contracts than men across all household types. . . . Fixed-term employment . . . seems to add to existing gender inequalities on the labour market.”).

<sup>50</sup> Foster et al., *supra* note 15, at 401–02.

<sup>51</sup> *Id.* at 411.

<sup>52</sup> *Id.* The authors of the study define “subjective poverty” as “not having enough money to cover basic living expenses” (in contrast to legal poverty, which is based on a monetary threshold). *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Ushma D. Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC WOMEN’S HEALTH, no. 102, 2015, at 1, 6, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4642756> [https://perma.cc/7L8W-732Q].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 6, 9.

compounding axis of identity-based marginalization that has restricted access to employment opportunities.

2. *Disproportionate Exclusion of Gender Minorities.* — A combination of gender and economic marginalization already places trans\* and nonbinary workers in a difficult position when seeking jobs.<sup>57</sup> Antidiscrimination law lags with regard to gender minorities, especially trans\* and nonbinary workers.<sup>58</sup> The law too often fails to protect trans\* folks who suffer aggressions and lack of opportunities at work.<sup>59</sup> Now, for gender minorities who can get pregnant, a post-*Dobbs* landscape exacerbates exclusion from work. Further, lack of access to gender-affirming care, along with lack of abortion access, is another affront to bodily autonomy, gender definition, and long-term life planning for gender minorities. From the legislature or the bench, attacks on gender-affirming care tend to coincide, precede, or immediately follow restrictions on abortion access.<sup>60</sup> Coalitions that engage in legal battles for gender equity often overlap directly with alliances for reproductive rights.<sup>61</sup>

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<sup>57</sup> Eleanor Greene, *Finding Jobs and Finding Justice for Trans Workers*, GREEN AM., <https://www.greenamerica.org/economic-action-against-hate/finding-jobs-and-finding-justice-trans-workers> [<https://perma.cc/8UFQ-F4G2>] (“The [U.S.] unemployment rate is three times for trans people what it is for the rest of the population — four times for trans women of color.”).

<sup>58</sup> See *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT (Oct. 4, 2022), [https://www.lgbtmap.org/equality\\_maps/employment\\_non\\_discrimination\\_laws](https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws) [<https://perma.cc/TUE9-EQ2P>] (showing that only twenty-four states have state laws explicitly prohibiting employment discrimination based on sexual orientation and/or gender identity, but also noting that, per Supreme Court precedent, gender identity discrimination is prohibited under Title VII for employers with over fifteen employees); TRANSGENDER L. CTR., TOOLS FOR TRANSGENDER PEOPLE TO ADDRESS DISCRIMINATION, <https://transgenderlawcenter.org/wp-content/uploads/2021/04/Tools-for-Transgender-People-to-Address-Discrimination.pdf> [<https://perma.cc/QN4D-9QVG>].

<sup>59</sup> Trans\* rights have become a partisan issue and the work of the Department of Justice has reflected that shift, making antidiscrimination protection shaky ground to rely upon when faced with changing administrations. See Brief for the Fed. Respondent in Opposition at 11–13, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n, No. 18-107 (U.S. Oct. 24, 2018), *decided sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

<sup>60</sup> See Juliana Kim, *How Gender-Affirming Care May Be Impacted When Clinics that Offer Abortions Close*, NPR (Aug. 14, 2022, 6:59 AM), <https://www.npr.org/2022/08/14/1115875421/gender-affirming-care-abortion-clinics> [<https://perma.cc/8PA2-LSSQ>]; *Our Bodies, Our Futures: Connecting Abortion Rights and Trans and Intersex Rights*, NAT’L WOMEN’S L. CTR. (Aug. 9, 2022), <https://nwlc.org/resource/our-bodies-our-futures-connecting-abortion-rights-and-trans-and-intersex-rights> [<https://perma.cc/S9X5-J7K6>].

<sup>61</sup> See Sarah Cottrell, *This Organization Is Extending Services for Those Who Need Transport to Abortion and Gender-Affirming Care*, PARENTS (May 20, 2022), <https://www.parents.com/news/this-organization-is-extending-services-for-those-who-need-transport-to-abortion-and-gender-affirming-care> [<https://perma.cc/TY5U-ZMYL>]; Mackenzie Hawkins, *Chicago Offers Sanctuary for Abortions, Gender-Affirming Care*, BLOOMBERG (Sept. 21, 2022, 5:12 PM), <https://www.bloomberg.com/news/articles/2022-09-21/chicago-offers-sanctuary-for-abortions-gender-affirming-care> [<https://perma.cc/4LZ4-FDN7>].

### B. Employer Action as a Stopgap Measure

1. *The Pro-Choice Corporation?* — In the weeks following *Dobbs*, some abortion providers closed up shop. Some refused to shutter their windows or doors. Some lawyers critiqued the interpretive methods and political origins of Justice Alito's majority opinion in *Dobbs*.<sup>62</sup> Others marked the Court's aggressive disregard for its own legitimacy and for *stare decisis*, calling out the active harms of the decisions (and of the entire Term), especially to marginalized peoples.<sup>63</sup> Activists raised their voices and fists in the streets<sup>64</sup> or went underground, considering ways to provide nonsurgical abortions<sup>65</sup> or to move people in need of health care across state lines.<sup>66</sup> Into the breach also came an unexpected ally: several prominent corporations who pledged to offer employees seeking to terminate pregnancies a few thousand dollars in abortion-related travel assistance.<sup>67</sup>

Corporate employers providing abortion-travel funds are making transparent the complex legal and financial navigation necessary to access reproductive care. What do the evolving promises of companies mean for the workers who will receive those benefits, and for the folks who provide the services that they will seek out? At the level of economic common sense, why would employers provide these benefits? Because *unwanted, unplanned pregnancies are bad for business*.

In addition to bodily indignity and psychological harms, people subjected to forced pregnancies must take leave and alter their work in ways that they did not plan for. Economic burdens fall on not just the

<sup>62</sup> See, e.g., Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 4), <https://ssrn.com/abstract=4179622> [<https://perma.cc/HB36-QPPA>].

<sup>63</sup> See, e.g., Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

<sup>64</sup> Natasha Ishak, *In 48 Hours Of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), <https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overtured-protests> [<https://perma.cc/96R2-ADMC>].

<sup>65</sup> See Lux Alptraum, *What to Know About Stocking Up on the Abortion Pill*, THE CUT (June 24, 2022), <https://www.thecut.com/2022/06/stock-up-abortion-pill.html> [<https://perma.cc/2ZW2-SXP6>].

<sup>66</sup> See James Politi, *White House Weighs Helping Women Cross State Lines to Access Abortions*, FIN. TIMES (June 27, 2022), <https://www.ft.com/content/11dc4b5b-015f-4710-babo-3ae9d1b99d90> [<https://perma.cc/GUS9-K4LM>]; see also Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines> [<https://perma.cc/KS39-NGH7>]; Ava Sasani, *Is It Legal for Women to Travel out of State for an Abortion?*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html> [<https://perma.cc/D6JV-687A>].

<sup>67</sup> For example, corporations such as Amazon, Lyft, Uber, Adobe, and Google instituted policies pre-*Dobbs* (but post-draft opinion leak in May) to support employees seeking to terminate pregnancies, with many offering \$4000 in abortion-related travel assistance. See Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [<https://perma.cc/6AJ7-4U2H>]. Post-*Dobbs*, several more followed suit, including Disney, Meta, and the *New York Times*. *Id.*

state but also employers wishing to retain their workforce. Someone who has a child at a time when they did not intend could end up embarking on an entirely different career path — or an entirely different timeline.<sup>68</sup> A famous (or infamous, depending on one’s political perspective) 2021 *New York Times Magazine* essay, *The Abortion I Didn’t Have*, was subtitled: “I never thought about ending my pregnancy. Instead, at 19, I erased the future I had imagined for myself.”<sup>69</sup> The sheer possibility of so many unpredictable contingencies discourages employers from hiring people who can get pregnant.

This section will explore the incentives for companies to retain their employees with the capacity to get pregnant. The contemporary corporate landscape is marked by (1) antidiscrimination law, (2) research on the economic upside of diverse cohorts of employees,<sup>70</sup> and (3) broad social pressure to hire a gender-diverse body of workers.<sup>71</sup> Companies that assume that gender-diverse employees will exercise whatever reproductive choice is available to them are developing burgeoning abortion-travel policies to expand the range of choices for employees they hope to retain. These policies are *severely limited* to corporations that are highly visible and rely on a broad consumer base.<sup>72</sup> This is where social consumer pressure and peer pressure from other corporations work. However, these benefits may be *limited* to only those persons who work for companies that are attending to public image, reading management consultant research, and hiring “top talent” from elite colleges and graduate schools (over seventy million American workers have a high school diploma but not a bachelor’s degree, and thus are rarely considered for many in-demand jobs in management, technology, and health care<sup>73</sup>).

2. *What Is Owed to Workers Who Can Become Pregnant?* — Antidiscrimination law suggests a corporate responsibility to workers who can become pregnant. The late Justice Ginsburg raised several

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<sup>68</sup> See, e.g., Merritt Tierce, *The Abortion I Didn’t Have*, N.Y. TIMES MAG. (Dec. 5, 2021) <https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html> [<https://perma.cc/2U6Z-HV5Z>].

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., VIVIAN HUNT ET AL., MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 11 (2018), [https://kimcenter.org/wp-content/uploads/2022/02/delivering-through-diversity\\_full-report.pdf](https://kimcenter.org/wp-content/uploads/2022/02/delivering-through-diversity_full-report.pdf) [<https://perma.cc/GJJ5-RA7D>].

<sup>71</sup> See Casey Herman et al., *Beyond Compliance: Consumers and Employees Want Business to Do More on ESG*, PWC, <https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/consumer-and-employee-esg-expectations.html> [<https://perma.cc/N2YU-4CXH>].

<sup>72</sup> Many early pro-choice policy adopters (such as Starbucks, Netflix, Google, Uber, Sephora, and Lyft) rely on a broad consumer base. See Goldberg, *supra* note 67; Blake Morgan, *The Top 100 Most Customer-Centric Companies of 2022*, FORBES (May 1, 2022, 7:10 PM), <https://www.forbes.com/sites/blakemorgan/2022/05/01/the-top-100-most-customer-centric-companies-of-2022/?sh=23bfe8b72b38> [<https://perma.cc/EW6M-CCXM>].

<sup>73</sup> *Understanding How American Workers Progress to Higher-Wage Jobs*, MCKINSEY & CO. (Aug. 12, 2020), <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/understanding-how-american-workers-progress-to-higher-wage-jobs> [<https://perma.cc/FME8-GW8N>].

early employment antidiscrimination cases to fame, including *Frontiero v. Richardson*<sup>74</sup> and *Weinberger v. Wiesenfeld*,<sup>75</sup> in which she argued on behalf of women and men that gender should not be a determinant in the denial of employment-related benefits.<sup>76</sup> Section C discusses the evolution of antidiscrimination law to identify lessons for reproductive concerns. The statutes that make up this body of law include the Fair Labor Standards Act of 1938,<sup>77</sup> the Equal Pay Act of 1963,<sup>78</sup> Title VII of the Civil Rights Act of 1964,<sup>79</sup> the Family and Medical Leave Act,<sup>80</sup> the PDA, the Affordable Care Act<sup>81</sup> (ACA), and the Americans with Disabilities Act<sup>82</sup> (ADA). This legal infrastructure weighs on corporations that, where possible, have incentives to continue to hire and retain gender-diverse workers (including cis women and gender minorities).

Further, the benefits of gender-diverse cohorts and culturally and ethnically diverse cohorts of employees have been touted in recent years.<sup>83</sup> Diversity research has been growing in the last decade, with robust numbers that illustrate how multi-identity teams directly lead to better business outcomes.<sup>84</sup> Despite the proven benefits of gender inclusivity in the workplace, massive barriers existed even before the looming threats to broad reproductive freedom. In 2015, McKinsey identified several important factors contributing to the lack of women in leadership in industry and the much lower pay brackets of gender minorities in the workforce: “blocked economic potential” (such as denied leadership opportunities and assignments), “time spent in unpaid care work,” fewer (and now diminishing) legal rights, “political

<sup>74</sup> 411 U.S. 677 (1973).

<sup>75</sup> 420 U.S. 636 (1975).

<sup>76</sup> David Kurlander, *One-Half Dependent: Frontiero v. Richardson and Ruth Bader Ginsburg's Long Quest for Equality*, CAFE (Sept. 24, 2020), <https://cafe.com/article/one-half-dependent-frontiero-v-richardson-and-ruth-bader-ginsburgs-long-quest-for-equality> [<https://perma.cc/7JVV-K9E7>].

<sup>77</sup> 29 U.S.C. §§ 201–219.

<sup>78</sup> *Id.* § 206(d).

<sup>79</sup> 42 U.S.C. § 2000e.

<sup>80</sup> 29 U.S.C. §§ 2601–2654.

<sup>81</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>82</sup> 42 U.S.C. §§ 12101–12213.

<sup>83</sup> See HUNT ET AL., *supra* note 70, at 14; VIVIAN HUNT ET AL., MCKINSEY & CO., DIVERSITY MATTERS 9–13 (2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters> [<https://perma.cc/U9B4-5DWW>]; VIVIAN HUNT ET AL., MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 32–41 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters> [<https://perma.cc/53U7-RPUM>].

<sup>84</sup> MEKALA KRISHNAN ET AL., MCKINSEY GLOB. INST., TEN THINGS TO KNOW ABOUT GENDER EQUALITY 7 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/ten-things-to-know-about-gender-equality> [<https://perma.cc/7TPR-4ZM5>] (“[C]ompanies in the bottom quartile for both gender and ethnic diversity were 27 percent more likely to underperform the industry average than all other firms.”). Modern representations abound of how these concerns can be foregrounded in DEI materials and recruitment while simultaneously ignored in partnership or promotion decisions. See, e.g., PARTNER TRACK (Netflix television series 2022).

underrepresentation,” and “violence against women.”<sup>85</sup> The playing field has never been level for all gender minorities; race,<sup>86</sup> sexuality, and disability are vital factors in determining access to opportunities.<sup>87</sup> Increasing public awareness of these inequities is one factor driving greater social pressure to hire and retain a gender-diverse body of workers.<sup>88</sup>

Broad social pressure on companies (stemming from robust new Environmental, Social, and Governance (ESG) policies, shareholder activism, and socially conscious purchasing by consumers) encourages employer support for workers who can become pregnant. Post-*Dobbs*, several companies have announced abortion-travel policies with a few thousand dollars in funding.<sup>89</sup> By all indications, companies will continue to institute similar policies and “benefits” for employees where possible.<sup>90</sup> Enabling employees to end unwanted pregnancies can be framed as an ESG matter — signaling virtue to workers and clients — and promotes more efficient and successful business.<sup>91</sup> The field of ESG is a developing realm of business pressures. “The idea is that investors should evaluate firms based not just on their commercial performance but also on their environmental and social record and their governance, typically using numerical scores.”<sup>92</sup> Investors use these scores to screen investments based on the policies that the corporations

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<sup>85</sup> KRISHNAN ET AL., *supra* note 84, at 7.

<sup>86</sup> *Id.* at 8 (“Women of color are especially underrepresented in the North American workforce and face the steepest drop-offs [from entry-level to C-suite]. . . . These outcomes are mirrored in the day-to-day experiences [including microaggressions] of women of color in the workforce . . . 40 percent of black women and 30 percent of Asian women say they needed to provide more evidence of their competence than others, compared with 28 percent of white women and 14 percent of men.”).

<sup>87</sup> JESS HUANG ET AL., MCKINSEY & CO., WOMEN IN THE WORKPLACE 2019, at 8 (2019) [https://womenintheworkplace.com/Women\\_in\\_the\\_Workplace\\_2019.pdf](https://womenintheworkplace.com/Women_in_the_Workplace_2019.pdf) [<https://perma.cc/R6K2-NKD5>] (“Black women and women with disabilities face more barriers to advancement, get less support from managers, and receive less sponsorship than other groups of women.”).

<sup>88</sup> Herman et al., *supra* note 71.

<sup>89</sup> See Goldberg, *supra* note 67. The benefit level for abortion-travel assistance has been set at a few thousand dollars by most companies. *Id.* This could be a reasonable travel budget, but it may be insufficient to address the legal uncertainties that abortion-related travel could raise.

<sup>90</sup> See DON’T BAN EQUALITY, <https://dontbanequality.com> [<https://perma.cc/X3TW-6YC9>] (listing over 750 companies and nonprofits that signed onto a statement condemning abortion restrictions as “bad for business”); #*WhatAreYourReproBenefits*, RHIA VENTURES, <https://rhiaventures.org/corporate-engagement/whatareyourreprobenefits> [<https://perma.cc/MHE5-LE67>] (logging all company-specific reproductive benefits into a central database and offering guidance on how companies can best support employees who can become pregnant).

<sup>91</sup> See Barbara Ortutay & Dee-Ann Durbin, *Companies Could Face Hurdles Covering Abortion Travel Costs*, ASSOCIATED PRESS (July 5, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-de9e1e2c764bf61b95aef756a66f8a5> [<https://perma.cc/CRG4-2WUV>] (“It also makes some sense for companies to not have a bunch of employees that are highly distressed because they have unwanted pregnancies and have to carry the child to term.”).

<sup>92</sup> *ESG Should Be Boiled Down to One Simple Measure: Emissions*, THE ECONOMIST (July 21, 2022), <https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions> [<https://perma.cc/77KA-TV6T>].

put in place — often around climate change or social justice concerns.<sup>93</sup> Shareholder pressure has become a prominent avenue for pushing for reproductive rights. Spending proposals and plans for political involvement in reproductive rights have entered corporate boardrooms.<sup>94</sup> The rhetoric around corporate social responsibility evolves every day that more consumers trust corporations in ways that exceed their trust in the media and government, and every day that corporations are pushed to be “proactive[]” with social policy, as opposed to reactive.<sup>95</sup> Socially conscious consumers assert that they will be putting their money where their mouths are. This type of spending can influence how companies operate: many depend on clients who purchase according to the principle that one should buy only from companies that do good.<sup>96</sup>

How will the inability to get an abortion affect whether women and gender-marginalized people will be able to find jobs? The unspoken pregnancy question has always existed: “Will this person get pregnant, thereby inconveniencing me and prompting a need to reshuffle?” But now it becomes an omnipresent threat: “Even if this person doesn’t seem to be planning to conceive, they could become pregnant by sheer virtue of having a uterus.” Due to social pressures, business benefits, and antidiscrimination law, companies cannot afford not to provide an abundance of reproductive health care options. But as a society, the United States cannot afford to rely primarily on corporate action as a solution for workers.

3. *Antichoice Legislators at Loggerheads with Big Business.* — These corporate allocations have prompted a strong reaction from anti-choice legislators. Fourteen state-level Texas lawmakers sent a letter to Lyft in May 2022 in response to their abortion-travel policy: “The state of Texas will take swift and decisive action if you do not immediately rescind your recently announced policy to pay for the travel expenses of

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<sup>93</sup> *What Is Environmental, Social, and Governance (ESG) Investing?*, INVESTOPEDIA (Sept. 27, 2022), <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp> [<https://perma.cc/UE7T-YY4N>].

<sup>94</sup> Erin Mulvaney, *Shareholder Activism Emerging as New Path to Abortion Rights* (1), BLOOMBERG L. (May 5, 2022, 4:45 PM), <https://news.bloomberglaw.com/us-law-week/shareholder-activism-emerging-as-path-to-protect-abortion-rights> [<https://perma.cc/8624-DSUZ>].

<sup>95</sup> Hongwei He, *Brand Activism: Why It's No Longer Sufficient for Businesses to Remain Reactive to Societal Issues*, FORBES (Feb. 9, 2022, 4:42 PM), <https://www.forbes.com/sites/alliancembs/2022/02/09/brand-activism-why-its-no-longer-sufficient-for-businesses-to-remain-reactive-to-societal-issues> [<https://perma.cc/AV2W-A253>].

<sup>96</sup> See Matthew Tilley, *The Increasingly Socially Conscious Consumer*, VERICAST, <https://www.vericast.com/insights/blog/the-increasingly-socially-conscious-consumer> [<https://perma.cc/QXE3-C7GJ>] (“Consumers expect authentic social and corporate responsibility from brands . . . [and are part of a culture that] demand[s] change on long-standing issues including diversity . . .”). Note that those who can afford to allocate their spending this way are often wealthier consumers, which increases the significance of retaining their patronage as morally driven clients.

women who abort their unborn children.”<sup>97</sup> The letter details potential mechanisms to punish corporate abortion-travel policies, including: (1) permitting Texan shareholders to sue executives of publicly traded companies that pay for abortion care and (2) allowing county district attorneys to pursue charges for abortion “crimes” anywhere in the state.<sup>98</sup>

Federal antiabortion legislators are aiming to prevent existing corporate benefits from extending to pro-choice ESG policies. On May 3, 2022, following the actions of several companies in response to the leak of the *Dobbs* opinion, Senator Marco Rubio introduced a bill called the No Tax Breaks for Radical Corporate Activism Act.<sup>99</sup> The bill would amend the tax code provisions on deductible employee travel<sup>100</sup> to prohibit employers from deducting expenses related to their employees’ abortion-travel costs (and costs of employees’ families’ gender-affirming care).<sup>101</sup>

4. *Anticontraception Corporations: Forced Pregnancy Is Bad for Business — But Some Businesses Do Not Mind.* — Abortion care and funding is a new frontier for corporations. However, the ACA insurance mandate for contraceptive coverage has long been contested — largely by companies who wish to eliminate it. In 2014, the Court held in *Burwell v. Hobby Lobby Stores, Inc.*<sup>102</sup> that for-profit corporations did not have to provide plans that included contraception if they contradicted employers’ religious beliefs (this exemption already existed for religious organizations and nonprofits).<sup>103</sup> Several companies at that time openly announced that they did not wish to provide birth control.<sup>104</sup> The government continues to address this issue in the administration of insurers’ plans. The ACA mandate has been the bulwark against this particular encroachment on workers’ rights to health

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<sup>97</sup> Zach Despart, *Businesses that Help Employees Get Abortions Could Be Next Target of Texas Lawmakers if Roe v. Wade Is Overturned*, TEX. TRIB. (May 23, 2022, 6:00 AM), <https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions> [<https://perma.cc/ACH4-JPD6>] (quoting Letter from Briscoe Cain et al., Tex. State Reps., to Logan Green, CEO, Lyft (May 6, 2022), <https://briscoecain.com/wp-content/uploads/2022/05/Briscoe-Cain-Lyft-Letter-With-Signatures-5.5.2022.pdf> [<https://perma.cc/4GJ9-P3DQ>]).

<sup>98</sup> *Id.*

<sup>99</sup> No Tax Breaks for Radical Corporate Activism Act, S. 4131, 117th Cong. (2022).

<sup>100</sup> *Id.* § 162.

<sup>101</sup> See Press Release, Sen. Marco Rubio, Rubio Introduces Bill to Remove Tax Breaks for Woke Corporations (May 4, 2022). The bill was written with specific attention to policies like Amazon’s and Disney’s. It was republicitized and discussed in June following the *Dobbs* decision. See Press Release, Sen. Marco Rubio, ICYMI: Rubio Introduces Bill to Remove Tax Breaks for Woke Corporations (June 27, 2022).

<sup>102</sup> 573 U.S. 682 (2014).

<sup>103</sup> *Id.* at 690–91.

<sup>104</sup> Miriam Berg, *The 82 Employers Who Want to Deny Birth Control Coverage*, PLANNED PARENTHOOD (July 8, 2014, 3:32 PM), <https://www.plannedparenthoodaction.org/blog/82-employers-who-want-deny-birth-control-coverage> [<https://perma.cc/2GKU-NZCU>].



care, protecting the structure of these plans themselves by insisting that contraception be a part of covered goods.<sup>105</sup>

Post-*Dobbs*, the Biden Administration's Secretaries of the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury prioritized protecting access to contraception as part of the ACA mandate.<sup>106</sup> Their joint statement asserted that contraception was essential health care and warned insurers against noncompliance.<sup>107</sup> These explicit directions to insurers help to protect against potential protestations of uncertainty. Keeping protections of health services clear and widely encompassing is the necessary work of the state.

5. *Corporate Care Packages Are Not the Answer.* — The simultaneous burgeoning corporate threat to contraception and pledging of abortion-related travel funding illustrate the variegation of help and options in the world of employers and insurers. Access to abortion should not depend on which corporation someone works for. Americans cannot rely on corporations to do the work of providing workarounds and options for reproductive care.<sup>108</sup>

Corporations have multiple competing incentives in these situations. Social pressure to provide abortion operates only on a subset of employers. Some employers are explicitly antichoice.<sup>109</sup> Within businesses that do provide benefits, the benefits are not distributed equally. Marginalized, low-income groups are more likely to lack access (or face challenges taking advantage of benefits even if offered).<sup>110</sup> Some

<sup>105</sup> See Daniel Wiessner, *U.S. Says Insurers Must Still Cover Birth Control After Supreme Court Abortion Ruling*, REUTERS (July 28, 2022, 7:55 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-says-insurers-must-still-cover-birth-control-after-supreme-court-abortion-2022-07-28> [https://perma.cc/KYU2-NNTA].

<sup>106</sup> See Press Release, U.S. Dep't of Health & Hum. Servs., HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage (July 28, 2022).

<sup>107</sup> See Shira Stein, *Insurers Pressed on Contraceptive Coverage After Roe's Demise*, BLOOMBERG L. (June 27, 2022, 3:02 PM), <https://news.bloomberglaw.com/health-law-and-business/insurers-pressed-on-contraceptive-coverage-after-roes-demise> [https://perma.cc/2TQ7-54LN].

<sup>108</sup> There are fundamental limitations to corporate action. In the broader scope of health care, where almost half of Americans get their general health insurance from their employer, the ACA had a strong salutary effect, illustrating how state action can provide broad relief in a way that employer action cannot. See SHERRY GLIED ET AL., COMMONWEALTH FUND, EFFECT OF THE AFFORDABLE CARE ACT ON HEALTH CARE ACCESS 4 (2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/may/effect-affordable-care-act-health-care-access> [https://perma.cc/CT9C-GZJT]. It bears further consideration that an abortion "benefit" may create tax consequences for the employee, which only the state can alleviate directly. See Jeff Green, *Women Are at Risk of Being Taxed on US Abortion Travel Benefits*, BLOOMBERG L. (July 29, 2022, 5:30 PM), <https://www.bloomberg.com/news/articles/2022-07-29/the-tax-man-cometh-for-americans-seeking-abortion-travel-benefits> [https://perma.cc/BR2C-MX3Z].

<sup>109</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>110</sup> See Meghan McCarty Carino, *Abortion Travel Benefit Unlikely to Reach Many Low-Wage Workers*, MARKETPLACE (June 27, 2022), <https://www.marketplace.org/2022/06/27/abortion->

employers may view this decision largely in economic terms (for example, as weighing the risk of employee departures and consumer losses against the litigation risk of providing abortion benefits), and that calculus can change,<sup>111</sup> especially with recent antichoice laws that mobilize citizen vigilantes.<sup>112</sup>

The state, by contrast, is perceived to be driven by a more singular set of incentives: to protect individuals citizens' bodies, rights, and property. At the state level, protecting rights to sexual and reproductive care can be achieved with referenda and state constitutional amendments and protections. At the federal level, such protections come from federal legislation and agency enforcement.

### C. *The Necessity of State Protections and Rights*

Government-provided protections begin with the overarching question of *access*. A state or federal government *ensuring* broad access to reproductive care is the quickest and most direct path to a more level playing field in the context of employment. In the immediate aftermath of *Dobbs*, ballot referenda and state constitutional amendments are the main prospects for this development.<sup>113</sup> Since the imperfect *Roe* decision, federal constitutional arguments have been raised to suggest that Equal Protection or the Thirteenth Amendment could serve as more capacious bases for reproductive rights;<sup>114</sup> however, these positions are

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travel-benefit-unlikely-to-reach-many-low-wage-workers [https://perma.cc/T3TB-A94K]; Adia Harvey Wingfield, *Do Your Company's Abortion Benefits Cover Your Most Vulnerable Workers?*, HARV. BUS. REV. (July 8, 2022), https://hbr.org/2022/07/do-your-companys-abortion-benefits-cover-your-most-vulnerable-workers [https://perma.cc/F3FY-TJYT] (“[C]orporate decisions to fund workers’ travel for abortion care or to include it as a benefit . . . won’t just replicate economic inequality, but it will have gendered and racial consequences, too.”).

<sup>111</sup> See Karl Evers-Hillstrom, *Why Companies Think Paying for Abortion Travel Is Worth It*, THE HILL (June 28, 2022, 5:18 AM), https://thehill.com/business-a-lobbying/353892-why-companies-think-paying-for-abortion-travel-is-worth-it [https://perma.cc/8QPT-3XMQ].

<sup>112</sup> Izabela Tringali & Julia Kirschenbaum, *Texas's Abortion Bans and Voter Suppression Laws Let Citizens Do “Dirty Work” of Opposing Constitution*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/texas-abortion-bans-and-voter-suppression-laws-let-citizens-do-dirty [https://perma.cc/73MT-W684].

<sup>113</sup> See Amna Nawaz, *Abortion Rights on the Ballot in Several States This Election*, PBS (Nov. 2, 2022, 6:40 PM), https://www.pbs.org/newshour/show/abortion-rights-on-the-ballot-in-several-states-this-election [https://perma.cc/C5QL-3NSJ] (noting four states had abortion-related ballot measures following *Dobbs*); *2022 Abortion-Related Ballot Measures*, BALLOTEDIA, https://ballotpedia.org/2022\_abortion-related\_ballot\_measures [https://perma.cc/R67M-FNXQ] (listing six states with ballot measures addressing abortion in 2022 — California, Kansas, Kentucky, Michigan, Montana, and Vermont).

<sup>114</sup> See, e.g., Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143–44 (1978); Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [https://perma.cc/A4HV-RTCU] (“Ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments. . . . Mandated,

out of vogue given the current direction of a virulently antichoice Supreme Court<sup>115</sup> and federal judiciary.<sup>116</sup>

*I. Lessons from the Road: The Evolution of Anti-Gender Discrimination Employment Law.* — As abortion access and gender equity are inextricably linked, the evolution of anti-gender discrimination employment law can offer helpful insights for understanding the future of reproductive justice. It takes multiple courses of legislation, litigation, and administrative enforcement for workforce participation to meaningfully improve. A multipronged, state-led campaign inevitably impacts governance at the individual employer level. In contrast, an employer taking individual steps to secure their workforce can deleteriously absolve the state of its vital role in taking protective action.

Employment antidiscrimination laws for women became a cause célèbre in part because of the work of the late Justice Ginsburg.<sup>117</sup> Antidiscrimination opinions have not, however, been limited to the Court's "liberal" Justices. When the *Bostock v. Clayton County*<sup>118</sup> opinion, authored by Justice Gorsuch and holding that Title VII prohibits employment discrimination based on sexual orientation or gender identity,<sup>119</sup> hit the news, antidiscrimination law suddenly came under public (and nonlegal) scrutiny, garnering attention beyond the advocacy organizations that had been waging the fight for decades.<sup>120</sup> Though some scholars raised concerns about how nonbinary, gender-nonconforming, and bisexual folks, as well as other gender or sexual minorities, were cut out of the conversation,<sup>121</sup> many communities celebrated the opinion as a step in the right direction. Preceding recent antidiscrimination fervor

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forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the 13th Amendment's prohibition against involuntary servitude and protection of bodily autonomy, as well as the 14th Amendment's defense of privacy and freedom."); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–84 (1990).

<sup>115</sup> See Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html> [https://perma.cc/ES3V-YMUP].

<sup>116</sup> See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [https://perma.cc/22A6-VMR8] (noting that President Trump appointed a large number of federal appeals court judges, thus increasing the share of conservative — and therefore likely antichoice — federal judges).

<sup>117</sup> See *supra* notes 74–76 and accompanying text.

<sup>118</sup> 140 S. Ct. 1731 (2020).

<sup>119</sup> *Id.* at 1754.

<sup>120</sup> See, e.g., *Employment*, GLBTQ LEGAL ADVOCES. & DEFS., <https://www.glad.org/issues/employment> [https://perma.cc/T2SX-SPFR].

<sup>121</sup> See Meredith Rolfs Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1508–09 (2021); A. Russell, Note, *Bostock v. Clayton County: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1602–03 (2021).

came Myra Bradwell's fight for her right to be a lawyer,<sup>122</sup> Pauli Murray's intersectional claims on the rights of people of color and women to freely seek and find work,<sup>123</sup> and Justice Ginsburg's benefits cases on behalf of men,<sup>124</sup> which established women's rights to be breadwinners and economically whole.<sup>125</sup> There are a number of antidiscrimination laws that built a rickety infrastructure for defending narrow causes rooted in gender and/or the capacity to get pregnant.<sup>126</sup> The Fair Labor Standards Act of 1938 set a minimum wage;<sup>127</sup> as more women work minimum wage jobs than men,<sup>128</sup> every increase in the minimum wage<sup>129</sup> has a gendered effect. While the Equal Pay Act of 1963 illegalized explicit pay differences on the basis of sex,<sup>130</sup> the dramatic pay gap persists.<sup>131</sup> Title VII of the Civil Rights Act of 1964 is likely the most central of the statutory protections for women in the workplace and has been read to include proscriptions on discrimination regarding gender stereotyping and gay and lesbian relationships.<sup>132</sup> The Family and Medical Leave Act and the PDA are often considered the most central to reproductive freedoms in the workplace, perhaps simply because the names call to mind the capacity to get pregnant. In practice, the ACA<sup>133</sup> and ADA<sup>134</sup> also do immense work to protect those freedoms on a broader scale. All these laws encourage corporations to, where possible, continue to hire and retain gender-diverse workers (including cis women and gender minorities). The upshot is that a broad legislative package with specific enforcement mechanisms is key to protecting reproductive rights. Following Title VII, between 1966 and 2013, women's workforce

<sup>122</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/section1.aspx> [<https://perma.cc/4DNB-EC8B>].

<sup>123</sup> See Brief for Appellant at 14–15, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 430) (brief written by Pauli Murray). See generally STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1997).

<sup>124</sup> See generally GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* (1st ed. 2016).

<sup>125</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

<sup>126</sup> See generally TOM SPIGGLE, *YOU'RE PREGNANT? YOU'RE FIRED! PROTECTING MOTHERS, FATHERS, AND OTHER CAREGIVERS IN THE WORKPLACE* (2014).

<sup>127</sup> 29 U.S.C. § 206.

<sup>128</sup> Jens Manuel Krogstad, *More Women than Men Earn the Federal Minimum Wage*, PEW RSCH. CTR. (May 5, 2014), <https://www.pewresearch.org/fact-tank/2014/05/05/more-women-than-men-earn-the-federal-minimum-wage> [<https://perma.cc/496T-TTKZ>].

<sup>129</sup> See generally *Minimum Wage Tracker*, ECON. POL'Y INST., <https://www.epi.org/minimum-wage-tracker> [<https://perma.cc/WRF2-LM9S>] (listing real-time state minimum wages).

<sup>130</sup> 29 U.S.C. § 206(d).

<sup>131</sup> Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/fact-tank/2023/03/01/gender-pay-gap-facts> [<https://perma.cc/FGR3-726F>].

<sup>132</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

<sup>133</sup> See 29 U.S.C. § 207(r); 42 U.S.C. § 300gg-13 (including breastfeeding care and a malleable contraception mandate).

<sup>134</sup> 42 U.S.C. §§ 12101–12213 (including policies for leave, maternal injury, and others).

participation rate increased from 31.5% to 48.7%.<sup>135</sup> These results are primarily because Title VII was not toothless — Congress encouraged regular and effective action on discrimination claims by creating the robustly funded Equal Employment Opportunity Commission (EEOC) “to enforce Title VII and eliminate unlawful employment discrimination.”<sup>136</sup> Without the EEOC, even tracking these indicators of minority participation in the workforce would be infeasible.<sup>137</sup>

2. *Solutions on the Table: Rights-Protective Direct Democracy Could Offer Workers Necessary Reproductive Justice.* — Though gerrymandering and voter suppression preempt many promises of democratic recourse for reproductive rights through the traditional voter mechanisms,<sup>138</sup> the 2022 midterm elections evinced mass political support for reproductive rights. Following a rights-supportive Kansas referendum in August 2022, five states introduced ballot measures designed to enshrine reproductive protections in their state constitutions or to definitively restrict abortion rights. Those protecting reproductive rights passed; those that were devised to restrict those rights were struck down.

The process of leveraging ballot measures for progressive goals appeared to reinvigorate the popular voice at a time when representative democracy was faltering. Historically, legal scholars have argued that ballot measures are underscrutinized by courts and that this form of direct democracy can result in the suppression of political speech and an imbalance in electoral outcomes in particular cases.<sup>139</sup> In the homophobic social climate of 1974–2012, anti-gay ballot measures regularly resulted in anti-gay outcomes at the ballot box.<sup>140</sup> The homophobic “tyranny of the majority” that advocates identified in these measures resounded through the LGBTQ+ community and left lasting negative psychological effects on individuals (even when anti-gay measures failed).<sup>141</sup> Indeed, as Professor Barbara Gamble writes, the question that “persistently haunts the use of direct democracy” is majoritarian tyranny.<sup>142</sup> Historians have pointed out that civil rights initiatives are

<sup>135</sup> *Women in the American Workforce*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/special-report/women-american-workforce> [<https://perma.cc/9V6R-BNQZ>].

<sup>136</sup> *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events> [<https://perma.cc/5D8Q-EWD2>].

<sup>137</sup> For an example of the in-depth workforce data collection and analysis performed by the EEOC, see *Indicators (2013) with a Look at EEO-1 Data for the 50th Anniversary*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/indicators-2013-with-look-eeo-1-data-50th-anniversary> [<https://perma.cc/QLK7-QZKQ>].

<sup>138</sup> See generally Siegel, *supra* note 62.

<sup>139</sup> See J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 144–51 (2008).

<sup>140</sup> See Amy L. Stone, *Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-gay Ballot Measures*, 19 CHAP. L. REV. 219, 220 (2016).

<sup>141</sup> See, e.g., *id.*

<sup>142</sup> Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997).

often profoundly vulnerable at the ballot box,<sup>143</sup> but 2022 evinced something unique and high unprecedented in the realm of direct democracy.

On August 2, 2022, Kansas — the first state to vote on the right to abortion since the Court’s overturning of *Roe* on June 24, 2022 — became the first win for abortion rights at the ballot box.<sup>144</sup> The ballot asked voters whether to remove state constitutional protections for abortion<sup>145</sup> — a provision upheld by the Kansas Supreme Court in 2019.<sup>146</sup> In the end, voters refused to remove the protections.<sup>147</sup>

Amidst interjurisdictional challenges<sup>148</sup> and the threat of criminalization,<sup>149</sup> the Kansas referendum was the beginning of a wave of pro-choice referenda votes in Montana, Kentucky, Michigan, California, and Vermont in November 2022. In Montana, voters rejected LR-131, an abortion measure that would have imposed criminal penalties on health care providers.<sup>150</sup> If adopted, the measure would have required doctors to treat any fetus that presented breath or muscle movement after being extracted, including as part of an abortion procedure.<sup>151</sup> Health care providers feared this would “compel [them] to intervene in futile and tragic circumstances, taking a dying infant away from their parents . . . in their final moments of life.”<sup>152</sup> A violation would constitute a felony with a sentence of up to twenty years in state prison or a fine of up to \$50,000.<sup>153</sup> Crucial to the rejection of the referendum was the Montanan medical community — physicians, nurses, and community

<sup>143</sup> *Id.* at 248.

<sup>144</sup> Dylan Lysen et al., *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/96XG-M4U7>].

<sup>145</sup> Alvin Chang, *Why the Language on the Kansas Abortion Ballot Is So Confusing*, THE GUARDIAN (Aug. 2, 2022, 6:00 AM), <https://www.theguardian.com/us-news/ng-interactive/2022/aug/02/kansas-abortion-ballot-language> [<https://perma.cc/QFR7-4WWT>].

<sup>146</sup> *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019).

<sup>147</sup> Lysen et al., *supra* note 144.

<sup>148</sup> See David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 17–33), <https://ssrn.com/abstract=4032931> [<https://perma.cc/D5UL-Q84B>].

<sup>149</sup> See Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes> [<https://perma.cc/8DUW-S2ZM>].

<sup>150</sup> *Montana Voters Reject Anti-Abortion Ballot Initiative*, CTR. FOR REPRODUCTIVE RTS. (Nov. 10, 2022), <https://reproductiverights.org/montana-voters-reject-anti-abortion-ballot-initiative> [<https://perma.cc/RV7G-TQDX>].

<sup>151</sup> H.B. 167, 67th Leg., Reg. Sess. §§ 3–4 (Mont. 2022).

<sup>152</sup> Mara Silvers, *How Montana’s LR-131 “Born-Alive” Referendum Failed*, NBC MONT. (Nov. 16, 2022), <https://nbcmontana.com/news/local/how-montanas-lr-131-born-alive-referendum-failed> [<https://perma.cc/393A-F5DU>].

<sup>153</sup> Mont. H.B. 167 § 5.

health workers — who helped to dispel misconceptions about “medically inaccurate and misguided legislation.”<sup>154</sup>

In Kentucky, voters rejected Amendment 2 to the state constitution, a proposal that would have constitutionalized an antiabortion state politic.<sup>155</sup> The amendment proposed: “To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”<sup>156</sup> Kentucky already has a law banning most abortions at any stage of pregnancy,<sup>157</sup> as well as another law that bans any abortion after six weeks of pregnancy.<sup>158</sup> Both have been challenged in lawsuits but have been authorized as enforceable in the interim.<sup>159</sup> In a state with extreme restrictions, the amendment’s rejection stemmed the tide of further constrictive bans; it demonstrated popular will for ongoing engagement in the battle for reproductive rights.

In Michigan, voters passed Proposal 3, enshrining abortion rights at the constitutional level.<sup>160</sup> Article 1, section 28 of the Michigan Constitution now establishes, among other things, an individual’s right to “reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy.”<sup>161</sup> The amendment will also prevent an obsolete 1931 abortion ban that criminalizes abortion without exceptions for rape or incest from going into effect.<sup>162</sup>

<sup>154</sup> Denali Sagner, *Montanans Reject “Born-Alive” Measure Despite Broad Wins for Republicans*, FLATHEAD BEACON (Nov. 10, 2022), <https://flatheadbeacon.com/2022/11/10/montanans-reject-born-alive-measure-despite-broad-wins-for-republicans> [<https://perma.cc/LLA5-KA8C>]; see also *Montana State Abortion Ballot Initiative*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/abortion-is-essential/advocate-in-your-state/ballot-initiatives/montana-lr-131> [<https://perma.cc/3EE9-ZE6V>].

<sup>155</sup> See Deborah Yetter, *Kentucky Voters Reject Amendment that Would Have Ended Right to an Abortion. What It Means for the Deep-Red State*, USA TODAY (Nov. 11, 2022, 9:03 AM), <https://www.usatoday.com/story/news/politics/elections/2022/11/09/midterm-election-2022-abortion-kentucky-amendment-2/8315146001> [<https://perma.cc/S6XM-V6X7>].

<sup>156</sup> H.B. 91, 2021 Leg., Reg. Sess. (Ky. 2021).

<sup>157</sup> KY. REV. STAT. ANN. § 311.772 (West 2019); see Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment on Abortion*, PBS (Nov. 9, 2022, 9:13 AM), <https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion> [<https://perma.cc/MZJ2-M8DD>].

<sup>158</sup> See KY. REV. STAT. ANN. §§ 311.7701–7711 (West 2019) (banning abortions after a fetal heartbeat is detectable, which generally occurs around six weeks of gestation).

<sup>159</sup> Deborah Yetter, *Abortion Remains Banned in Kentucky While Supreme Court Reviews Disputes in Case*, COURIER J. (Aug. 18, 2022, 5:11 PM), <https://www.courier-journal.com/story/news/politics/2022/08/18/kentucky-abortion-ban-supreme-court-not-lifting-ban/65391842007> [<https://perma.cc/SX7W-6ZXP>].

<sup>160</sup> Ben Orner & Taylor DesOrmeau, *Proposal 3 Passes, Etching Abortion Rights into Michigan Constitution*, MLIVE (Nov. 10, 2022, 10:36 AM), <https://www.mlive.com/politics/2022/11/1/proposal-3-passes-etching-abortion-rights-into-michigan-constitution.html> [<https://perma.cc/4JF2-KELD>].

<sup>161</sup> MICH. CONST. art. 1, § 28; see Abigail Abrams, *Michigan Is Fighting One of the Most Significant Abortion Battles in the Country*, TIME (Nov. 18, 2022, 3:50 PM), <https://time.com/6223955/michigan-abortion-ballot-initiative> [<https://perma.cc/5T53-WPN5>].

<sup>162</sup> Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), <https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-0064778> [<https://perma.cc/Z8VX-KGWD>].

Abortion advocates had been planning for this fight for years before *Roe* was overturned.<sup>163</sup> The geographic centrality of Michigan made this fight even more essential. The state is surrounded by Wisconsin, Ohio, and Indiana; Michigan providers are often the default abortion providers for patients in those states who cannot receive care in those states. Organizers submitted over 750,000 signatures — over 300,000 more than the necessary 425,000 — to put Proposal 3 on the ballot.<sup>164</sup> The success of such ballot initiatives<sup>165</sup> preserved a measure of voter control over reproductive policy, upholding a rights-based status quo.

During the 2022 midterms, California voters passed Proposition 1, which enshrined abortion rights in the state constitution.<sup>166</sup> While other states contend with looming closures of last clinics<sup>167</sup> or “pill fairies” crossing the border,<sup>168</sup> a broader reproductive justice framework might be a workable experiment in states where the popular voices of voters and legislators are as impassioned as those in California appear to be.

Voters in Vermont’s midterms passed Proposal 5, which amended the constitution to protect rights to pregnancy, abortion, and birth control.<sup>169</sup> The adopted amendment, article 22, reflects concern for the needs of people who can become pregnant.<sup>170</sup> The Vermont legislature first proposed this liberty-protective amendment in 2019,<sup>171</sup> years before *Dobbs*, seeing the end of *Roe* on the horizon.

<sup>163</sup> Alice Miranda Ollstein, *Michigan Activists Submit Signatures to Put Abortion Rights on the Ballot in November*, POLITICO (July 11, 2022, 8:22 AM), <https://www.politico.com/news/2022/07/11/michigan-abortion-rights-voting-00044823> [<https://perma.cc/T84K-EZN3>].

<sup>164</sup> *Id.*

<sup>165</sup> See Rachel M. Cohen, *How Abortion Rights Advocates Won Every Ballot Measure This Year*, VOX (Nov. 9, 2022, 1:58 AM), <https://www.vox.com/policy-and-politics/23451074/abortion-ballot-measure-midterms-kentucky-montana-michigan> [<https://perma.cc/TMN2-VWXH>].

<sup>166</sup> Victoria Colliver, *California Voters Guarantee Abortion Rights in State Constitution*, POLITICO (Nov. 9, 2022, 1:58 AM), <https://www.politico.com/news/2022/11/09/california-abortion-rights-state-constitution-00065820> [<https://perma.cc/ST7L-3FL2>]. The inclusion of contraceptives in Proposition 1, *id.*, orients the amendment toward a broader concept of reproductive justice that unifies the right to choose an abortion with the rights to bodily autonomy, to parent, and to raise children in safe and sustainable communities. For background on this conception of reproductive justice, see generally *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/WJ62-V2QT>].

<sup>167</sup> See Marielle Kirstein et al., *One Month Post-Roe: At Least 43 Abortion Clinics Across 11 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (July 28, 2022), <https://www.guttmacher.org/article/2022/07/one-month-post-roe-least-43-abortion-clinics-across-11-states-have-stopped-offering> [<https://perma.cc/7FQL-DP2P>].

<sup>168</sup> The New Yorker Radio Hour, *The New Abortion Underground*, NEW YORKER (Oct. 14, 2022), <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/the-new-abortion-underground> [<https://perma.cc/E64V-E9ZJ>].

<sup>169</sup> Lola Duffort, *Vermont Becomes the 1st State to Enshrine Abortion Rights in Its Constitution*, VTDIGGER (Nov. 8, 2022), <https://vtdigger.org/2022/11/08/measure-to-enshrine-abortion-rights-in-vermont-constitution-poised-to-pass> [<https://perma.cc/V3QW-WGKZ>].

<sup>170</sup> See VT. CONST. ch. I, art. 22.

<sup>171</sup> Michelle Lou, *Vermont Lawmakers Are Trying to Pass a Constitutional Amendment to Protect the Right to an Abortion*, CNN (May 13, 2019, 4:21 PM), <https://edition.cnn.com/2019/05/09/us/vermont-reproductive-liberty-constitution-amendment-trnd> [<https://perma.cc/3BJE-6N53>].



In some ways, the evolution of these victories through direct democracy is a confounding phenomenon. In the last few decades of the twentieth century, voters approved over seventy-five percent of citizen initiatives that restricted civil rights in housing and public accommodations for racial minorities, school desegregation, gay rights, English-language laws, and AIDS policies.<sup>172</sup> Considering only about thirty percent of all initiatives and popular referenda pass overall, this rate is shockingly high.<sup>173</sup> For years, critical race theorists had expressed concerns about the danger of direct democracy for minority rights. Professor Derrick Bell wrote that “direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process.”<sup>174</sup> In the late 1970s, Bell noted that referenda “enable[] . . . voters’ racial beliefs and fears to be recorded and tabulated in their pure form,” facilitating “bias, discrimination, and prejudice.”<sup>175</sup> Minority rights and individual liberties are threatened by “a device that aggregates without filtering.”<sup>176</sup>

The question of abortion is freighted with questions of racial, social, and class status. Voters of different social identities reacted differently to the possibility of abortion bans, perhaps because these are laws that address a marginalized population — but not one that is a numerical minority — or because the laws took the shape of revoking an existing right. In an exceptional turn of populism in this intersectional question, putting it to “the people” offered a rare win for people of color, people living below the poverty line, and gender and sexual minorities.

At the federal level, organizers have advocated for the Pregnant Workers Fairness Act,<sup>177</sup> which passed both the House and Senate in December 2022.<sup>178</sup> Analogous state-level legislation was introduced in New York in 2012.<sup>179</sup> Thirty states and the District of Columbia have added further protections, twenty-three of which have been passed in the last decade.<sup>180</sup> However, state-level advocacy is the priority for immediate action. A newborn chimera of rights-protecting direct democracy offers vital potential solutions.

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<sup>172</sup> Gamble, *supra* note 142, at 253.

<sup>173</sup> *Id.* at 254.

<sup>174</sup> Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14 (1978).

<sup>175</sup> *Id.* at 14–15.

<sup>176</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1586 (1990).

<sup>177</sup> H.R. 1065, 117th Cong. (2021).

<sup>178</sup> Kim Elsesser, *Senate Passes Two Bills for Pregnant and Breastfeeding Moms at Work*, FORBES (Dec. 22, 2022, 11:33 PM), <https://www.forbes.com/sites/kimelsesser/2022/12/22/senate-passes-two-bills-for-pregnant-and-breastfeeding-moms-at-work> [<https://perma.cc/AH49-H75F>].

<sup>179</sup> See Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> [<https://perma.cc/L36H-NLL2>].

<sup>180</sup> NAT'L WOMEN'S L. CTR., PREGNANCY ACCOMMODATIONS IN THE STATES 1 (2021), <https://nwlc.org/resource/pregnancy-accommodations-states> [<https://perma.cc/T3CM-ZJHZ>].

*Conclusion*

For the sake of a well-functioning society that includes people of all genders and reproductive capacities, the United States must force courts and legislatures to face litigation and policy proposals that challenge the most restrictive or criminalizing provisions aimed at reproductive justice workers. The linkages between various segments of the working population who are able to get pregnant align with the concerns of people marginalized by race, gender, and other identity factors as they seek economic opportunities. If state action is deficient, the image of the situation unfolding is bleak: Lawyers with binders of ever-changing laws attempt research at the same time as doctors hesitate to treat a hemorrhaging patient. Criminal punishments for reproductive care apply not just to providers, but also to pregnant people<sup>181</sup> and those who assist them.<sup>182</sup> Prosecutions and complaints come from both the state and private citizens.<sup>183</sup> Advocates must fight for protections that are broader than the punishments newly available under a contemporary legal regime shaped by *Dobbs*.

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<sup>181</sup> See generally MICHELE GOODWIN, *POLICING THE WOMB* (2020).

<sup>182</sup> See MARY ZIEGLER, *PERSONHOOD: THE NEW AMERICAN WAR OVER REPRODUCTION* (forthcoming) (manuscript at 43–108) (on file with the Harvard Law School Library).

<sup>183</sup> Legal regimes that derive private-cause-of-action structures from the example set by Texas's S.B. 8 are cropping up in many states; Oklahoma followed suit just before *Dobbs* went into effect. See Jordan Smith, *Oklahoma's Total Abortion Ban Will Mean Surveillance, Criminalization, and Chaos*, *THE INTERCEPT* (May 20, 2022, 12:15 PM), <https://theintercept.com/2022/05/20/oklahoma-abortion-ban-surveillance-criminalization> [<https://perma.cc/HX6X-FCTQ>].

## CHAPTER FIVE

### POLICY AS A ONE-LEGGED STOOL: U.S. ACTIONS AGAINST SUPPLY CHAIN FORCED LABOR ABUSES

Forced labor is on the rise worldwide, with migrant workers and local communities falling victim to exploitative trafficking and labor practices. These practices sometimes catch the headlines, as evidenced by stories of abuse of migrant workers building the 2022 World Cup stadiums in Qatar.<sup>1</sup> But, far more often, the labor and suffering of migrant workers go unnoticed.

Forced labor — or the subset of forced labor that is the focus of this Chapter — exists in a particular web of overlapping legal jurisdictions and moral responsibilities. Demand from U.S. consumers drives U.S. companies to outsource production to the Global South, where wages and costs are low but risk of labor abuses runs high. Additionally, multinational corporations (often with ties to former colonial powers) return to extract resources and commodities from resource-rich areas in Africa and Asia. In those corners of the world, shadowy networks of farmers, middlemen, and recruiters drive systems that traffic vulnerable human beings, including children, to work in the production or extraction of goods destined for consumption in wealthy Western markets. These actors may operate in climates where local law enforcement structures are not able to take action to prevent forced labor. But the fact that these products make their way into global supply chains, managed by transnational corporations and destined for the supermarkets of North America, has led many to argue that pathways for justice can and should be found in the court systems of Western states.<sup>2</sup> The instances of forced labor upon which this Chapter focuses are perpetrated by non-U.S. persons outside of U.S. territory, but extraterritorial avenues inside the U.S. court system have nevertheless allowed corporate nexuses in the United States to confer jurisdiction to bring claims or use federal policies against rights abuses abroad.

This Chapter proceeds in three sections. Section A sets out, firstly, to explain the worldwide problem of forced labor in global supply chains and, secondly, to argue that the United States, the world's largest economy, has a moral duty to victims of forced labor. Section B points to

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<sup>1</sup> E.g., Emily Mae Czachor, *EU Condemns Qatar over Alleged Human Rights Abuses Ahead of World Cup*, CBS NEWS (Nov. 24, 2022, 2:41 PM), <https://www.cbsnews.com/news/eu-condemns-qatar-alleged-human-rights-abuses-2022-world-cup> [<https://perma.cc/5439-3S6N>]; Becky Sullivan, *Why Qatar Is a Controversial Host for the World Cup*, NPR (Nov. 18, 2022, 10:21 AM), <https://www.npr.org/2022/11/18/1137204271/qatar-world-cup-controversies> [<https://perma.cc/U3K6-N3UE>].

<sup>2</sup> See generally, e.g., MARTINA E. VANDENBERG, HUM. TRAFFICKING PRO BONO LEGAL CTR. & THE FREEDOM FUND, *ENDING IMPUNITY, SECURING JUSTICE: USING STRATEGIC LITIGATION TO COMBAT MODERN-DAY SLAVERY AND HUMAN TRAFFICKING* (2015).

one erstwhile mechanism for accountability for these rights abuses — private civil claims in U.S. federal courts. Recent restrictions of extraterritorial causes of action and overall difficulties in showing supply-chain connections in court have spelled the demise of the Alien Tort Statute<sup>3</sup> (ATS) and will, this Chapter predicts, soon close the door on civil claims for forced labor under the Trafficking Victims Protection Reauthorization Act of 2003<sup>4</sup> (TVPRA). Without these avenues to bring claims before U.S. courts, victims of international labor abuses are beholden to others to drive policy and compliance with labor standards. Section C turns to U.S. foreign and public policy actions against forced labor abroad. Canvassing the many avenues for increasing use of the federal toolkit against forced labor, this section argues that U.S. foreign policy can play a crucial role on the world stage in enforcing labor standards. However, such action will always be dependent on — and subservient to — greater American political and diplomatic interests. A brief conclusion surveys the impacts of these changes on victims of rights abuses throughout the world.

#### A. *Forced Labor and Moral Duties*

1. *“They Sold Us Like Animals, But We Are Not Animals — We Are Human Beings.”*<sup>5</sup> — There are over twenty-seven million individuals currently estimated to be caught in conditions of forced labor around the world.<sup>6</sup> These individuals work in industries ranging from textiles to high-tech manufacturing to deep-sea fishing.<sup>7</sup> The International Labor Organization defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>8</sup> Forced labor is a “broad category” that falls short of chattel slavery or modern forms of slavery — its “essence is coercion rather than ownership but arguably a less intense coercion than in the case of servitude.”<sup>9</sup>

The United States is also by far the world’s largest importer of products at risk for being produced with forced labor.<sup>10</sup> The Walk Free

<sup>3</sup> 28 U.S.C. § 1350.

<sup>4</sup> Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.).

<sup>5</sup> Kate Hodal et al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, THE GUARDIAN (June 10, 2014, 7:05 AM) <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> [<https://perma.cc/H3QA-EJWY>].

<sup>6</sup> U.S. DEP’T OF LAB., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 3 (2022). This number has grown by several million within the past half decade. *Compare id.*, with WALK FREE FOUND., THE GLOBAL SLAVERY INDEX 2018, at ii (2018).

<sup>7</sup> See WALK FREE FOUND., *supra* note 6, at iv.

<sup>8</sup> Convention Concerning Forced or Compulsory Labour art. 2(1), *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

<sup>9</sup> HOLLY CULLEN, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF CHILD LABOR 23 (2007). Some definitions of forced labor may even involve labor relations near-universally accepted, such as military conscription of adults. *See id.*

<sup>10</sup> *See* WALK FREE FOUND., *supra* note 6, at iv.

Foundation's Global Slavery Index cites laptops, computers, and mobile phones; garments; fish; cocoa; and sugarcane as the top five products at risk of production through modern slavery imported into G20 countries.<sup>11</sup> The United States's combined total of these imports is \$144 billion.<sup>12</sup>

Forced labor is endemic throughout the world, especially in countries where high-value exports are produced and that contain areas of high poverty and social instability. In Côte d'Ivoire, cocoa farming faces an "epidemic of child labor."<sup>13</sup> On rural cocoa plantations, boys as young as eleven spend their days in hard manual labor, without schooling, medical care, or access to their families.<sup>14</sup> Many of these children hail from neighboring Burkina Faso and are brought by coordinated traffickers across the border to Côte d'Ivoire on the promise of work.<sup>15</sup> On small farms in the Ivorian forest, these boys produce and process cocoa that flows into the U.S. market for some of the world's largest chocolate producers.<sup>16</sup>

In Xinjiang, China, the pervasive repression of the Uyghur ethnic minority group has included forced labor practices. Reports by the U.S. government, the U.N. Office of the High Commissioner of Human Rights (OHCHR), and advocacy groups have shown the prevalence of forced labor in an overall system of ethnic repression that includes placing Uyghurs in "Vocational Education Training Centers" (VETCs), where they are sent through a program of Sinicization.<sup>17</sup> The OHCHR report states that Uyghur detainees are forced, as part of their "graduation process," to work within the VETCs without the possibility of refusal.<sup>18</sup> The U.S. Department of Labor (DOL) estimates that the number of such workers reaches one hundred thousand.<sup>19</sup> Government forces have additionally sent Uyghurs to work in factories in other provinces of China in "labor transfer programs."<sup>20</sup> And, prior to the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), <https://wapo.st/cocoa-child-laborers> [<https://perma.cc/C9PC-6UBP>].

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See* Off. of the U.N. High Comm'r for Hum. Rts., *OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, ¶¶ 120–121 (Aug. 31, 2022); HUM. RTS. WATCH, "BREAK THEIR LINEAGE, BREAK THEIR ROOTS": CHINA'S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS 10, 13, 34–35 (2021); *Against Their Will: The Situation in Xinjiang*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang> [<https://perma.cc/WU8T-DSBY>].

<sup>18</sup> Off. of the U.N. High Comm'r for Hum. Rts., *supra* note 17, ¶ 121.

<sup>19</sup> *Against Their Will: The Situation in Xinjiang*, *supra* note 17. DOL links the following goods produced in China to forced labor: gloves, hair products, polysilicon, textiles, thread, yarn, tomato products, and fish. *Id.*

<sup>20</sup> HUM. RTS. WATCH, *supra* note 17, at 35; *see also* Off. of the U.N. High Comm'r for Hum. Rts., *supra* note 17, ¶ 121.

enactment of the Uyghur Forced Labor Prevention Act<sup>21</sup> (UFLPA), which halted imports from Xinjiang to the U.S. market, sixteen percent of cotton clothes sold in the United States contained cotton sourced from Xinjiang.<sup>22</sup>

In Thailand, the fishing industry is a hotbed of forced labor.<sup>23</sup> A 2018 Human Rights Watch report examined stories of migrant workers in the Thai fishing industry who were kept on fishing ships without pay and under conditions of extreme physical abuse for years on end.<sup>24</sup> And *The Guardian* reported in 2014 the stories of men “bought and sold like animals and held against their will” on Thai fishing boats — sharing horrific stories of abuse and murders in slavery-like conditions.<sup>25</sup> The forced laborers on these boats were largely migrants from Myanmar (Burma), Cambodia, and Laos, who traveled to Thailand seeking higher-paying work, often on the advice of a local agency or trusted community member.<sup>26</sup> Too often, however, migrants land in the control of exploitative “brokers,” who trap them in debt bondage or sell them directly to ship captains or owners, who force them into inhumane work conditions on deep-sea fishing vessels.<sup>27</sup> Men interviewed by the *New York Times* and other media outlets described horrific environments on board, including insufficient food, unhygienic conditions, and beatings and sadistic punishment of those who disobeyed the captains.<sup>28</sup> The labor from these ships leads directly to the global supply chain: forced laborers catch fish that is sold as fishmeal to shrimp farmers or to canneries that process it for pet food.<sup>29</sup> Major U.S. retailers like Costco and Walmart then buy those products for import into the United States.<sup>30</sup>

<sup>21</sup> Act of Dec. 23, 2021, Pub. L. No. 117-78, 135 Stat. 1525 (codified in scattered sections of 19 and 22 U.S.C.).

<sup>22</sup> Alexandra Stevenson & Sapna Maheshwari, “Escalation of Secrecy”: Global Brands Seek Clarity on Xinjiang, N.Y. TIMES (May 29, 2022), <https://www.nytimes.com/2022/05/27/business/cotton-xinjiang-forced-labor-retailers.html> [<https://perma.cc/4LT3-PLA6>].

<sup>23</sup> See WALK FREE FOUND., *supra* note 6, at 103. Several news agencies and human rights organizations have undertaken investigations of the Thai fishing industry. See, e.g., HUM. RTS. WATCH, HIDDEN CHAINS: RIGHTS ABUSES AND FORCED LABOR IN THAILAND’S FISHING INDUSTRY 1 (2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry> [<https://perma.cc/D8ZD-V29N>]; Kate Hodal & Chris Kelly, *Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns*, THE GUARDIAN (Oct. 19, 2022, 12:25 PM), <https://www.theguardian.com/global-development/2014/jun/10/sp-migrant-workers-new-life-enslaved-thai-fishing> [<https://perma.cc/4658-MZZK>]; Ian Urbina, “Sea Slaves”: The Human Misery that Feeds Pets and Livestock, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> [<https://perma.cc/5ZZC-FFNN>]. These and other reports “sparked an international outcry.” VANDENBERG, *supra* note 2, at 2.

<sup>24</sup> See HUM. RTS. WATCH, *supra* note 23, at 1, 15–16.

<sup>25</sup> Hodal et al., *supra* note 5.

<sup>26</sup> See HUM. RTS. WATCH, *supra* note 23, at 17–18, 30–31.

<sup>27</sup> *Id.* at 78–79.

<sup>28</sup> See *supra* note 23.

<sup>29</sup> See Hodal et al., *supra* note 5; Urbina, *supra* note 23 (“The United States is the biggest customer of Thai fish, and pet food is among the fastest growing exports from Thailand . . .”).

<sup>30</sup> See Hodal et al., *supra* note 5.

The three sectors mentioned above provide just a small window into the scale and breadth of forced labor worldwide. Migrants also work under horrible conditions in mining, domestic work, construction, agriculture, and other areas across all of the countries of the world.<sup>31</sup>

2. *Those in Glass Houses Shouldn't Buy Fish.* — The victims of forced labor described in the above section reside far outside the territorial confines of the United States. But, with the United States's large number of imports, victims' fates are fundamentally tied to the demands and whims of American consumers: our insatiable appetite for Mars Halloween candy, Patagonia vests, and frozen shrimp stir-fries helps construct the webs of demand, power, and money that bind millions across the globe in conditions of abject servitude and misery.<sup>32</sup> This Chapter offers, as a premise, that the Western countries that drive the demand for such goods — chief among them the United States — should hold some moral (if not strictly legal) responsibility for the human rights abuses fostered in their production. This concept is not new: the sense of moral obligation to the workers who toil to produce one's commercial goods has been observed on the domestic and international stages and has, to some degree, permeated public consciousness.<sup>33</sup> This Chapter argues that such a moral duty should implicate U.S. policy and foreign relations, even if not directly implemented into U.S. legislation or legal doctrine.<sup>34</sup> Even if tacit, this fundamental conception (from a rights-based framework) of moral duty to the millions of individuals whose slavery and subjugation is a direct result of U.S. market forces can be a powerful tool for shaping policy. Civil society, victims' groups, and progressive lobbyists can and should use morality-based arguments to push for increasing U.S. action on forced labor.

Moreover, these duties are also, to some extent, recognized within the international legal system. On a state-to-state level, and in the vernacular of international law, some human rights scholars argue that the United States owes a moral or principle-based human rights obligation (even absent binding provisions in treaty or custom) to those across the world who contribute to the U.S. economy.<sup>35</sup> These obligations, referred

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<sup>31</sup> See WALK FREE FOUND., *supra* note 6, at 104.

<sup>32</sup> See Whoriskey & Siegel, *supra* note 13; Stevenson & Maheshwari, *supra* note 22; Hodal & Kelly, *supra* note 23.

<sup>33</sup> See, for example, the work of Corporate Accountability Lab, a Chicago-based advocacy group fighting for the recognition of the United States's role as a demand-generator for forced labor. *Combating Forced Labor*, CORP. ACCOUNTABILITY LAB, <https://corpaccountabilitylab.org/combating-forced-labor> [https://perma.cc/3L2M-CC7M].

<sup>34</sup> Indeed, this Chapter assumes that a suggestion that any U.S. actor or consumer should have a *legally cognizable* duty to the laborer who creates products far across the world would not find wide acceptance within the United States.

<sup>35</sup> Wouter Vandenhoe & Mark Gibney, *Introduction: Transnational Human Rights Obligations*, in *LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS* 1, 3–4 (Mark Gibney & Wouter Vandenhoe eds., 2014).

to as “transnational human rights obligations,” attach to all parties *other* than the domestic state government.<sup>36</sup>

This is partially because, as Professors Mark Gibney and Wouter Vandenhoeve have noted, “the ability of [s]tates and other actors to impact human rights far from home — both positively and negatively — has never been clearer.”<sup>37</sup> Under such a theory, legal principles to address the roles and responsibilities of states, corporations, and other international actors are needed to create a globalized system of response to forced labor.<sup>38</sup> Even if victims of forced labor are not within the territorial jurisdiction of a given state, an international consensus suggests that it is the responsibility of each state to combat the practice.<sup>39</sup>

Where there are rights, there should be remedies. It has been stated above that the human rights of millions around the world are being violated, in horrific and dehumanizing ways, in part due to pressure from the U.S. markets and consumer base. The vast majority of direct perpetrators of these human rights abuses (ship captains, foremen, brokers, smugglers, plantation owners, factory bosses, manufacturing executives, and others) are far outside the jurisdiction of U.S. courts. But items produced through forced labor make their way into U.S. supply chains through U.S. persons, companies, and subsidiaries. These entities — including giants like Nestlé and Apple<sup>40</sup> — aid and abet the human rights abuses in their supply chains when they buy and import materials produced using forced labor.

The following sections outline the powers of government and advocates to address forced labor through the U.S. legal and administrative system, ultimately arguing that the United States should leverage this system to address the moral responsibilities that the United States rightly owes to these individuals. Section B surveys the erstwhile promise of a private right of action for extraterritorial human rights abuses, and section C summarizes actions taken on a federal policy level.

### *B. The Private Right of Action: Hope, Challenges, Demise*

*1. The Promise and Peril of a Private Right.* — Those seeking to find recourse for their injuries in the courts of the United States face some hope of action but ultimately, this Chapter argues, ever-decreasing potential for justice. In the United States, two statutes primarily apply to the victims of forced labor abroad: the ATS, which provides a civil cause of action for those injured by tort by a non-U.S. person, and the

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<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *See id.* at 1, 5 (detailing different principles).

<sup>39</sup> *See id.* at 4–5.

<sup>40</sup> *See* Whoriskey & Siegel, *supra* note 13; Jacob Zinkula, *23 Major Brands Suspected of Illegally Sourcing Products Made by Forced Labor in China*, BUS. INSIDER (Dec. 17, 2022, 7:15 AM), <https://www.businessinsider.com/companies-brands-china-supply-chains-illegal-forced-labor-2022-12> [<https://perma.cc/Z559-WWZS>].



TVPPRA, which provides a cause of action for trafficking and forced labor. However, two developments in the doctrine of U.S. law make application of U.S. human rights statutes to the situations of victims of forced labor abroad challenging.

First, U.S. law applies a wide presumption against extraterritoriality.<sup>41</sup> Statutes apply outside the territory of the United States only if Congress has given a “clear, affirmative indication” that it intends the statute to do so.<sup>42</sup> The prevailing test for whether a statute applies extraterritorially was set out in *RJR Nabisco, Inc. v. European Community*.<sup>43</sup> This two-step test first asks whether the statute has given “affirmative indication that it applies extraterritorially.”<sup>44</sup> If the first step is not met, the statute may still apply to extraterritorial conduct if the conduct that is the “focus” of the statute occurred within the United States.<sup>45</sup>

Secondly, the factual circumstances inherent in many situations of supply chain forced labor may make it difficult for a plaintiff to obtain a grant of jurisdiction or establish nexus to a U.S. corporate defendant. Plaintiffs, who were potentially the victims of trafficking and forced labor in a shadowy and nebulous supply chain stretching from the countries of their mistreatment to U.S. supermarket shelves, may struggle to substantiate a chain of knowledge or joint venture between their immediate abusers in the production of materials and the ultimate U.S. corporation bringing goods to market.<sup>46</sup> U.S. corporate entities can, therefore, continue to offer consumers products that were produced in industries rife with forced labor without risking civil liability in U.S. courts, absent a smoking gun of knowledge or support for forced labor practices.<sup>47</sup>

The following sections chart the rise and (potential) demise of the two human rights statutes apposite to forced labor victims and forecast additional challenges arising in cases winding their ways through federal courts.

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<sup>41</sup> *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (stating that a presumption exists that U.S. law “governs domestically but does not rule the world”); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (“Absent clearly expressed congressional intent to the contrary, federal laws [are] construed to have only domestic application.” (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010))).

<sup>42</sup> *RJR Nabisco*, 579 U.S. at 339.

<sup>43</sup> 579 U.S. 325.

<sup>44</sup> *Id.* at 337. This indication may be implied by statutory context. *Id.* at 340 (“[A]n express statement of extraterritoriality is not essential.”); see also *Morrison*, 561 U.S. at 265 (stating that the given statute need not expressly contain a provision reading “this law applies abroad”).

<sup>45</sup> *RJR Nabisco*, 579 U.S. at 337.

<sup>46</sup> Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 3–4 (2021).

<sup>47</sup> See *id.* at 3 (“[T]he opacity of the global supply chain structure has created a shield of liability for [multinational corporations] that profit from forced labor.”).

2. *The ATS*. — The ATS provides federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>48</sup> The ATS was enacted by the First Congress in 1789, but the modern era of ATS litigation began with the 1980 precedent-setting Second Circuit decision *Filartiga v. Pena-Irala*.<sup>49</sup> In *Filartiga*, a case involving two Paraguayan nationals suing a former Paraguayan official for the torture and killing of one of their family members, the court construed the ATS as allowing the claims of non-U.S. nationals against other nonnationals for offenses in violation of customary international law.<sup>50</sup> Following *Filartiga*, dozens of ATS suits were filed in courts across the country challenging rights abuses around the world.<sup>51</sup> The Supreme Court’s first interpretation of the ATS, in *Sosa v. Alvarez-Machain*,<sup>52</sup> confirmed the *Filartiga* approach.<sup>53</sup> Following *Sosa*, despite an ever-increasing stream of cases using the ATS as the basis for jurisdiction over extraterritorial harms, the Court narrowed its interpretation of extraterritoriality writ large.<sup>54</sup> And the Court dealt the ATS the first of several blows in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>55</sup> which read the presumption against extraterritoriality into the statute and denied jurisdiction over the case because the claims did not sufficiently “touch and concern” the United States.<sup>56</sup>

The Supreme Court’s 2021 decision in *Nestlé USA, Inc. v. Doe*<sup>57</sup> further limited the scope of the ATS, particularly in cases concerning forced labor in U.S. supply chains. The *Nestlé* plaintiffs were six citizens of Mali who alleged that, as children, they had been transported to Côte d’Ivoire to work in horrific conditions on cocoa bean plantations.<sup>58</sup> The plaintiffs brought suit against Nestlé and Cargill under the ATS, alleging that the companies, which ultimately purchased cocoa beans made with plaintiffs’ forced labor, had aided and abetted human rights abuses.<sup>59</sup> Nearly all of the conduct in question (forced labor and child slavery) undisputedly occurred in Côte d’Ivoire, and the Court ruled

<sup>48</sup> 28 U.S.C. § 1350.

<sup>49</sup> 630 F.2d 876 (2d Cir. 1980). See Tyler R. Giannini, *Living with History: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor?*, 132 YALE L.J.F. 814, 815, 817 (2022).

<sup>50</sup> *Filartiga*, 630 F.2d at 878; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 588–89 (2002).

<sup>51</sup> See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 7 & n.61 (2022).

<sup>52</sup> 542 U.S. 692 (2004).

<sup>53</sup> See Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT’L L. 1329, 1335–36 (2013).

<sup>54</sup> In 2010, the Court decided *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which applied the presumption against extraterritoriality more extensively. See *id.* at 255.

<sup>55</sup> 569 U.S. 108 (2013).

<sup>56</sup> *Id.* at 124–25.

<sup>57</sup> 141 S. Ct. 1931 (2021).

<sup>58</sup> *Id.* at 1935; Appellants’ Opening Brief at 5–6, *Doe 1 v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (No. 10-56739).

<sup>59</sup> *Nestlé*, 141 S. Ct. at 1935.

that the “mere corporate presence” of U.S. defendants in Côte d’Ivoire did not warrant extraterritorial application of the ATS.<sup>60</sup> *Nestlé* was met with dismay by human rights activists, who worried that the Court’s restrictive ruling could shut the door on future human rights litigation in U.S. courts.<sup>61</sup> The ATS had long been “one of the most important tools for pursuing justice for human rights victims in the United States,”<sup>62</sup> but the Court’s *Nestlé* decision severely limited its scope, especially for future cases involving forced labor in extraterritorial supply chains.<sup>63</sup> After *Nestlé*, it is difficult to see how the complicated chains of causation and nexuses that often characterize supply chain forced labor could ever meet the jurisdictional bars the Court has read into the ATS.

3. *The TVPRA*. — The TVPRA<sup>64</sup> has been held up as a possible substitute for the ATS post-*Nestlé* on forced labor claims.<sup>65</sup> The TVPRA has seen limited success thus far in federal litigation attempting to bring claims on behalf of extraterritorial forced labor victims. In a small series of cases, victims of industrial rights violations have been unable to tie their abuses to the conduct or knowledge of U.S. corporations or entities. And, with the current Court’s conservative influence on the doctrine of extraterritoriality, current cases winding their way through the courts may result in the repudiation of the TVPRA’s extraterritorial effect.

<sup>60</sup> *Id.* at 1937 (quoting *Kiobel*, 569 U.S. at 133).

<sup>61</sup> *E.g.*, Giannini, *supra* note 49, at 836 (“[T]here are good reasons to be pessimistic about future human rights cases that might come before the current Court.”); Charles Szymanski, Essay, *The Window Closes: Nestle, Inc. v. Doe and the Lost Promise of the U.S. Alien Tort Statute as a Means of Enforcing International Labor Law*, DIRITTI LAVORI MERCATI INT’L, no. 1, 2022, at 29, 32 (stating that *Nestlé* “all but foreclosed the use of the ATS” to combat labor abuses); David J. Scheffer, *The Supreme Court Denied a Child Labor Claim Against U.S. Firms: What to Know*, COUNCIL ON FOREIGN RELS. (June 25, 2021, 9:42 AM), <https://www.cfr.org/article/supreme-court-denied-child-labor-claim-against-us-firms-what-know> [<https://perma.cc/DP2J-GXCV>].

<sup>62</sup> Oona A. Hathaway, *Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe: The Twists and Turns of the Alien Tort Statute*, 2020–2021 AM. CONST. SOC’Y SUP. CT. REV. 163, 163 (2021).

<sup>63</sup> See Elizabeth Pollman, *The Supreme Court, 2020 Term — Comment: The Supreme Court and the Pro-business Paradox*, 135 HARV. L. REV. 220, 224 (2021).

<sup>64</sup> The TVPRA is a reauthorization of the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, which did not include a private right of action. *See id.* The TVPRA has been itself reauthorized several times, most recently in January 2023. *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (“2005 TVPRA”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (“2008 TVPRA”); Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, 136 Stat. 6199.

<sup>65</sup> This contention was even raised at the *Nestlé* oral arguments, when plaintiffs’ counsel Paul Hoffman stated: “[I]t is certainly true that the TVPRA is broader than the ATS claims that we are making in this case and that it . . . seems very likely that any case from 2008 on would use . . . the Trafficking Victim[s] Protection Act rather than the ATS in making these kinds of claims.” Transcript of Oral Argument at 55, *Nestlé* (No. 19-416) [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-416\\_6k47.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-416_6k47.pdf) [<https://perma.cc/25C6-NS4K>].

The TVPRA creates a civil cause of action for the victims of certain trafficking offenses.<sup>66</sup> Section 1595(a) provides that “[a]n individual who is a victim of a violation of” the predicate acts of peonage, slavery, and trafficking in persons “may bring a civil action against the perpetrator” in U.S. federal district court.<sup>67</sup> When the civil cause of action was first created, it did not explicitly authorize an extraterritorial scope to the law.<sup>68</sup> In subsequent reauthorizations, Congress amended the TVPRA to create extraterritorial grounds for trafficking occurring abroad.<sup>69</sup> The 2008 reauthorization created extraterritorial jurisdiction over “any offense (or any attempt or conspiracy to commit an offense)” named in several enumerated sections<sup>70</sup> of the TVPRA if the alleged offender is a U.S. national or lawful permanent resident,<sup>71</sup> or is present in the United States.<sup>72</sup>

Two sets of problems plague bringing accountability for victims of extraterritorial forced labor under the TVPRA. First, several fundamental issues posed by global supply chains may make it difficult for plaintiffs to prove the actus reus and mens rea of § 1595(a) when tracing liability from the human rights abuses abroad to a U.S. corporation. In *Ratha v. Phatthana Seafood Co.*,<sup>73</sup> the Ninth Circuit dismissed a case alleging that plaintiffs were victims of forced labor in the Thai fishing industry.<sup>74</sup> The court found that plaintiffs did not overcome the summary judgment burden because they failed to show that U.S. corporate defendants benefitted from a “venture” with the Thai fishing companies or that they knew or should have known of the conditions of forced

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<sup>66</sup> 18 U.S.C. § 1595; see also Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 109–10 (2006). The TVPRA exists to “fill [a] gap[]” in the antitrafficking and anti–forced labor enforcement landscape — allowing victims to reap restitution and compensation from forced labor offenders in cases where other criminal actions are unfeasible. See ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018).

<sup>67</sup> 18 U.S.C. § 1595(a). Section 1589 defines forced labor as “knowingly provid[ing] or obtain[ing] the labor or services of a person,” *id.* § 1589(a), by certain coercive measures or “knowingly benefit[ing] . . . from participation in a venture which has engaged in the providing or obtaining of labor or services by [coercive means], knowing or in reckless disregard of the fact,” *id.* § 1589(b).

<sup>68</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878.

<sup>69</sup> In 2006, Congress reauthorized the TVPRA to extend liability over the conduct of federal employees acting outside of the United States, see Trafficking Victims Protection Reauthorization Act of 2005 § 103(a)(1), 18 U.S.C. §§ 3271–3272, and in 2008, Congress extended the statute even further, see Trafficking Victims Protection Reauthorization Act of 2008 § 223(a), 18 U.S.C. § 1596.

<sup>70</sup> 18 U.S.C. § 1596(a).

<sup>71</sup> *Id.* § 1596(a)(1).

<sup>72</sup> *Id.* § 1596(a)(2).

<sup>73</sup> 35 F.4th 1159 (9th Cir. 2022).

<sup>74</sup> *Id.* at 1164–65.

labor perpetrated therein.<sup>75</sup> This evidentiary difficulty has been replicated in other cases currently being litigated. In *Coubaly v. Cargill, Inc.*,<sup>76</sup> another case concerning child slavery in the cocoa industry in Côte d'Ivoire, the defendants prevailed on their motion to dismiss in the D.C. District Court in June 2022, after the court failed to find subject matter jurisdiction and requisite causation under the TVPRA.<sup>77</sup>

Second, challenges have recently been raised on the extraterritorial application of the TVPRA's civil cause of action under § 1595(a). While previous cases and circuits assumed *ab initio* or for the sake of argument that the TVPRA applied extraterritorially,<sup>78</sup> high-profile cases before circuit courts have begun to challenge those notions. One recent, notable case was *Doe I v. Apple Inc.*,<sup>79</sup> which alleged that major U.S. corporations including Apple, Alphabet, and Microsoft are liable for forced labor violations under the TVPRA due to the treatment of workers in the Democratic Republic of the Congo (DRC) who produced cobalt, which ultimately made its way into lithium batteries.<sup>80</sup> In this case, the D.C. District Court held both that the harms perpetrated in the DRC were not traceable to the U.S. defendants<sup>81</sup> and also that the TVPRA did not have extraterritorial effect.<sup>82</sup> The argument over the TVPRA's extraterritoriality centers on the meaning of § 1596 — which explicitly grants extraterritorial application to sections of the TVPRA except for § 1595 (which provides the civil cause of action).<sup>83</sup> The possibility of a grant of certiorari in *Doe I v. Apple*, combined with the Court's entrenched conservative majority, may lead to further constraints on the power of existing human rights statutes like the TVPRA.

Ultimately, successive interpretations of human rights statutes by the Supreme Court have narrowed the range of cases that can feasibly be brought in U.S. courts against foreign traffickers or human rights abusers. While the path through U.S. courts is not completely foreclosed — especially for those whose rights abuses or trafficking occurred within

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<sup>75</sup> *Id.* at 1175. Two additional cases dealt with allegations that Nepalese workers were trafficked from Nepal to Iraq and subjected to conditions of forced labor working for a U.S. government subcontractor on a U.S. military base. Those two cases were both dismissed, with Judge Ellison finding that the amendment of § 1595 to provide for extraterritorial application did not apply retroactively to conduct that occurred before its enactment. *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1021 (S.D. Tex. 2015); *Adhikari v. KBR*, No. 16-CV-2478, 2017 WL 4237923, at \*5 (S.D. Tex. Sept. 25, 2017).

<sup>76</sup> No. 21-cv-386, 2022 WL 2315509 (D.D.C. June 28, 2022).

<sup>77</sup> *Id.* at \*8.

<sup>78</sup> See, e.g., *Ratha*, 35 F.4th at 1168 (“We therefore decline to decide whether § 1595 applies to foreign conduct because whether it does or not, we are left with the same result . . . . We will assume in this case that § 1595 applies extraterritorially and leave for another day the question of whether that assumption is correct.”).

<sup>79</sup> No. 19-cv-03737, 2021 WL 5774224 (D.D.C. Nov. 2, 2021).

<sup>80</sup> *Id.* at \*1–2.

<sup>81</sup> *Id.* at \*7.

<sup>82</sup> *Id.* at \*16.

<sup>83</sup> See 18 U.S.C. § 1596(a).

or into the United States — the ability for victims of labor abuses in supply chains to bring claims in the United States has all but disappeared in the post-*Kiobel* rollback.

### C. *The Public Policy Levers*

With the further narrowing of the ATS and limited success under the TVPRA, this section discusses public action taken on the part of governmental actors against forced labor. For decades, leaders in U.S. politics have called attention to the problems of poor labor standards and human rights abuses abroad, and enforcement options have increased recently. The policy options open to the U.S. government on a federal level are substantively different from the type of relief provided to individual plaintiffs in U.S. courts. The U.S. federal government acts not through individual indictments of corporate conduct but instead through an amorphous web of domestic statutes, agency discretion, and the foreign affairs powers of the executive. This section aims to demystify the levers available to the U.S. government.

The options presented below show the strength of the federal government in working to prevent extraterritorial forms of forced labor — but serious questions remain as to whether such avenues of enforcement are ultimately better suited than the courts to regulate the problem of worldwide rights abuses. While U.S. policies can alter the market forces driving forced labor around the globe, they are also beholden to the political and diplomatic agenda of the U.S. government. With power centralized in the discretion of the executive branch and removed completely from individual petitions through the courts, individualized arguments may be superseded by the political realities of the United States's role on the global stage.

*i. Federal Powers Toolkit.* — Congress has enacted a wide variety of statutes that allow the United States to exercise its influence abroad on the issue of forced labor. These levers are instances of “economic statecraft”: policies that seek to drive change in the behavior of another country by influencing, directly or indirectly, that country’s economic well-being.<sup>84</sup> Whereas the courts have frowned upon the extension of private claims against corporations and bad actors, the same limitation does not constrain the congressional and executive branches. Statutory provisions, enacted as far back as the 1930s, delegate power to the executive branch and its agencies to act extraterritorially against forced labor abuses. The power of U.S. agencies such as the DOL, the Department of Homeland Security (DHS), the Department of Commerce, and the Department of the Treasury is stunning in its breadth and influence on global markets, and — purposefully or not — federal enforcement has risen as avenues for private claims have

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<sup>84</sup> See generally DAVID A. BALDWIN, *ECONOMIC STATECRAFT* (1985).

dried up. The power of the Executive stretches outside the territorial boundaries of the United States in a way that the court system is hesitant to allow private citizens to challenge. Through trade policy, import restrictions, sanctions regimes, and export restrictions, the U.S. government (acting through the Executive and its agencies) can exert incredible amounts of damage and pressure on foreign governments or companies. By denying access to U.S. markets (or, conversely, by dangling the prospect of preferential access to those markets), shutting off assets and access to financial systems, and forbidding access to certain crucial U.S.-produced goods, the Executive wields vast power over extraterritorial entities. This power, vested in the Executive by Congress, makes up the legislation-based toolkit of the United States in the fight against extraterritorial forced labor.

(a) *U.S. Trade Policy*. — The United States is the world’s largest importer of goods, with over \$2.5 trillion worth of goods brought into the country in 2019.<sup>85</sup> This power on the world stage means that the United States’s trade policy can disproportionately impact the behavior of exporters and companies across the world. Under U.S. trade law, the Office of the U.S. Trade Representative (USTR) and executive branch are empowered to make certain trade decisions based on human rights standards and the presence of forced labor.

The first mechanism for conditioning trade on standards of labor is the U.S. Generalized System of Preferences<sup>86</sup> (GSP). The GSP was introduced in the Trade Act of 1974,<sup>87</sup> and it created a system through which the United States can extend preferential trade treatment to certain developing countries, in exchange for specified conditions.<sup>88</sup> According to the USTR’s website, the GSP intends to “provide opportunities for many of the world’s poorest countries to use trade to grow their economies and climb out of poverty.”<sup>89</sup> One of the provisions to determine whether a country can qualify for the GSP benefits is “a prohibition on the use of any form of forced or compulsory labor.”<sup>90</sup> The President determines which countries are eligible for GSP dependent on the recommendation of the USTR, which itself is dependent on a government committee review, including public hearings and a public comment period.<sup>91</sup>

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<sup>85</sup> *Countries & Regions*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/countries-regions> [https://perma.cc/7PA2-8JPT].

<sup>86</sup> 19 U.S.C. § 2462; *Generalized System of Preferences (GSP)*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> [https://perma.cc/6W6J-XFYZ]; MICHAEL TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 717 (4th ed. 2013).

<sup>87</sup> Pub. L. No. 93-618, § 502, 88 Stat. 1978, 2066 (codified at 19 U.S.C. § 2462).

<sup>88</sup> See *Generalized System of Preferences (GSP)*, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, U.S. GENERALIZED SYSTEM OF PREFERENCES: GUIDEBOOK 17 (2020).

<sup>91</sup> *Id.* at 9.

Other region-specific statutory bases allow the United States to give trade preferences to certain countries contingent on labor standards. The Caribbean Basin Economic Recovery Act of 1983<sup>92</sup> conditioned trade with seventeen Caribbean nations partially on their compliance with international labor standards.<sup>93</sup> The Omnibus Trade and Competitiveness Act of 1988<sup>94</sup> likewise allowed the Trade Representative to investigate reports of international labor standards violations and, if substantiated, authorize countermeasures including trade restrictions.<sup>95</sup> And the African Growth and Opportunity Act of 2000<sup>96</sup> (AGOA) allowed duty-free access to U.S. markets on certain products for sub-Saharan African countries that meet certain standards, such as the “protection of internationally recognized worker rights, including . . . a prohibition on the use of any form of forced or compulsory labor.”<sup>97</sup>

Effectiveness of the GSP and regional trade preferences regimes is mixed. GSP countries are subject to annual review, and the USTR conducts additional eligibility review upon requests from civil society or government groups when concern exists that countries are not meeting GSP eligibility criteria.<sup>98</sup> Labor groups in the United States such as the AFL-CIO have filed petitions and public comments to the USTR regarding designations of countries with poor labor standards, in many cases urging the U.S. government to suspend GSP or AGOA benefits.<sup>99</sup> In some cases, as with Eswatini in 2015 and Mauritania and Thailand in 2019, the United States has partially or fully suspended benefits under the AGOA or GSP.<sup>100</sup> But in others, the AFL-CIO has filed comments and attended hearings alleging gross violations of international labor

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<sup>92</sup> 19 U.S.C. §§ 2701–2707.

<sup>93</sup> *Caribbean Basin Initiative (CBI)*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/issue-areas/trade-development/preference-programs/caribbean-basin-initiative-cbi> [<https://perma.cc/5BCH-LFDY>].

<sup>94</sup> 19 U.S.C. §§ 2901–2906.

<sup>95</sup> TREBILCOCK ET AL., *supra* note 86, at 717.

<sup>96</sup> Pub. L. No. 106-200, 114 Stat. 251 (codified as amended in scattered sections of the U.S. Code).

<sup>97</sup> 19 U.S.C. § 3703(1)(F).

<sup>98</sup> One example of this is the GSP de-designation in 2019 of India and Turkey, for reasons unrelated to worker rights. See *United States Will Terminate GSP Designation of India and Turkey*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT (Mar. 4, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp> [<https://perma.cc/E46E-K3S5>].

<sup>99</sup> See *Raising Labor Standards Through Trade Preference Programs*, AFL-CIO, <https://aflcio.org/raising-labor-standards-through-trade-preference-programs> [<https://perma.cc/59FH-SWSN>].

<sup>100</sup> See *id.*



norms in countries that retain preferential U.S. trade benefits theoretically contingent on abiding by such labor standards.<sup>101</sup>

Crucially, however, the GSP is currently not active.<sup>102</sup> The bill authorizing the GSP program lapsed in the end of calendar year 2020,<sup>103</sup> and though talk of reauthorization has been constant in Congress, the GSP has not yet been reactivated.<sup>104</sup> The GSP had previously lapsed on multiple occasions when authorizations fell behind the expiry date, and past reauthorizations extended the coverage of the program retroactively to the date of its lapse.<sup>105</sup> In 2022, both the House and Senate passed bills that included the renewal of the GSP, but the trade provisions from the two bills were never reconciled into a piece of passed legislation.<sup>106</sup> As recently as September 2022, however, lawmakers introduced legislation that would reauthorize the GSP retroactively to its date of expiration in December 2020.<sup>107</sup> Accordingly, as of writing, the GSP is not an active tool being used to fight against labor abuses abroad.

(b) *The Tariff Act.* — U.S. trade statutes forbid the import of goods produced with forced labor through the Tariff Act of 1930.<sup>108</sup> Section 307 of the Act prohibits the import of goods into the United States that have been manufactured, in whole or in part, by forced labor.<sup>109</sup> DHS's Customs and Border Protection (CBP) is empowered to commence investigations into goods that are suspected to have been produced with forced labor.<sup>110</sup> In cases where such forced labor has been determined, federal authorities are permitted to seize goods, and importing entities can face criminal investigation.<sup>111</sup> The effectiveness of section 307 grew in 2015, when Congress removed a loophole that allowed importers to

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<sup>101</sup> *Id.* The AFL-CIO has filed such briefs in the cases of Georgia and Kazakhstan, which both retain GSP benefits. *Id.* Eswatini, which lost its AGOA eligibility in 2015, had its benefits reinstated on the condition that it improve its labor practices. *Id.* However, the AFL-CIO filed an additional petition in 2019, attesting that those standards had not been met. *Id.*; see AFL-CIO, PUBLIC COMMENT TO THE AFRICAN GROWTH AND OPPORTUNITY ACT IMPLEMENTATION SUBCOMMITTEE (2019), <https://aflcio.org/sites/default/files/2019-10/FINAL%202019%20AFL-CIO%20Swaziland%20AGOA.pdf> [<https://perma.cc/KZN8-DJWV>].

<sup>102</sup> LIANA WONG, CONG. RSCH. SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES (GSP): OVERVIEW AND ISSUES FOR CONGRESS 1 (2022).

<sup>103</sup> *Id.*

<sup>104</sup> See John B. Brew & Dmitry Bergoltsev, *Lawmakers in Washington Propose Bill for Allowing Retroactive GSP Benefits*, LEXOLOGY (Sept. 21, 2022), <https://www.lexology.com/library/detail.aspx?g=62209117-ofaf-46db-b1cd-1977d661c1c4> [<https://perma.cc/C5KX-7HH5>].

<sup>105</sup> WONG, *supra* note 102, at 33–34.

<sup>106</sup> Brew & Bergoltsev, *supra* note 104.

<sup>107</sup> *Id.*

<sup>108</sup> 19 U.S.C. §§ 1202–1683.

<sup>109</sup> *Id.* § 1307; see also WALK FREE FOUND., *supra* note 6, at 108 (noting that the United States has implemented policies to “prevent the sourcing of goods or services linked to modern slavery” through the Tariff Act, which “allows the seizure of goods believed to be produced with forced labor”).

<sup>110</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-259, FORCED LABOR: CBP SHOULD IMPROVE COMMUNICATION TO STRENGTHEN TRADE ENFORCEMENT (2021) (describing the CBP's approach to enforcing section 307).

<sup>111</sup> WALK FREE FOUND., *supra* note 6, at 108–09.

skirt the Tariff Act's requirements if their products fulfilled a "consumptive demand" in the United States.<sup>112</sup>

The first step that CBP may take to enforce section 307 of the Tariff Act is the issuance of a Withhold Release Order (WRO). WROs are indications that "information *reasonably but not conclusively* indicates that merchandise [produced with forced labor] is being, or likely to be, imported into the United States."<sup>113</sup> An active WRO allows CBP officials to temporarily detain shipments of merchandise at U.S. ports of entry and request that an importer provide "sufficient evidence that the merchandise was not produced with forced labor."<sup>114</sup> Currently, there are fifty-six active WROs in place.<sup>115</sup>

If the CBP finds that conclusive evidence of forced labor *does* exist, it can issue a Finding of Forced Labor. A Finding goes beyond a WRO in that it does not simply authorize goods to be withheld at U.S. ports of entry pending evidence that the goods were produced with forced labor.<sup>116</sup> Rather, it assumes that the goods from a particular company or region *were* produced by forced labor and authorizes U.S. port authorities to seize the goods.<sup>117</sup> In late 2020, CBP issued its first Finding of Forced Labor in a supply chain in twenty-four years.<sup>118</sup> The Finding implicated stevia products produced by a Chinese company (Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd.).<sup>119</sup>

However, section 307 of the Tariff Act has been applied inconsistently: provisions within the Act that create exceptions for goods where domestic production is insufficient to meet domestic demand have stymied efforts to crack down on forced labor in some industries.<sup>120</sup> WROs, while effective, can be evaded by importers, and discretion to initiate investigations into potential abusers rests with politically

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<sup>112</sup> CHRISTOPHER A. CASEY & CATHERINE D. CIMINO-ISAACS, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 2 (2022).

<sup>113</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 110, at 9 (emphasis added).

<sup>114</sup> *Id.* at 9–10.

<sup>115</sup> *Withhold Release Orders and Findings List*, U.S. CUSTOMS & BORDER PROT. (Feb. 8, 2023), <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> [<https://perma.cc/A88W-BYF6>].

<sup>116</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 110, at 11.

<sup>117</sup> *Id.*

<sup>118</sup> Notice of Finding that Certain Stevia Extracts and Derivatives Produced in the People's Republic of China with the Use of Convict, Forced or Indentured Labor Are Being, or Are Likely to Be, Imported into the United States, 85 Fed. Reg. 66,574 (Oct. 20, 2020) [hereinafter 2020 CBP Finding]; Press Release, U.S. Customs & Border Prot., CBP Issues First Forced Labor Finding Since 1996 (Oct. 20, 2020, 12:00 PM), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-first-forced-labor-finding-1996> [<https://perma.cc/NY8L-YYLW>].

<sup>119</sup> 2020 CBP Finding, *supra* note 118.

<sup>120</sup> FRANZISKA HUMBERT, THE CHALLENGE OF CHILD LABOUR IN INTERNATIONAL LAW 320–21 (James Crawford & John S. Bell eds., 2009). *But see* WALK FREE FOUND., *supra* note 6, at 108 (stating that the United States is "fully implementing" section 307 of the Act).

appointed agency heads, which may leave the WRO process vulnerable to manipulation for political aims.

(c) *Targeted Federal Legislation.* — While long-existing legislation like the Tariff Act gives U.S. agencies broad powers to investigate forced labor abroad and seize or detain goods, some circumstances may call for more action than existing legislation provides for. In such cases, Congress may act to determine that the labor situation in a particular country or region is so egregious and verifiable that ad hoc legislation is necessary to combat the import of goods from that region into the United States.

Actions taken against Myanmar's ruling junta are an example of such extra legislative steps. Concerns grew in Myanmar in the 1990s that the ruling military junta was using forced labor and conscription of the population, particularly in the construction of public works.<sup>121</sup> In the early 2000s, the United States legislature targeted the ruling military junta in Myanmar with several sets of sanctions: these included the 2003 Burmese Freedom and Democracy Act<sup>122</sup> (imposing asset freezes and certain export bans) and the Burmese JADE Act<sup>123</sup> (banning import of certain gemstones).<sup>124</sup> Through these measures, the United States put additional penalties on the Burmese state above and beyond what was provided for in human rights and national security legislation. The sectors targeted by the laws were those that were determined to hit at the funding and maintenance of the military power.

The most recent, and most expansive to date, use of congressional powers to address forced labor is the UFLPA. The UFLPA delegates to agencies, namely the DOL and CBP, the power to block imports from Xinjiang, China, on the assumption that products manufactured wholly or in part in Xinjiang were created with forced labor of the Uyghur population.<sup>125</sup> It “establishes a rebuttable presumption that the importation of any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in [Xinjiang], or produced by certain entities, is prohibited by Section 307 . . . [and such goods] are not entitled to entry to the United States.”<sup>126</sup> Such goods are allowed entry into the United States only if CBP “determines that the importer of record has complied with specified conditions and, by clear and convincing

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<sup>121</sup> See HUMBERT, *supra* note 120, at 184; INT'L LAB. ORG., FORCED LABOUR IN MYANMAR (BURMA): REPORT OF THE COMMISSION OF INQUIRY 3 (1998); CULLEN, *supra* note 9, at 23.

<sup>122</sup> Pub L. No. 108-61, 117 Stat. 864 (codified at 50 U.S.C. § 1701 note).

<sup>123</sup> Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008, Pub L. No. 110-286, 122 Stat. 2632 (2008) (codified at 50 U.S.C. § 1701 note).

<sup>124</sup> Claire Buggenhoudt, *U.S. Trade Sanctions (World Trade Organization, Panel Report)*, in LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS: ALTERNATIVE JUDGMENTS, *supra* note 35, at 13, 13–14.

<sup>125</sup> *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT. (Feb. 24, 2023), <https://www.cbp.gov/trade/forced-labor/UFLPA> [<https://perma.cc/5WH8-QHQU>].

<sup>126</sup> *Id.*

evidence, that the goods, wares, articles, or merchandise were not produced using forced labor.”<sup>127</sup>

The UFLPA represents a significant step beyond the provisions of the Tariff Act on their own because it does not require a case-by-case finding of forced labor in the products produced by a specific company operating within Xinjiang.<sup>128</sup> While previous action against forced labor in China had entailed WROs and Findings against individual Chinese entities working in Xinjiang,<sup>129</sup> the UFLPA acts as a sort of blanket WRO for the entire region, imposing a presumption against the products ab initio. Such a move has drastic consequences for businesses and foreign governments whose goods may be prevented from entering the United States without costly disclosures and internal investigations. While the drastic steps taken in the UFLPA are not suitable for *all* instances of forced labor hotspots, the commitment shown by the United States in enacting the legislation can act as a model for forced labor prevention efforts in other countries, as well as deterrence in cases where the threat of targeted legislation in the United States may motivate a country to change its domestic practices.

(d) *Sanctions Authority.* — The President’s power to enact sanctions comes from acts designed to protect the national security of the United States,<sup>130</sup> chief among them the International Emergency Economic Powers Act<sup>131</sup> (IEEPA). While IEEPA was originally enacted to constrain the President’s nonwartime powers, successive interpretation has given the Executive “sweeping tools of economic warfare.”<sup>132</sup> Under IEEPA, the President may take economic actions in response to an “unusual and extraordinary threat” to the foreign policy, economy, or national security of the United States.<sup>133</sup> Powers under IEEPA are broad: the President can take a wide range of economic actions from seizing foreign property under U.S. jurisdiction to imposing trade embargos, import restrictions, and asset freezes.<sup>134</sup>

To date, Presidents have declared national emergencies under IEEPA in seventy-six cases, with the designations often pertaining to

<sup>127</sup> *Id.*

<sup>128</sup> See U.S. DEP’T OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE’S REPUBLIC OF CHINA: REPORT TO CONGRESS 7–8 (2022).

<sup>129</sup> See *Withhold Release Orders and Findings List*, *supra* note 115.

<sup>130</sup> For a critical perspective on the overbreadth of the Executive’s national security powers, see Patrick Corcoran, Note, *Trade and Wars: Checking the President’s Overbroad Trade Sanction Authority*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 687 (2021).

<sup>131</sup> 50 U.S.C. §§ 1701–1707.

<sup>132</sup> HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 46–47, 80 (1990).

<sup>133</sup> 50 U.S.C. § 1701(a). For information about the context of IEEPA’s enactment, see KOH, *supra* note 132, at 46–48.

<sup>134</sup> Cf. KOH, *supra* note 132, at 122 (describing measures taken by President Carter under IEEPA in response to the Iranian hostage crisis). These broad powers under IEEPA have been held up in courts. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding President Carter’s IEEPA actions against Iran); *INS v. Chadha*, 462 U.S. 919, 959 (1983).

situations in specific countries.<sup>135</sup> These include responses to situations in Bosnia and Herzegovina, Côte d'Ivoire, Cuba, Haiti, Iran, Iraq, Liberia, Libya, Myanmar, Nicaragua, Panama, Serbia, Sierra Leone, South Africa, Sudan, Zimbabwe, and more.<sup>136</sup> While many of the IEEPA designations have been in response to terrorism or conflict, more recent designations have focused on threats to elections, criminal networks, drug smuggling, and, relevant for the purposes of this Chapter, human rights abuses.<sup>137</sup>

IEEPA's use has been sweeping. One of the first declarations came in 1985 in response to the apartheid regime in South Africa<sup>138</sup> and was followed by invocations in Sudan,<sup>139</sup> Sierra Leone,<sup>140</sup> Myanmar,<sup>141</sup> and North Korea.<sup>142</sup> The regime of Global Magnitsky sanctions,<sup>143</sup> in part implementing IEEPA, targets human rights abuse perpetrators around the globe and has also been used to target perpetrators of forced labor.<sup>144</sup>

The sanctions authority of the President is useful in combatting grave forms of forced labor or human rights abuses that can credibly rise to the level of a national emergency or threat to U.S. foreign policy. The United States has used this authority several times in the past few decades, and sanctions designations of individuals or of certain industries could be an important tool to return to in the fight against forced labor abroad.

(e) *Export Administration Regulation.* — The Department of Commerce's Bureau of Industry and Security (BIS) is the government office responsible for implementation of the Export Administration Regulations<sup>145</sup> (EAR). BIS maintains an Entity List, which contains names of companies and foreign entities that are not allowed to be the recipient of U.S. exports. Such a restriction has potentially huge impacts, as the United States is a leading (or, in some cases, the sole) global

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<sup>135</sup> *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (Feb. 17, 2023), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [<https://perma.cc/6NFR-GPZ9>].

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> Exec. Order No. 12,532, 3 C.F.R. § 387 (1985); CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* 23–24 (2022).

<sup>139</sup> Exec. Order No. 13,067, 3 C.F.R. § 230 (1997).

<sup>140</sup> Exec. Order No. 13,194, 3 C.F.R. § 741 (2002).

<sup>141</sup> Exec. Order No. 13,651, 3 C.F.R. § 324 (2014).

<sup>142</sup> Exec. Order No. 13,722, 3 C.F.R. § 446 (2017).

<sup>143</sup> Exec. Order No. 13,818, 3 C.F.R. § 399 (2018).

<sup>144</sup> Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act (July 9, 2020), <https://home.treasury.gov/news/press-releases/sm1055> [<https://perma.cc/FUM4-S7A2>].

<sup>145</sup> 15 C.F.R. § 730 (2022).

producer of important dual-use goods and technology.<sup>146</sup> Inclusion on the Entity List extends to activities “sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests.”<sup>147</sup>

In July 2020, the Department of Commerce added eleven companies to the Entity List that were implicated in China’s campaigns of human rights violations and forced labor in Xinjiang.<sup>148</sup> So far, the Xinjiang designations have been the sole time that entities have been invoked under the EAR in response to forced labor violations.<sup>149</sup> However, this move may open the door for future designations based not only on strict definitions of national security but also on more expansive interpretations of the United States’s vested interest in human rights and labor freedoms around the world.

2. *Other Measures.* — Other than the authority vested by Congress and carried out through the agencies, the federal government also has separate avenues to take action on forced labor. These include diplomatic pressure through the Executive’s foreign affairs powers, research and business-compliance initiatives under the powers of the DOL, and cross-agency task force initiatives to streamline and heighten compliance and cross-functionality.

(a) *Diplomatic Channels.* — Beyond the powers vested in the Executive through Congress, the President possesses their own foreign affairs powers. The Executive, qua executive, holds diplomatic and military authority. These authorities can be used alongside other statutory means to influence the behavior of foreign governments. Executive policies can include restricting foreign aid, putting controls on imports or exports, stopping access to U.S. or international financial systems, or even affecting other types of bilateral relations such as landing rights.<sup>150</sup> The Executive holds greatest control over bilateral relations such as diplomatic and military aid, landing restrictions, and U.S. exports.<sup>151</sup>

(b) *The Department of Labor.* — The DOL’s Bureau of International Labor Affairs (ILAB) functions as the government’s hub for research on

<sup>146</sup> Cf. Hideki Uno, *The Unintended Impacts of the U.S. Export Control Regime on U.S. Innovation*, CTR. FOR STRATEGIC & INT’L STUD. (July 25, 2022), <https://www.csis.org/blogs/perspectives-innovation/unintended-impacts-us-export-control-regime-us-innovation> [https://perma.cc/L4HB-YL4M]; BALDWIN, *supra* note 84.

<sup>147</sup> *CBC FAQs - Entity List FAQs*, BUREAU INDUS. & SEC., U.S. DEP’T COM., [https://www.bis.doc.gov/index.php/cbc-faqs/cat/36-entity-list-faqs-2#faq\\_282](https://www.bis.doc.gov/index.php/cbc-faqs/cat/36-entity-list-faqs-2#faq_282) [https://perma.cc/H3ZG-NB2S].

<sup>148</sup> Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List, 85 Fed. Reg. No. 44,159 (July 22, 2020).

<sup>149</sup> See Alison J. Stafford Powell et al., *BIS Adds Eleven Chinese Entities Implicated in Human Rights Abuses in Xinjiang to the Entity List*, BAKER MCKENZIE: SANCTIONS & EXP. CONTROLS UPDATE (Aug. 11, 2020), <https://sanctionsnews.bakermckenzie.com/bis-adds-eleven-chinese-entities-implicated-in-human-rights-abuses-in-xinjiang-to-the-entity-list> [https://perma.cc/QY45-DPWD].

<sup>150</sup> See BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 2 (1988).

<sup>151</sup> *Id.* at 32–33, 63–65.

forced labor worldwide and is the “largest government agency in the world dedicated to improving global working conditions and countering labor abuses.”<sup>152</sup> This work has included the production of more than forty congressionally mandated reports on forced labor and human trafficking worldwide, and nearly two hundred publications.<sup>153</sup>

ILAB also produces a biennial report entitled the List of Goods Produced by Child Labor or Forced Labor.<sup>154</sup> These reports provide “actionable information” to other government agencies with authority over procurement or import and can serve to “help foreign governments build their capacity to end labor exploitation in their countries.”<sup>155</sup>

DOL also leads initiatives geared at business compliance and technical innovation. Its Comply Chain program released an app that is targeted at industry groups and companies “seeking to develop robust social compliance systems” for global supply chains.<sup>156</sup> ILAB also partners with the private sector, governments, worker organizations, and civil society to lead training and technical assistance programs abroad and, as of 2021, was funding fifty projects in nearly as many countries.<sup>157</sup>

(c) *Interagency Developments.* — The Biden Administration has commenced new initiatives to streamline and consolidate the existing agencies and units that work against forced labor. These initiatives include an effort to consolidate the interagency process for reporting implemented by the TVPRA under the banner of *The National Action Plan to Combat Human Trafficking*.<sup>158</sup> Efforts also include a DHS-led interagency Forced Labor Enforcement Task Force, which aims to consolidate and formalize processes for agencies including the State Department, DOL, and Department of Commerce to aid DHS’s antitrafficking measures.<sup>159</sup> An additional step is the creation within USTR of the office’s first-ever “focused trade strategy to combat forced labor.”<sup>160</sup>

<sup>152</sup> U.S. DEP’T OF LAB., *supra* note 6, at 6.

<sup>153</sup> See *Reports and Publications*, U.S. DEP’T LAB. <https://www.dol.gov/agencies/ilab/research-impact-evaluation> [<https://perma.cc/4A49-7GDK>].

<sup>154</sup> E.g., U.S. DEP’T OF LAB., *supra* note 6.

<sup>155</sup> *Id.* at 6–7. Pursuant to Executive Order 13,126, the U.S. government also depends on ILAB’s *List of Products Produced by Forced or Indentured Child Labor* to ensure that public procurement does not support goods produced by forced labor. See Exec. Order No. 13,126, 3 C.F.R. § 195 (2000).

<sup>156</sup> *Comply Chain: Business Tools for Labor Compliance in Global Supply Chains*, U.S. DEP’T LAB., <https://www.dol.gov/general/apps/ilab-comply-chain> [<https://perma.cc/HTW7-65DE>].

<sup>157</sup> U.S. DEP’T OF LAB., *supra* note 6, at 9–10, 12.

<sup>158</sup> THE WHITE HOUSE, THE NATIONAL ACTION PLAN TO COMBAT HUMAN TRAFFICKING (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf> [<https://perma.cc/E6E5-P5QQ>].

<sup>159</sup> See *Forced Labor Enforcement Task Force*, U.S. DEP’T. HOMELAND SEC. (Jan. 24, 2023), <https://www.dhs.gov/forced-labor-enforcement-task-force> [<https://perma.cc/MBH6-9KM4>].

<sup>160</sup> Press Release, Off. of the U.S. Trade Representative, USTR Announces the Development of a Focused Trade Strategy to Combat Forced Labor (Jan. 25, 2022), <https://ustr.gov/about-us/policy->

3. *Critiques and Challenges.* — The U.S. system has, at least theoretically, two overlapping lenses for enforcing prohibitions on trafficking and forced labor abroad: private claims through the civil court system against corporations or individuals, and public policies that target the companies, entities, and countries that participate in or foster conditions of forced labor.

However, policies spearheaded by the federal government, and especially those falling under the discretion of the executive branch, are subject to several important limitations. The power of the executive branch — which applies its discretion through agency enforcement — is captured by the greater overarching political goals of the state. The discretionary actions of any individual agency — DHS in issuing WROs, Commerce in wielding EAR power, State in trading harsh words and enacting diplomatic pressure — are directly tied back to the policy aims of the Executive. The sitting President must, therefore, be confident answering for the extent of their forced labor policy to every corporation and foreign government affected by U.S. enforcement.

There is perhaps no clearer depiction of this dynamic than the ways in which recent enforcement has been focused around the Uyghurs. The situation of human rights abuses in Xinjiang is horrific, likely rising to the level of crimes against humanity or genocide,<sup>161</sup> and should be condemned by the greatest number of international actors possible. However, the restrictions on Xinjiang come as successive U.S. administrations accelerate their overall trade and geopolitical rivalries with China.<sup>162</sup> Moreover, the sectors in Xinjiang that regularly export to the United States are far from vital to the U.S. economy: in 2020, some key products for import were reportedly wind turbines, some chemicals, and holiday decorations.<sup>163</sup>

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offices/press-office/press-releases/2022/january/ustr-announces-development-focused-trade-strategy-combat-forced-labor [https://perma.cc/M5S9-BG3M].

<sup>161</sup> Cf. Press Release, Michael R. Pompeo, Sec’y of State, U.S. Dep’t of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html> [https://perma.cc/8HKV-6477].

<sup>162</sup> See Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2022, 5:00 PM), <https://www.cfr.org/background/contentious-us-china-trade-relationship> [https://perma.cc/MX8D-6QUC]; cf. Ryan Hass, Commentary, *A Roadmap for U.S.-China Relations in 2023*, BROOKINGS INST. (Jan. 4, 2023), <https://www.brookings.edu/blog/order-from-chaos/2023/01/04/a-roadmap-for-us-china-relations-in-2023> [https://perma.cc/2BK6-74SU].

<sup>163</sup> Finbarr Bermingham, *China’s Xinjiang More than Doubled Its US Exports in 2020, Despite Trump’s Sanctions and Bans*, S. CHINA MORNING POST (Feb. 24, 2021, 4:43 PM), <https://www.scmp.com/economy/china-economy/article/3118656/xinjiangs-us-exports-more-doubled-2020-despite-trumps> [https://perma.cc/8CTP-5GDF]. The *South China Morning Post* also reported that cotton, the industry most targeted by the sanctions, was a minor good for direct export to the United States. *Id.* Rather, Xinjiang cotton “typically enters the garment supply chain elsewhere in China or Asia, at which point it can be difficult to trace.” *Id.*



Such politically driven enforcement is, one could argue, not a bad thing. After all, *some* enforcement is better than none. The rights violations perpetrated against the Uyghurs undoubtedly rise to the substantive level to be worthy of strong federal action. So, one might ask, why make the perfect the enemy of the good? One answer is that the good in this scenario is inadequate. When federal action to combat rights abuses remains, or appears to be, subservient to political tensions, it cheapens the value of the enforcement that *does* occur, opens the United States up to criticisms of empty actions, and gives bad actors a playbook for avoiding enforcement by cozying up politically to the United States.

Accordingly, federal policy — necessarily beholden to outside interests — must be supplemented by other, more independent mechanisms. Specific statutes under Congress's enacting power may be able to fill this gap. Congress could pass laws similar to the Burmese JADE Act that target labor abuses in the Thai fishing industry, West African cocoa plantations, or even the Gulf States' domestic abuses of migrant workers. However, Congress has been hesitant to act in recent years, preferring to take its direction from the executive branch. And, with the threat of near-total closing of extraterritorial forced labor claims in U.S. courts, there is no longer the risk that *any* corporate actor, much less ones friendly to the United States or beholden to its interests, will be forced to pay up and admit its role in labor abuses.

A federal system bolstered by the seat of world capital markets and the largest economy is one that wields enormous power. The United States, if it works with its allies to drive forceful policies that apply to rights-abusing states and corporations irrespective of politics, could take steps to fundamentally shift the problem of forced labor around the world. But such steps, implemented at a federal level, would require policy calculations that elevate the prevention of human rights abuses for non-U.S. citizens above the economic and political interests of the United States in its relationships with other states.

It is no wonder why the United States would not seek to make many of its closest political and economic relationships dependent on the dictates of human rights demands. But such is the reason for a multi-pronged government and approach. Allowing the United States to drive policy to the extent that it is comfortable, while simultaneously fostering an independent and robust accountability mechanism for corporate human rights abuses in the court system, is the only way to guarantee consistent action against this moral fault and prevent the abrogation of our moral duties. Otherwise, the entire system rests on unstable footing.

### *Conclusion*

The foregoing sections have laid out U.S. action against forced labor. The balance of power and options within the U.S. system is changing: as the courts move to read against extraterritoriality in human rights

statutes, the federal levers of foreign policy and economic sanctions gain greater use. One question, however, remains unanswered: what do these shifting policies mean for a victim of forced labor outside the United States?

This Chapter proffers several views: Firstly, the decline of private extraterritorial claims in U.S. courts deprives plaintiffs and victims of opportunities to have their voices heard and their claims litigated in our adversarial court system. That system has its drawbacks: Cases can stay in the court system for close to a decade at a time and come at an exorbitant cost. Victims and the NGOs that represent them rely on pro bono practices of large established law firms to shepherd the cases through the court system. And such a system gives the option to be plaintiffs only to an infinitesimal segment of the population of victims of forced labor.

But the court system also has important advantages that will be lost in an ecosystem driven only by U.S. foreign policy on a federal level. Court decisions impose binding precedents. The potential for binding precedents in U.S. courts that impose liability on corporations as a result of their business practices, business partners, or subsidiaries abroad could drive serious change in the way U.S. corporations operate. Court judgments also provide for damages (not envisioned under the federal policy levers) and give moral heft to the positions of victim plaintiffs.

As action shifts to the federal level, the possibility arises to paint with a much broader brush. The United States occupies enormous space and wields enormous power on the world stage: U.S. action can cripple the profits of a company accused of forced labor practices or suspend entire entities' access to markets and banking systems. If offenders throughout the world were put on notice that the United States was willing to take serious action akin to the UFLPA by targeting other products and supply chains, they may well reassess their labor and market practices.

But, as noted above, the U.S. federal system is also beholden to political interests. The United States may be more likely to go after its enemy states than its allies (no matter the presence of rights abuses). Federal policy is also not precedent setting; changes in administration politics and personnel could wipe out gains in combatting forced labor in one fell swoop.

What the world system needs is strong action from the United States that is applied consistently, apolitically, and forcefully. The best approach would be one that allows all three branches of the government to pronounce that forced labor in the U.S. supply chain is a human rights abuse that directly ties to the U.S. economy and should not be tolerated. Absent that reality, market forces will continue to drive deplorable and inhumane conditions for workers in some of the most destitute corners of the world.