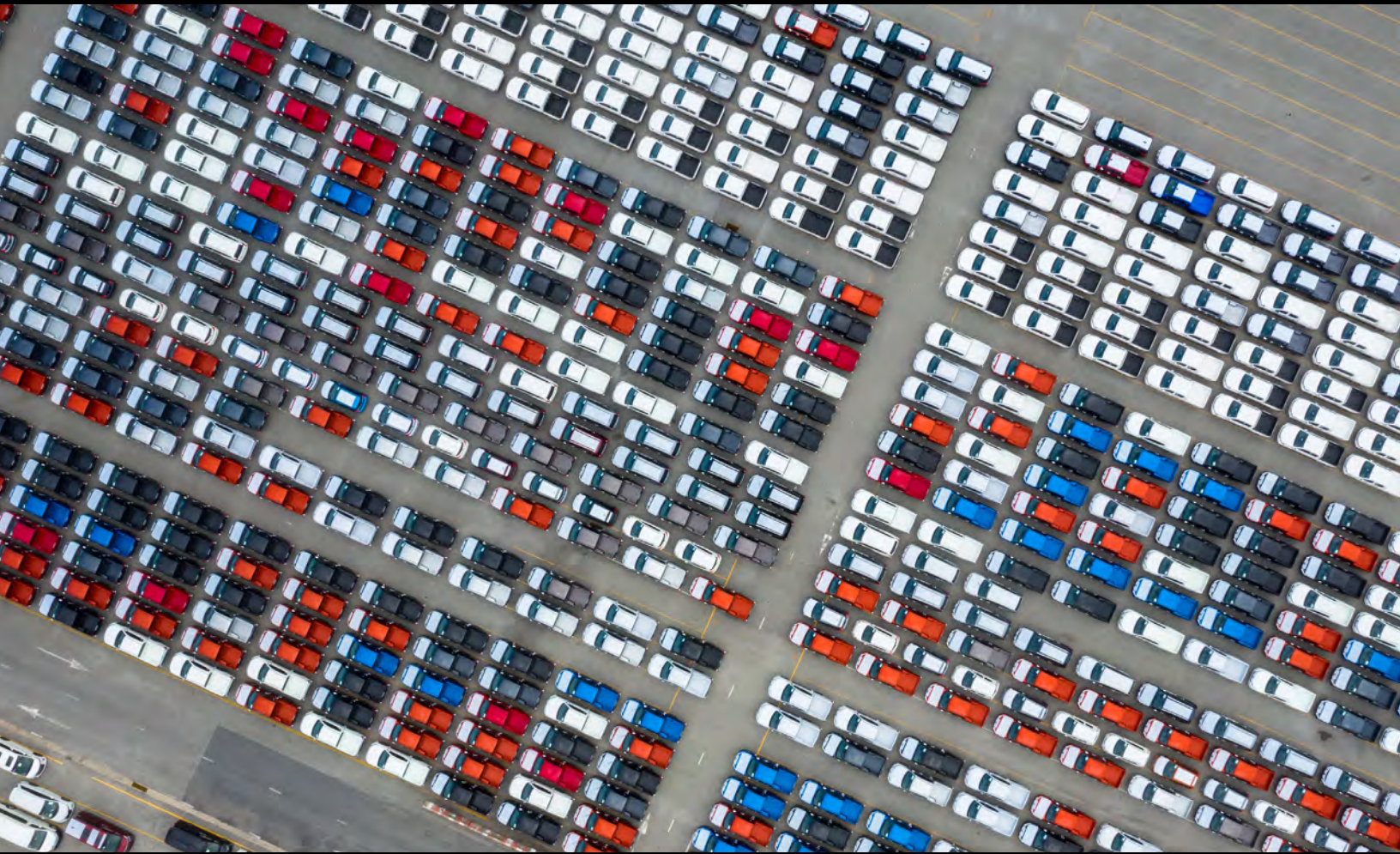


Building Back Better or **building back worse?**

**The challenge of building a
high-road EV industry with
anti-union employers**



Gordon Lafer, PhD

Professor, Labor Education & Research Center, University of Oregon

Executive Summary

In the coming decade, the U.S. economy will undergo a radical transformation as electric vehicles replace the gasoline-powered auto industry. This shift will bring profound changes not only for the environment, but also for employees in the auto manufacturing industry. This industry constitutes the country's single largest manufacturing sector, with nearly one-million jobs in auto and auto parts manufacturing. Further, with average earnings of \$55,000 per year, these are some of the most important jobs in the national economy – providing critical opportunities for workers to support their families in dignity.¹

But will the new jobs in electric vehicle (EV) manufacturing be decently-paid jobs? Or will they be lower-wage jobs that serve to exacerbate the current crisis of inequality? The answer to this question depends, above all, on employees' ability to secure a fair share of the profits their work creates, through collective bargaining. Unfortunately, in recent years many auto manufacturers and suppliers have subjected their employees to a wide range of threats and intimidation tactics – many illegal, others legal only under labor law but banned in normal democratic elections – that have effectively blocked employ-

ees from exercising their right to collective bargaining. As a result, the share of auto workers who enjoy the right to collective bargaining has shrunk, leading to a dramatic falloff in wages. Indeed, the average hourly wage in the auto manufacturing industry, after adjusting for inflation, has declined by over 20% from 1990-2018.²

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President Biden has celebrated the transition to electric vehicles, and has proposed dedicating nearly \$200 billion to supporting this shift.³ If the administration and Congress adopt policies to keep most of this work within the country, the switch to EVs could add 150,000 new jobs to the American auto industry.⁴ But if we are truly to build back better, we must guarantee that these auto workers can choose to form unions through a truly democratic process, free from fear of retaliation by their employers. If we are to reverse

the national crisis of inequality, it is critical that we restore genuine organizing rights in this important industry.

In this sense, what happens in the electric vehicle industry is a bellwether for the country as a whole. The central fact of our economy is the long-term decline of employment conditions over the past 40 years. We live in an economy where corporate profits, executive salaries and shareholder returns have all grown steadily, while those who do the work that creates the corporate profits have seen their wages stagnate.⁵ One of the primary causes of growing inequality over the past four decades is the shrinking share of Americans who have unions in their workplace.⁶ No matter what new technologies may be invented or what new skills workers may acquire, if employees lack the ability to bargain for their share of corporate success, GDP growth will continue to be dominated by a small slice of the economic elite.

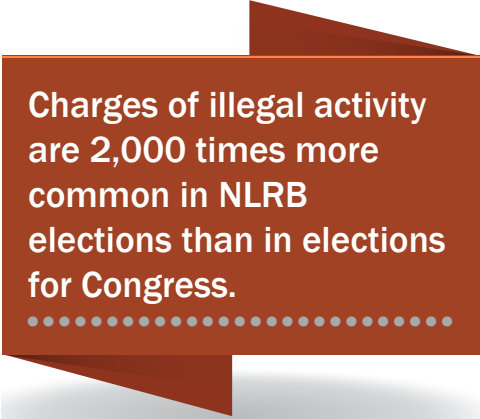
One of the primary causes of growing inequality over the past four decades is the shrinking share of Americans who have unions in their workplace

Perhaps in response to this crisis of inequality, Americans' support for unions has grown steadily over the past decade, reaching a 55-year high point in 2021, with 68% of the country voicing support for unions.⁷ Indeed, there is good reason for this: if one compares two employees of the same gender, race, ethnicity, education and experience, and working in the same occupation, but one has a union and the other does not, the unionized worker will enjoy significantly better wages and benefits.⁸ Unions also create much safer work environments: as one example, the chance of losing a finger or a limb in non-union auto parts plants in Alabama is twice the national average, far higher than that faced by people doing the same work in heavily unionized Michigan.⁹ So too, unions have negotiated binding nondiscrimination policies in their workplaces, with the result that both the gender and racial wage gap is significantly smaller than in non-union companies.¹⁰ In the auto industry, this has made unionized auto manufacturing a backbone of the Black middle class.

The most recent survey data suggests that nearly 60 million non-union employees in the U.S. would vote for a union in their workplace if given the chance.¹¹ Yet only 50,000 workers per year are able to establish a new union

through National Labor Relations Board (NLRB) elections, or less than 1% of the number who want a union.¹²

What makes unions so rare despite being so popular? The simple answer is that employers take advantage of a profoundly undemocratic federal labor law that makes NLRB elections look more like the sham practices of rogue regimes abroad than like anything we would recognize as American democracy.



Charges of illegal activity are 2,000 times more common in NLRB elections than in elections for Congress.

NLRB elections are characterized by a remarkable degree of illegal activity. Compared with federal elections, charges of illegal activity are 2,000 times more common in NLRB elections than in elections for Congress.¹³ Across the country as a whole, employers are charged with lawbreaking in more than 40% of all NLRB-supervised elections, and charged with illegally firing pro-union employees in nearly

20% of elections.¹⁴ Unfortunately, anti-union intimidation tactics have come to define a growing share of the auto industry. At Tesla, for instance, the Labor Board recently concluded that the company committed a series of violations, including illegally firing one union supporter and disciplining another because of their union activity; threatening employees with a loss of stock options if they joined a union; restricting employees from speaking with the media; coercively interrogating union supporters; and barring employees from distributing union information to their co-workers.¹⁵ So too, the CEO at Fuyao Glass – the country's largest producer of automobile glass – was filmed openly reporting to the firm's chairman that he had fired employees who tried to organize a union.¹⁶

Because there are nearly no effective penalties for violating workers' labor rights, employers ignore the law with near-total impunity. At Nissan's Canton, Mississippi plant, for instance, the NLRB in 2018 issued a formal complaint charging the company with 24 counts of lawbreaking, including prohibiting employees from talking to the public about their working conditions, banning distribution of pro-union literature, interrogating employees about their voting intentions, threatening to falsify documents in order to discipline

In the auto industry, Toyota, Nissan, Hyundai, Mercedes-Benz, BMW, Volkswagen and Honda have all called on “union avoidance” specialists to guide their anti-union campaigns in the United States.

union supporters, and issuing multiple threats to fire employees in retaliation for pro-union activities or to close the plant as a whole if employees voted to unionize.¹⁷ Yet this campaign of illegal threats was initiated less than two years after an earlier complaint in which the NLRB asserted that Nissan managers had “interfered with, restrained, and coerced” pro-union employees.¹⁸ The company’s sole punishment in that case was a requirement that Nissan post a notice recognizing that such acts are illegal and pledging to respect employees’ labor rights from here on. That Nissan management so quickly broke this promise points up how ineffective such remedies are.

Even when employers obey the law, they rely on a set of tactics that are legal under the National Labor Re-

lations Act (NLRA) but illegal in elections for Congress, and that violate fundamental norms of democracy.¹⁹ A multi-billion-dollar industry of “union avoidance” consultants and law firms helps employers exploit the weakness of federal labor law in order to deny workers the right to collective bargaining.²⁰ Over the past fifty years, these advisors have developed cookie-cutter strategies that are applied across industries. By the early 2000s, over three-quarters of all large firms employed anti-union consultants when faced with employee organizing.²¹ In the auto industry, Toyota, Nissan, Hyundai, Mercedes-Benz, BMW, Volkswagen and Honda have all called on “union avoidance” specialists to guide their anti-union campaigns in the United States.²² Thus, workers who seek to organize a union are forced by their employers to run a gauntlet of fear, threats, intimidation, forced propaganda, and stifled speech – all things that are illegal in any election to public office, but allowed under current labor law.

The report that follows outlines both the legal and illegal means that have been used to stop auto workers from exercising their right to collective bargaining. If we are serious about enabling American workers to support their families in dignity, we must

restore employees’ ability to negotiate with their employers. It is particularly important that we address this issue at the moment that the federal government is poised to invest hundreds of billions of dollars to support the transition to electric vehicles. As we stand on the cusp of reinventing the auto industry, we face a choice of either taking steps to ensure that this highly profitable sector provides family-wage jobs, or allowing employers to use federal investments, in part, to deny their employees the right to collective bargaining and continue eroding job standards in this industry and in the country.

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Introduction: The Crisis of Inequality and the Role of Unions

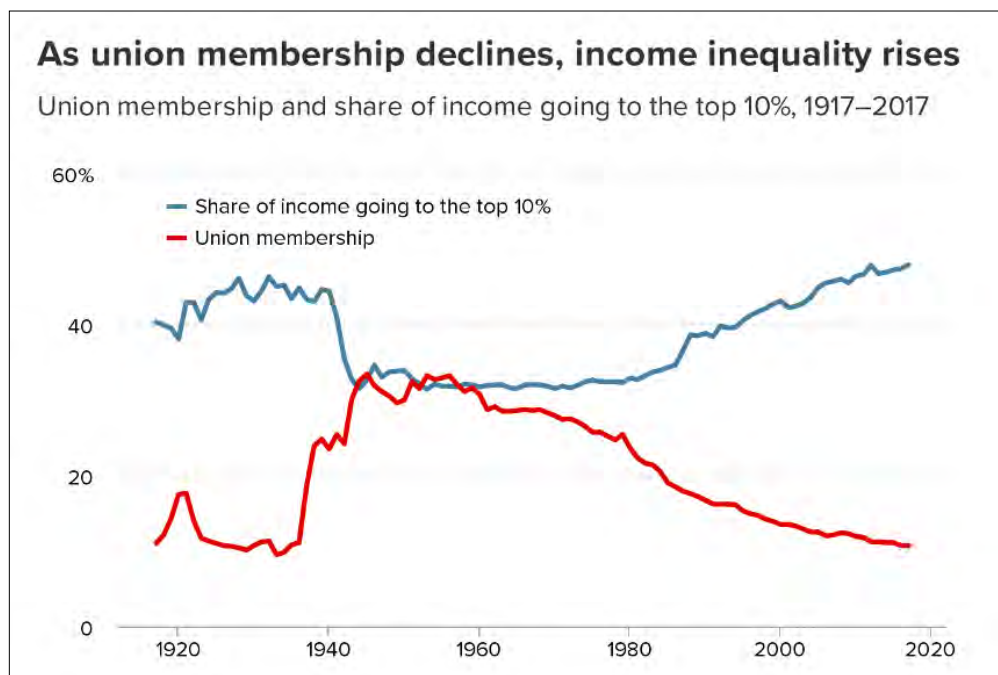
The central fact of our economy is the long-term decline of employment conditions over the past 40 years. Particularly in the two-thirds of the labor market where jobs do not require a college degree, family-wage jobs have grown ever scarcer—even during periods of record-low unemployment. Since the late 1970s, we have witnessed an economy in which corporate profits, executive salaries and shareholder returns have all grown steadily, while those who do the work that creates these profits have seen their wages stagnate.²³ Chief executive officer compensation grew 940% from 1978 to 2018, while typical worker compensation rose only 12%.²⁴ Even

American workers find themselves working harder, running faster, and still sliding slowly but steadily backwards.

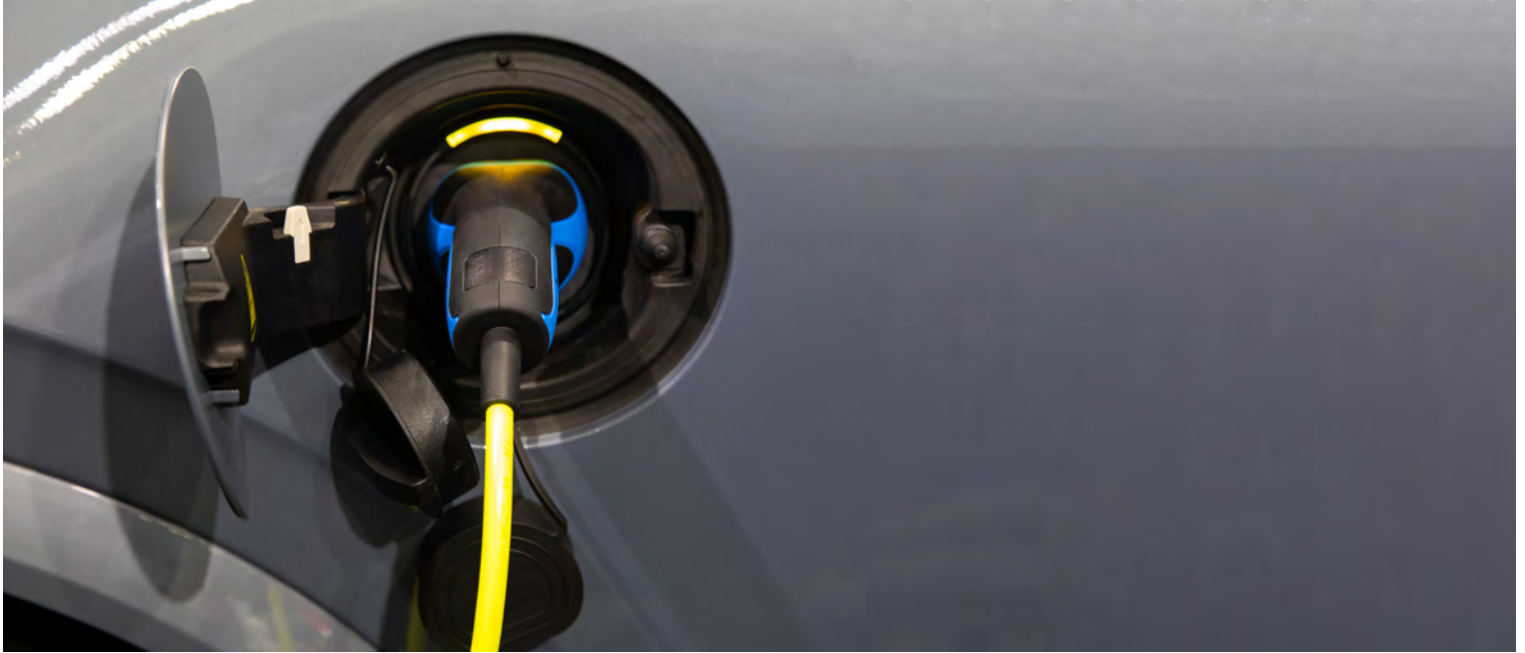
the low unemployment rate reached by 2018 was not enough to spur truly significant wage growth, leading one economic analyst to declare that “the competitive supply-and-demand model of labor markets is fundamentally broken.”²⁵ Workers have responded to falling wages, in part, by working longer hours.²⁶ Thus, American workers find themselves working harder, running faster, and still sliding slowly but steadily backwards.

One of the primary causes of growing inequality over the past four decades is the shrinking share of Americans who enjoy the right to collective bargaining.²⁷ Indeed, other than high unemployment, the decline of unions is the single most important factor that has served to depress wage growth over the past four decades.²⁸

Figure 1 – Unions and Inequality ²⁹



Reproduced from Heidi Shierholz, Labor Day 2019: Working people have been thwarted in their efforts to bargain for better wages by attacks on unions, Economic Policy Institute, September 9, 2019. <https://www.epi.org/publication/labor-day-2019-collective-bargaining>. Data on union density follows the composite series found in Historical Statistics of the United States, updated to 2017 from unionstats.com. Income inequality (share of income to top 10%) data are from Thomas Piketty and Emmanuel Saez, “Income Inequality in the United States, 1913-1992,” Quarterly Journal of Economics 118, no. 1 (2003), and updated data from the Top Income Database, updated March 2019



By contrast, restoring the right to collective bargaining is one of the most promising policy solutions to the crisis of inequality. On average, if one compares two employees of the same gender, race, ethnicity, education and years of experience, working in the same occupation, same industry and same geographic area, but one has a union and the other does not, the unionized worker's wages will be 10.2% higher than their non-union counterpart.³⁰

Taking into account health insurance and pensions, the impact of unionization on workers' compensation is even greater than that of wages alone. Workers who have a union are significantly more likely to get health insur-

ance through their jobs, and their employers pay a significantly larger share of insurance costs than do employers where there is no union.³¹ Similarly, not only are unionized employees much more likely to have a pension, but their employers contribute 56% more toward employees' retirement plans than do otherwise similar non-unionized employers.³² Finally, when employees have a union, they are more likely to get paid sick leave, paid vacation and paid holidays, and less likely to be in danger of occupational injury.³³

Beyond wages and benefits, unions have also made workplaces safer – including in the auto industry. Indeed, safety concerns have often been the spark that led to organizing efforts.

For instance, at Fuyao Glass – the nation's largest producer of glass for automobiles – the company was operating without legally mandated safety equipment, with employees suffering almost daily cuts. After an employee filed a complaint with OSHA – leading to Fuyao being fined for multiple safety violations³⁴ – the company transferred her to a lower-paid and physically harder job, where she was assigned a task that had previously been a two-person job. This employee became a union supporter because she believed that “if we had a union, the plant would be safer.”³⁵ She's correct: unionized firms have significantly lower rates of injury or occupational illness on the job, both because unions negotiate enforceable safety standards and establish joint la-

bor-management committees to oversee safety, and because workers who have a union are less scared to speak up about unsafe conditions.³⁶ Within the auto industry, the difference unions make can be stark: for instance, the chance of losing a finger or limb in non-union auto parts plants in Alabama is twice the national average, far above that of similar workers in heavily unionized Michigan.³⁷

So too, employees often turn to unions as a response to harassment or discrimination on the job. This was the case, for instance, at Faurecia Interiors – supplier of interior technology to one-third of the world’s cars – where the Labor Board concluded an investigation by issuing a complaint against the company, charging that, after a female employee complained to management that “female employees were uncomfortable with certain conduct by supervisors,” she was banned from discussing the issue in public, suspended, and ultimately fired.³⁸ In organized firms, unions negotiate non-discriminatory standards that are enforceable by an impartial grievance procedure, and as a result both the gender and racial wage gaps are significantly smaller than in non-union workplaces.³⁹ In all these ways, unions have been able to create safe and secure family-wage jobs in what might otherwise have been low-wage, high-stress and physically risky occupations.

No matter what new technologies may be invented or what new skills workers may acquire, if employers can deny workers the ability to bargain for their share of corporate success, GDP growth will continue to be dominated by a small slice of the economic elite. Turning collective bargaining into a realistic right rather than a theoretical privilege is the single most important step we can take toward reversing the crisis of inequality.

The Role of the Auto Industry in Sustaining the American Middle Class

As we look to restore the promise of middle class jobs for American families, the auto industry has a central role to play. The country has long looked to manufacturing jobs as the backbone of the American middle class: a recent survey found that 90% of Americans believe that a strong manufacturing base is essential to the country’s standard of living, and when asked what type of employer they

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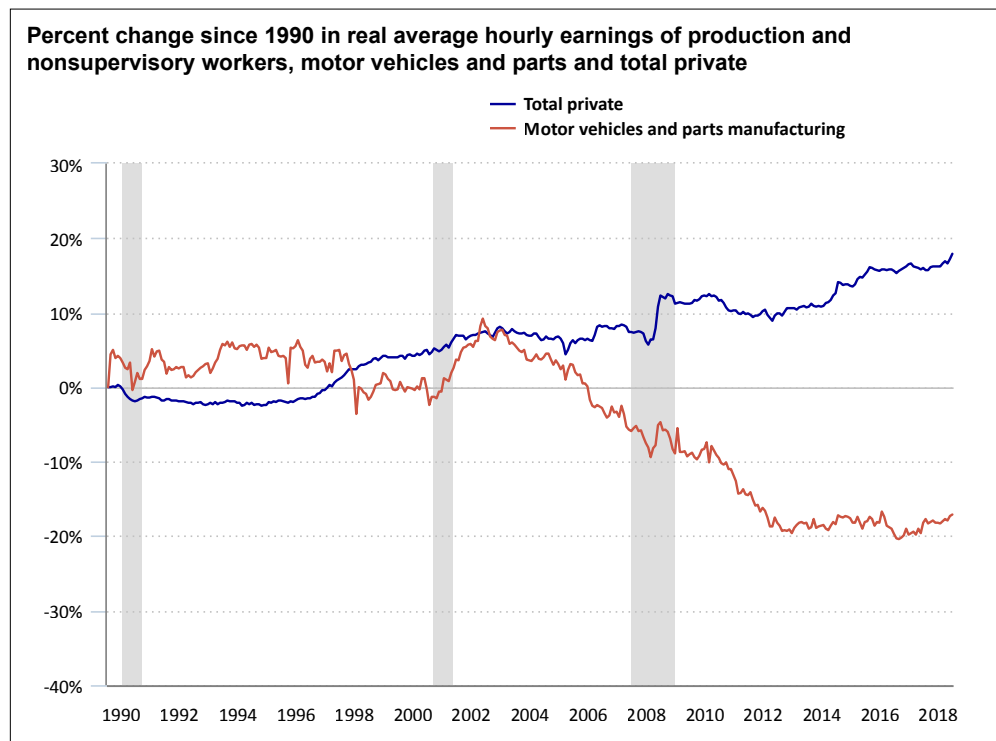
would most like to see come to their community, manufacturing topped the list.⁴⁰ The auto industry constitutes the country’s single largest manufacturing sector, and with average earnings of \$55,000 per year, boasts some of the most important jobs in the national economy – providing critical opportunities for non-professional workers to support their families in dignity.⁴¹

For many decades, jobs in this industry served as the hallmark of well-paid middle class employment. In the 1980s, autoworkers’ pay was more than double the private sector average.⁴² Automobile and auto parts manufacturing has served as a crucial source of good jobs particularly for workers who have not gone to college – especially in unionized plants. The median wage for workers without a four-year college degree in unionized

auto plants is \$20.95, more than \$5 per hour above the national norm.⁴³ So too, union-enforced nondiscrimination agreements have helped make this a key sector for the Black middle class: Black workers now constitute just over 25% of the workforce in unionized auto plants – twice as high as the share of Black workers in the economy as a whole.⁴⁴

But over the past two decades, job standards in the auto industry have witnessed an alarming decline. Average hourly wages – adjusted for inflation – have fallen precipitously since 2003, with the result that by 2018, the average wage was one-fifth lower than it had been in 1990. This is not the result of broader trends in the economy – on the contrary, over the same period the average hourly wage for all private sector workers increased by just over 17%. Thus jobs in the auto industry have seen dramatic wage cuts even while wages in the rest of the economy increased.

Figure 2



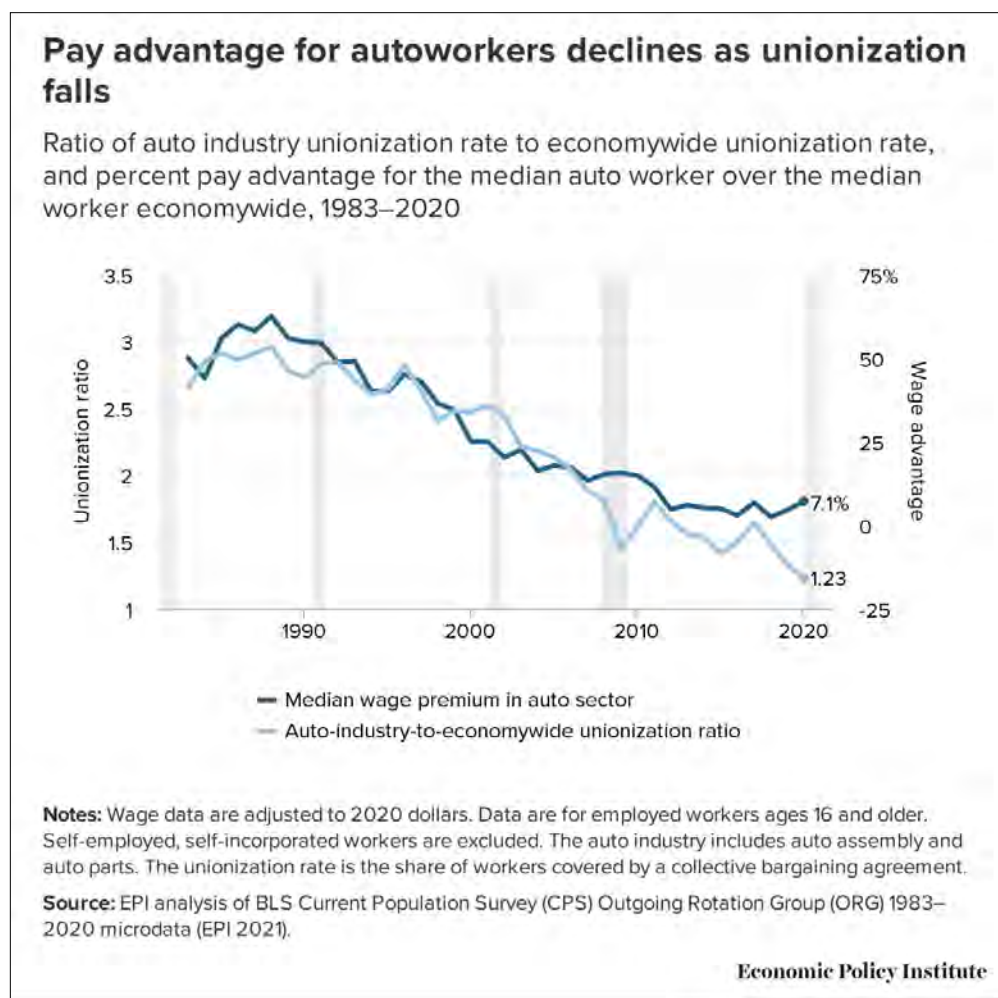
Source: Inflation-adjusted earnings in motor vehicles and parts industry down 17 percent from 1990 to 2018, U.S. Bureau of Labor Statistics, January 6, 2020. <https://www.bls.gov/opub/ted/2020/inflation-adjusted-earnings-in-motor-vehicles-and-parts-industry-down-17-percent-from-1990-to-2018.htm>

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This deterioration in wage standards has been caused by multiple factors, including international trade treaties that encouraged moving jobs out of the U.S. to lower-wage countries, shifting work out of assembly plants to lower-wage parts suppliers, and the use of staffing agencies to replace regular employees with low-paid temporary workers.⁴⁵ But one of the most important causes for falling wages is the shrinking share of auto workers who enjoy the benefits of unionization. The past two decades have seen the proliferation of mostly foreign-owned auto and auto parts manufacturers who have opened facilities in “right to work” states and waged bitter campaigns to prevent employees from exercising their right to collective bargaining.⁴⁶ In the 1980s, when auto workers were unionized at a rate three times the national average, their

median wage was 60% higher than the national norm. But by 2020, the combination of employer anti-union campaigns and the proliferation of temporary or outsourced jobs that lack union representation had left the unionization rate for the auto industry only slightly higher than that of the general private sector. And as shown in Figure 3 below, as the share of workers with union representation declined, so did industry wages.⁴⁷

Figure 3



could add 150,000 new jobs to the auto industry.⁴⁹ But will jobs in the electric vehicle manufacturing industry be decently-paid jobs, through which American workers can provide their families with economic security? Or will they be low-wage jobs that serve to exacerbate the current crisis of inequality? The answer to this question depends, above all, on employees' ability to secure a fair share of the profits their work creates, through collective bargaining.

People still want unions, but few get them

Unsurprisingly, many non-union workers wish that they too could earn union wages and benefits. The most recent survey data show that nearly 60 million workers in non-union companies would vote to organize a union if given the opportunity to do so.⁵⁰ Yet only 50,000 employees per year are able to establish a new union through National Labor Relations Board (NLRB) elections, or less than 1% of the number who want a union.⁵¹ What makes unions so rare despite being so popular? The central cause is the fact that federal labor law is profoundly broken, and that employers exploit that brokenness. Instead of

We now stand at the precipice of a new era in the auto industry. President Biden has declared a goal of ensuring that electric vehicles (EV) account for 50% of all new car sales by the end of this decade.⁴⁸ If the administration and Congress adopt policies to keep most of this work within the country, the switch to EVs

serving as a neutral expression for workers' preferences, the NLRB election system allows employers to subject workers to an intense campaign of fear, threats, intimidation, forced propaganda, and stifled speech. This is what must change for American workers to have a meaningful right to collective bargaining and for our country to find our way out of the crisis of economic inequality.

A Toothless Law Encourages Widespread Law-breaking

Employers' ability to block workers from securing union representation is in large part a product of the rampant lawlessness that characterizes NLRB elections, made possible by the absence of meaningful penalties under the law. In elections for Congress, those who violate elections law may face fines, imprisonment, or loss of commercial licenses. But in NLRB elections, even employers who willfully and repeatedly break the law by threatening employees, bribing employees, destroying union literature, or firing union supporters, can never be

fined a single cent, have any license or other commercial privilege revoked, or serve a day in prison. As a result, it is not merely rogue employers who violate workers' rights under law, but many mainstream employers who decide it is worth breaking the law in order to intimidate employees out of organizing a union. Illegal threats, intimidation and terminations are common in the auto industry. For instance, Tesla – the country's largest manufacturer of electric vehicles – was charged by the Labor Board with threatening to lay off employees if they vote in a union, illegally banning employees from talking to reporters or



the public about working conditions, and blocking employees from distributing pro-union information to co-workers.⁵² So too, the CEO of Fuyao Glass, was filmed openly reporting to the firm's chairman that he had fired union supporters from an Ohio plant where workers sought to organize.⁵³

But penalties for violating the law are so slight that companies who the government has found to be acting illegally often face nothing more than a requirement that they publicly promise to obey the law in the future – a promise that is frequently broken. At the Nissan plant in Canton, Mississippi, for instance, the NLRB in 2013 charged that managers had “interfered with, restrained, and coerced” pro-union employees by exercising discriminatory discipline and establishing an illegal prohibition on the distribution of pro-union literature.⁵⁴ Nissan posted a notice recognizing that such acts are illegal and pledging to respect employees’ labor rights from here on. Yet less than two years later, Nissan began a campaign of illegal coercion and threats that ultimately led the Labor Board to issue a formal complaint charging the company with 24 counts of lawbreaking that included prohibiting employees from talking to the public about their working conditions, banning distribution of pro-union literature, interrogating employees about

their voting intentions, threatening to falsify documents in order to discipline union supporters, and issuing multiple threats to fire employees in retaliation for pro-union activities or to close the plant as a whole if employees voted to unionize.⁵⁵

That Nissan engaged in such widespread lawbreaking so soon after having been forced to post public notices vowing to respect the law is a testament to the near total absence of meaningful penalties under current law. Even in the most extreme cases – if an employer is found guilty of having illegally terminated union supporters – the maximum possible penalty is that the employer may be required to hire the worker back, and to provide backpay for the period the person was laid off, minus whatever money the person earned at another job in the meantime.⁵⁶ Since most individuals find another job, the total back payment may be quite small. If earnings in the replacement job equaled those of the former position, the employer may not owe any backpay whatsoever.⁵⁷ With such a weak penalty, some executives have come to regard the backpay remedy as their “hunting license.”⁵⁸

Given the lack of meaningful enforcement, it is unsurprising that NLRB elections are characterized by rampant lawlessness.⁵⁹ In recent years:

Given the lack of meaningful enforcement, it is unsurprising that NLRB elections are characterized by rampant lawlessness.

- Employers have been charged with violating workers’ legal rights in 41.5% of all NLRB-supervised union elections.
- Employers have been charged with illegally firing workers in nearly one-fifth (19.9%) of elections.
- In nearly one-third (29.2%) of all elections, employers have been charged with illegally coercing, threatening, or retaliating against workers for union support.
- Charges of illegal activity are even more frequent among larger employers, such as those most common in the auto industry: in elections involving more than 60 voters, more than half (54.4%) of employers were charged with violating the law.

To put these findings in context, in the 2016 elections for president and Congress, the Federal Elections Commission reports a total of 372 charges of illegal activity, or one charge for every

367,000 voters.⁶⁰ By comparison, NLRB-supervised elections saw one charge for every 161 eligible voters.⁶¹ By this count, charges of illegal activity are 2,000 times more common in NLRB elections than in federal elections.

Table 1
Share of NLRB Election Campaigns in Which Employers Were Charged With Illegal Activity

Total, all forms of illegal activity	41.5%
Firing pro-union employees	19.9%
Imposing discriminatory discipline on union supporters	14.9%
Making threats against pro-union employees or offering bribes for employees to vote no	18.2%
Spying on pro-union employees	13.9%

A multi-billion dollar industry of “union avoidance” consultants and law firms helps employers exploit the weakness of federal labor law in order to deny workers the right to collective bargaining.

Legal Intimidation and Coercion: Elections Without Democracy

Even when employers obey the law, they rely on a set of tactics that are legal under the NLRA but illegal in elections for Congress, city council, or any other public office. A multi-billion-dollar industry of “union avoidance” consultants and law firms help employers exploit the weakness of federal labor law in order to deny workers the right to collective bargaining.⁶² Over the past fifty years, these advisors have developed cookie-cutter strategies that are applied across industries. By the early 2000s, over three-quarters of all large firms employed anti-union consultants when faced with employee organizing – including in the auto industry.⁶³ For example:

- When workers at Nissan’s Canton, Mississippi plant tried to form a union, the company turned to the anti-union law firm of Littler Mendelson, which boasts a “Union Prevention” practice in which “we help employer develop strategies for dealing with union avoidance” in order to “minimize the risk of organizing campaigns.”⁶⁴
- Volkswagen hired both Littler Mendelson and the union avoidance firm IRI Consultants when its employees sought to unionize.⁶⁵

- When workers started to organize at Fuyao Glass – the country’s largest producer of automobile glass – the company paid nearly \$800,000 for union avoidance firm Labor Relations Institute to help stop the unionization effort.⁶⁶
- Toyota, Hyundai, BMW and Honda have all contracted with a firm whose president boasts of “maintaining union-free operations” and serves on the Council for Union-Free Environments.⁶⁷
- Mercedes-Benz, Hyundai and BMW have all used Ogletree Deakins – the country’s second-largest firm specializing in union avoidance

Union elections conducted under the National Labor Relations Act fail to uphold the most basic standards of American democracy.

– for advice on how to undermine employee organizing efforts.⁶⁸

The voter intimidation tactics described in this report are drawn from the playbooks developed by such consultants.⁶⁹

When most people hear that there is such a thing as union “elections,” they assume these must be conducted in accord with the same democratic standards that Americans apply to all other elections. Unfortunately, nothing could be further from the truth. As the world’s first democracy, the United States has long served as the standard-bearer for defining what constitutes “free and fair” elections, including:

- Free speech for both candidates and voters
- No forced attendance at political events or forced consumption of political propaganda.



- Equal access to voters
- Equal access to the media
- Protecting voters from economic coercion

By each one of these measures, union elections conducted under the National Labor Relations Act fail to uphold the most basic standards of American democracy.

To imagine what it might be like if elections to Congress were conducted under the same rules as NLRB elections, it is important to understand that union election campaigns take place primarily within the workplace. Thus, the list of workers’ contact information is equivalent to the voter rolls in elections to public office; meetings, media and First Amendment rights in the workplace are the equivalent of print, digital and broadcast media in elections for public office. Seen this way, the comparison between NLRB rules and those we take for granted in American democratic elections is stark indeed. Indeed, NLRB-supervised elections look more like the discredited customs of rogue regimes abroad than anything we would call American. There is, for instance, no First Amendment right of free speech for voters in union elections. There is no equal access to media. Indeed, there is not even equal access to the names and

contact information of eligible voters. There is no effective protection against economic coercion of voters. Finally, because there are no meaningful penalties for violating voters’ rights, even the few protections that federal law provides employees are routinely ignored by employers bent on quashing unionization drives. The discussion that follows below describes how NLRB elections fail to meet the fundamental standards of free and fair elections.

Table 2
American Democratic Standards Compared With NLRB

	Federal Elections	NLRB Elections
Unequal Access to Voter Lists	Illegal	Legal
One Party Speaks to All Voters Every Day, the Other Party is Prohibited	Illegal	Legal
Vote Takes Place at One Party's Premises	Illegal	Legal
Voters Forced to Discuss Their Political Views	Illegal	Legal
Media Dominated by One Party, Unavailable to the Other	Illegal	Legal
Voters Forced to Attend Partisan Speeches	Illegal	Legal
Voters Forced to View Partisan Videos	Illegal	Legal
Supervisors Tell Employees They May Lose Their Jobs if the Vote the "Wrong" Way	Illegal	Legal
Election Results Not Implemented for Years	Illegal	Legal

The first prerequisite of democratic elections is guaranteeing that all candidates have equal access to the list of names and addresses of potential voters.⁷⁰ In elections to public office, it is axiomatic that the list of eligible voters must be provided to competing candidates at the same time and in the same manner.⁷¹

Unequal Access to Voters and the Denial of Employees’ Right to Vote

In any workplace, management has every employee’s contact information from their date of hire and is free to campaign against unionization at any time. But workers who are interested in organizing their workplace have no right to this information. And this unequal access to the voter list poses a major barrier to most workers ever getting a chance to vote on unionization, and marks the first place where labor law departs from American democratic norms.

When workers become interested in forming a union in their workplace, neither they nor any union with which they are working can get a list of potential voters. For pro-union employees to get access to the voter list, they must first collect signatures from at least 30% of their coworkers and ask the NLRB to schedule a vote on unionization.⁷² The fact that pro-union employees must accomplish this without any list to work from is a daunting prospect. If candidates seeking to challenge an incumbent Congressperson first had to collect signatures of support from 30% of their district's residents – and to do so without knowing the names or addresses of registered voters – it is hard to imagine how any challenger could prevail. Certainly if a foreign country operated in this manner, the U.S. government would not hesitate to denounce this as a sham electoral system. But it is exactly such a system that U.S. citizens must endure in workplaces across the country.

Taking advantage of this one-sided access to employees, employers' foremost goal is not to convince workers to vote against unionization, but to deny them the chance to vote entirely – by preventing pro-union workers from reaching 30% of their colleagues. As attorneys from the Jackson Lewis firm crow, “winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!”⁷³ Consultants advise employers to look out for early “warning signs” of employee organizing, and to launch an aggressive counter-offensive as soon as any workers begin discussing unionization, with the goal of preventing an election.⁷⁴ One organizer describes what this looks like in practice:

*Supervisors ... were already calling workers at home on Saturday morning, instructing employees not to speak with union organizers who had begun home visits on Friday afternoon. On Monday morning at 7:00 am the plant manager began captive-audience meetings, fifteen of which were held, where supervisors warned employees that the corporation might shut the plant down if it were unionized.*⁷⁵

By combining intimidation tactics with unequal access to voters, consultants report an impressive number of workplaces in which they have successfully denied employees the right to vote.⁷⁶

One-sided domination of media in the workplace

For those employees who do manage to win the right to vote, what awaits them is an electoral season characterized by heavy-handed intimidation tactics that would not be allowed in any election to public office. The fundamental aim during an election is, as one consultant notes, “to reduce the union’s access to the employees, the employees’ access to the union, and the flow of union information within the workplace.”⁷⁷ The universal advice of anti-union consultants and lawyers begins with two rules that set the stage for the election. First, union organizers are banned from ever entering the workplace. Second, employees are banned from talking about the union while they are on work time, and are banned from distributing pro-union information except when they are both on break time and in a break room.⁷⁸ Further, even spaces where employees are permitted to talk about the union are dominated by management’s message; at Nissan, the company ran anti-union videos on a continuous loop in the employee break areas.⁷⁹

Because employers so tightly restrict workplace communication, the primary means for pro-union employees to talk with co-workers is calling on them at home after work hours. But employees often live spread out across large distances, work more than one job, and may be afraid to be seen meeting with a known union supporter. As a result, research shows that in a typical union campaign, less than half the employees have even a single conversation with a union representative.⁸⁰ As management attorney DeMaria notes,

[U]nions are at a severe disadvantage in the communications battle. Home visitations are ex-

pensive and time-consuming, meetings are sparsely attended because they take place on the employee's own time, and union organizers can rarely ensure that all voters will even receive the union flyers that organizers hand out. On the other hand, management has the employee under its control for eight hours a day.⁸¹

Employers typically rely on their domination of workplace media to launch an intensive and entirely one-sided

communications blitz in the months leading up to a vote, including plas-

tering the workplace with anti-union posters, leaflets and videos and flooding the workplace with “Vote No” t-shirts, buttons, hats and bumper stickers.⁸² When employees at a Kumho Tire plant in Georgia sought to join the United Steelworkers in 2017, they faced a typical such campaign: as one employee described, “the whole place was covered in anti-union posters.”

In addition, “anti-union videos played 24/7 on flat screens that management put up in the employee entrance to the plant, at the security gates, in the cafeteria and in break rooms... Any time you went on break or to the bathroom, they were in your face.”⁸³

Within this lopsided campaign environment, the employer’s message typically focuses on a few key themes: unions will drive employers out of business, unions only care about extorting dues payments from workers, and unionization is futile because employees can’t make management do something it doesn’t want to do.⁸⁴ Many of these arguments are highly deceptive or outright false. At the heart of Nissan’s anti-union campaign, for instance, was the repeated insistence that the plant was in danger of closing if workers voted to form a union; but all of Nissan’s plants in other countries are unionized and none has ever closed as a result.⁸⁵ So too, many employers have stressed



that a union will require employees to pay exorbitant dues – even in states with “right to work” laws where all dues are strictly voluntary.⁸⁶ Yet in an atmosphere in which pro-union employees have little effective right of reply, these messages may prove extremely powerful.

Forced Propaganda Meetings and No Freedom of Speech for Employees

The right to free speech enshrined in the First Amendment to the Constitution stands at the heart of the U.S. electoral system. The standard for U.S. democracy set by the Supreme Court is that “debate on public issues should be uninhibited, robust and wide-open.”⁸⁷ But this right does not extend to employees participating in NLRB elections.

Under current labor law, management is not only permitted unlimited reign to voice anti-union arguments to employees, but also the power to largely stifle employees’ own political speech. At Nissan, within two days of employees’ asking the Labor Board to hold a vote for unionization, all employees were forced into mass meetings in which they were required to watch anti-union videos and listen to anti-union speeches. Such meetings went on throughout the entire campaign period, culminating in a mass event two nights before the vote, in which employees were bussed in from every part of the 1,000-acre plant and required to

listen to a succession of managers attack unionization. At none of these meetings were pro-union employees permitted to offer an alternative view. Indeed, management took care to prevent pro-union employees from talking to others even while walking back to work from such meetings: known pro-union employees were generally segregated in their own meetings, while openly anti-union workers were grouped together with undecided voters in order to amplify the power of their voices.⁸⁸

Under current labor law, management is not only permitted unlimited reign to voice anti-union arguments to employees, but also the power to largely stifle employees’ own political speech.

Employers are granted the unique power to force employees to attend one-sided anti-union meetings. Workers may be required to attend mass meetings – as often as twice a day – to watch anti-union videos and listen to anti-union speeches from their managers. Not only is the union not granted equal time, but pro-union employees may be required to attend on condition that they not ask questions; those who speak up despite this prohibition can be legally fired on the spot.⁸⁹ Unsurprisingly, such one-sided “captive audience” meetings are a very popular tool for discouraging unionization. The most recent data show that nearly 90% of employers force employees to attend captive audience events, with the average employer holding 10 such mandatory meetings during the course of an election campaign.⁹⁰

It is inconceivable that such a practice could be allowed in elections for public office – that Democrats, for instance, might compel all voters to attend partisan campaign rallies, where Republicans who spoke their minds could find themselves unemployed. Indeed, when other countries’ ruling parties force voters to attend partisan campaign rallies, we denounce it as an abuse of power and a perversion of democracy. But this has become a standard feature of NLRB elections.⁹¹

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Economic Coercion of Voters

In elections to public office, it is axiomatic that U.S. citizens cannot be threatened, coerced or bribed into voting for one party or another. Under the NLRA, however, while employers cannot explicitly threaten to fire employees for unionizing, employers may “predict” that they’ll lose their jobs as the result of a pro-union vote.⁹⁵ Employers are legally permitted, for instance, to report that they will lose major customers in the event of unionization,⁹⁶ and to inform employees that personal relationships in the company will suffer.⁹⁷ For most employees, these statements are understood as a threat to their livelihood, and serve as one of the single most powerful motives to vote against a union.

In recent years, anti-union politicians and corporate lobbyists have amplified the threat of union supporters losing their jobs. In the leadup to a 2014 unionization vote at the Volkswagen plant in Chattanooga, the Majority Leader of the state House of Representatives threatened to withhold state subsidies for the plant if workers voted to organize,⁹⁸ while US Senator and former Chattanooga mayor Bob

In addition to group meetings, employers typically have supervisors talk one-on-one with each of their direct subordinates.⁹² As one longtime consultant explained, a supervisor’s message is especially powerful because “the warnings... come from... the people counted on for that good review and that weekly paycheck.”⁹³ In these conversations, the same person who controls one’s schedule, assigns job duties, approves vacation requests, grants raises, and has the power to terminate employees “at will” asserts the importance of voting ‘no.’ As one Nissan employee explained, when a personal supervisor engages one in an anti-union conversation, “you feel threatened, and it’s a real fear. If you want a day off, you want to spend time with your family, or you are too sick, you have to call this person ... It’s like, ‘If I don’t do it, then am I going to be treated differently?’”⁹⁴

As in group meetings, listening to a supervisor’s anti-union rhetoric is compulsory. In the American democratic system, the right to free speech includes within it the freedom to not listen to political speech. If a canvasser knocks on the door of your home, you are free to tell them you’re not interested in talking. But if a manager walks up to you on the job and launches into an anti-union speech, an employee is not free to walk away, put in earbuds, or sigh with obvious boredom or disrespect.



Corker simultaneously declared that if the workers voted against unionization, the company would commit to manufacturing a new line of SUVs at the plant.⁹⁹ In 2019, just weeks before another unionization vote, Tennessee Governor Bill Lee personally led an anti-union captive audience meeting at the Chattanooga facility. Since the governor had made his opposition to the union so vociferous and so clearly known, it is reasonable to assume that his words were understood as a threat to put the plant's future in jeopardy if the workers voted to organize. Leading members of the Tennessee state legislature continued to threaten loss of state subsidies if workers unionized during the 2019 election.¹⁰⁰ The addition of leading elected officials as a platform for issuing threats against union supporters points to one more dimension by which federal labor law fails to safeguard the principles of free and fair elections.¹⁰¹

the tactics of employer intimidation, coercion, restrictions on employee free speech and one-sided control of workplace communications have become standard features of NLRB elections.

The Outcome of Elections Without Democracy

As shown in Table 3 below, the tactics of employer intimidation, coercion, restrictions on employee free speech and one-sided control of workplace communications have become standard features of NLRB elections.¹⁰² Between 80%-90% of companies force employees to attend mass anti-union meetings, with an average of between 5-10 forced meetings per NLRB election. A majority threatened that the firm would close down if workers voted to organize. More than three-quarters of employers have supervisors conduct one-on-one anti-union meetings with their subordinates. Between one-quarter and one-third of all employers fire union activists during the course of the election campaign; the great majority of those fired are not reinstated before election day. The most recent data shows that 40% of employers were charged with violating federal labor law. All of these strategies exert a powerful force in scaring employees away from exercising their right to collective bargaining.

Table 3
Three Decades of Research: Standard Tactics of Employer Anti-Union Campaigns

	Bronfenbrenner 1994	Rundle 1998	Bronfenbrenner 2000	Theodore 2005	Bronfenbrenner 2009
Hired union avoidance consultant	71%	87%	75%		75%
Held forced-attendance meetings	82%	93%	92%	87%	89%
<i>average number of meetings</i>	5.5	10.0	11.4		10.4
Supervisors hold 1-on-1 anti-union talks with subordinates	79%	76%	78%	98%	77%
Employer threatened full or partial plant closing			51%	49%	57%
Fired union supporters	30%	28%	25%	30%	34%
<i>average number fired</i>		2.7	4.09	3.60	2.6
Mailed letters to employees' homes	79%		70%		70.0%
<i>average number of letters</i>	4.5		6.51		6.5
Distributed leaflets in workplace	70%		75%	75%	74%
<i>average number of leaflets</i>	6.0		13.37		16.2
Offered bribes/favors for workers to vote no		42%	34%	51%	22%
Illegally aided anti-union committee	42%	50%	31%		30%
Employer charged with violation of federal labor law	36%		33%		40%

It is common for unionization drives to start with two-thirds of employees supporting unionization and still end in a “no” vote. This reversal points to the anti-democratic dynamics of NLRB elections: voters are not being convinced of the merits of remaining without a collective voice — they are being intimidated into the belief that unionization is at best futile and at worst dangerous. When a large national survey asked workers who had been through an election to name “the most important reason people voted against union representation,” the single most common response was management pressure, including fear of job loss.¹⁰³ It’s not surprising that such threats

succeed in scaring people away from forming unions. As one Fuyao Glass employee noted, “the anti-union campaign worked. Workers feared losing their job for supporting the union.”¹⁰⁴ But those who vote on this basis are not expressing a preference to remain unrepresented. Indeed, many might still prefer unionization if they believed it could work. Where fear is the motivator, what is captured in the snapshot of the ballot is not preference but despair.

Higher Standards for Political Elections Abroad Than for Union Elections at Home

Unfortunately, it appears that the federal government upholds higher standards for voters in foreign countries than for American workers at home. Thus, for instance, the State Department rejected elections in Ukraine as illegitimate when that country failed to “ensure a level playing field for all political parties.”¹⁰⁵ Among the criticisms leveled at Ukraine were that employees of state-owned enterprises were pressured to support the ruling party; mineworkers were told to withdraw from a trade union that supported the opposition; faculty and students





were instructed by the head of their university to vote for specific candidates; and the ruling party enjoyed “uncritical coverage from regional and local media outlets” while the opposition faced restricted access to billboards, newspapers, and state-funded television.¹⁰⁶ Similarly, the U.S. government criticized elections in Armenia for failing to meet democratic standards because government employees and factory workers were required to attend ruling party rallies and state-run television refused to provide equal access for opposition candidates.¹⁰⁷ Yet the actions that disqualify an election abroad are perfectly legal in every private sector workplace across the United States, and have come to

define standard NLRB elections. Viewed in this context, it is remarkable that any workers succeed at organizing unions under current law.

Conclusion

The increasing hardship that most families face and the escalating inequality that has come to define our country are not facts of nature over which we lack control. We may not be able to control the economic cycles of job growth and unemployment, but we can guarantee that when companies are doing well, the employees whose work makes those profits possible share in the benefits. Collective bargaining is the opposite of a one-size-fits-all government mandate. Instead, it is a process that can be fine-tuned for the circumstances that face any given employer at any given point in time. Collective bargaining is a mechanism by which employees at a given firm are able to negotiate wages and benefits that are fair to employees while still ensuring the financial health of their particular employer.

Given the improved wages, benefits and job safety that workers enjoy when they have a union, it’s not surprising that nearly 60 million non-union workers wish

they had a union in their workplace. But under current law, virtually none of these employees will see their wish come true.

The profoundly undemocratic nature of NLRB elections, and the ease with which employers can evade or ignore the few rights provided under federal labor law, has made it almost impossible for American workers to exercise the legal right to collective bargaining.

The decline of unions is one of the most important factors that has suppressed wage growth and led to an economy of unprecedented inequality. If we are serious about restoring American families' ability to support their families in dignity, we must restore workers' ability to negotiate with their employers – in reality and not just on paper.

The U.S. House of Representatives took an important step in the direction of restoring workers' collective bargaining rights when it passed the Protecting the Right to Organize (PRO) Act in February 2020.¹⁰⁸ Some of the most damaging tactics used by employers to oppose union organizing efforts would be restricted under the legislation, and meaningful penalties would be imposed when employers violate the law. But the prospects for this federal

legislation passing are slim, and we can't wait for that to happen before insisting on more democratic procedures for union elections.

A number of employers have already taken steps to establish fairer processes for workers who want to establish a union, without relying on the NLRB and without waiting for federal legislation. In the private sector, companies including UPS, AT&T, US Steel, Kaiser Permanente, Safeway and Ford have all signed agreements that provide a democratic path to establishing a union, without forcing workers to go through the gauntlet of threats and intimidation that have come to define NLRB elections.¹⁰⁹ In the public sector, the states of California, Illinois, New Hampshire, New Jersey, New York and Oregon have long established procedures for enabling employees to form a union without fear of retaliation from their employers.¹¹⁰ There is no reason that all employers in the auto industry can't follow this example.

The auto industry constitutes the country's single largest manufacturing sector, accounting for 3% of the entire U.S. GDP.¹¹¹ If we are to reverse the crisis of inequality and restore family-wage jobs, it is critical that we restore genuine organizing rights in this industry. In the coming years, the

If we are to reverse the crisis of inequality and restore family-wage jobs, it is critical that we restore genuine organizing rights in this industry.

federal government will spend many billions of dollars helping the auto industry transition to electric vehicles – including subsidies to producers and consumers, construction of a national charging-station infrastructure, and commitments to large-scale purchase of electric vehicles for federal, state and local government fleets.¹¹² As we stand on the brink of reinventing the auto industry, we must ensure that employees in this industry are free to exercise their right to collective bargaining free from intimidation or fear or reprisals. By insisting on workplace democracy in the next-generation auto industry, we can ensure that Americans' tax dollars serve not only to develop clean energy technologies but also to restore American workers' ability to support their families at a dignified and secure standard of living.

About the author

Gordon Lafer is a professor at the University of Oregon's Labor Education and Research Center and a Research Associate with the Economic Policy Institute. He previously served as Senior Policy Advisor for the U.S. House of Representatives' Committee on Education and Labor.



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- 35 Statement of Cynthia Harper before the U.S. House of Representatives, Committee on Education and Labor, Health, Employment Labor and Pensions Subcommittee, Hearing on "Protecting Workers' Right to Organize: The Need for Labor Law Reform," March 26, 2019.
- 36 See J. Hagedorn, C Paras, H. Greenwich and A. Hagopian, "The role of labor unions in creating working conditions that promote public health," American Journal of Public Health 106(6), 2016. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3430909/>; Alison D. Morantz, "Coal Mine Safety: Do Unions Make a Difference?" ILR Review 66(1): 88-116, January 2013. New York Committee for Occupational Safety and Health, Deadly Skyline: An Annual Report on Construction Fatalities in New York State, January 2017; Harry Miller, Tara Hill, Kris Mason, and John S. Gaal, "An Analysis of Safety Culture and Safety Training: Comparing the Impact of Union, Non-Union and Right-to-Work construction Venues," Online Journal for Workforce Education and Development, vol. 6, no. 2, 2013; Florida Department of Health, A Comparison of Health and Safety Concerns of Union and Non-Union Construction Workers, 2012. http://www.floridahealth.gov/environmental-health/occupational-health-surveillance/_documents/const-union1.pdf; and Kwan Hyung Yi, Hm Hak Cho and Jiyun Min, "An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees' Activity, and Their Relation to the Changes in Occupational Injury and Illness Rates," Safety and Health at Work, volume 2, no. 4, December 2011. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3430909/>.
- 37 Peter Waldman, "Inside Alabama's Auto Jobs Boom: Cheap Wages, Little Training, Crushed Limbs," Bloomberg, March 23, 2017. <https://www.bloomberg.com/news/features/2017-03-23/inside-alabama-s-auto-jobs-boom-cheap-wages-little-training-crushed-limbs>.
- 38 United States of America, Before the National Labor Relations Board, Region 10, Complaint and Notice of Hearing: Faurecia Interior Systems, Inc. and Alison Moore, an individual, Case 10-CA-147100, July 23, 2015.
- 39 See Economic Policy Institute, Fact Sheet: Unions help reduce disparities and strengthen our democracy, April 23, 2021. <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy>.
- 40 Craig A. Giffi, et al, U.S. public opinions on the manufacturing industry, Deloitte, February 13, 2015. <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/manufacturing/us-mfg-public-perception-manufacturing-021315.PDF>.
- 41 American Automotive Policy Council, State of the U.S. Automotive Industry 2020, <https://www.americanautomakers.org/sites/default/files/AAPC%20ECR%20Q3%202020.pdf>; U.S. Bureau of Labor Statistics, Automotive Industry: Employment, Earnings and Hours. <https://www.bls.gov/iag/tgs/iagauto.htm>. Accessed June 22, 2021.
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- 43 Jim Barrett and Josh Bivens, The stakes for workers in how policymakers manage the coming shift to all-electric vehicles, Economic Policy Institute, September 22, 2021. <https://www.epi.org/publication/ev-policy-workers>.
- 44 Jim Barrett and Josh Bivens, The stakes for workers in how policymakers manage the coming shift to all-electric vehicles, Economic Policy Institute, September 22, 2021. <https://www.epi.org/publication/ev-policy-workers>. By comparison, Black workers account for just 14.8% of the workforce in non-union auto plants.
- 45 Catherine Ruckelshaus & Sarah Leberstein, Manufacturing Low Pay: Declining Wages in the Jobs That Built America's Middle Class. National Employment Law Project, November 2014.

- 46 For one such example, see the description of the anti-union campaign run by Kumho Tire in Gordon Lafer and Lola Loustanaun, *Fear at Work*, Economic Policy Institute, July 2020. <https://files.epi.org/pdf/202305.pdf>.
- 47 Jim Barrett and Josh Bivens, *The stakes for workers in how policymakers manage the coming shift to all-electric vehicles*, Economic Policy Institute, September 22, 2021. <https://www.epi.org/publication/ev-policy-workers>.
- 48 Justin Worland, “The Auto Industry is Going Green Will Workers Go Along for the Ride?” *Time* magazine, August 12, 2021. <https://time.com/6084144/green-auto-industry-workers>.
- 49 Jim Barrett and Josh Bivens, *The stakes for workers in how policymakers manage the coming shift to all-electric vehicles*, Economic Policy Institute, September 22, 2021. <https://www.epi.org/publication/ev-policy-workers>. The jobs impact of EV depends largely on public policies encouraging both EV components and their final assembly to be done in the U.S. In 2020, for instance, 98% of vehicles sold in China were assembled in that country, and 100% of the value of electric car batteries sold in China remained in that country. By contrast, just 72% of vehicles sold in the US were assembled domestically, and most of the value of EV batteries was paid to foreign companies, primarily in China, Japan and South Korea. Noam Scheiber, “What Will it Take for Electric Vehicles to Create Jobs, Not Cut Them?” *New York Times*, September 22, 2021. <https://www.nytimes.com/2021/09/22/business/economy/electric-vehicles-jobs.html>.
- 50 Thomas Kochan, William Kimball, Duanyi Yang, and Erin Kelly, “Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research,” MIT Sloan School of Management Institute for Work and Employment Research working paper, June 2018.
- 51 Data is from fiscal 2017, when new unions were certified in 868 NLRB-supervised elections, with a combined total of 47,278 eligible voters. Election filings data for 2016-2017 were obtained from the NLRB through Freedom of Information Act (FOIA) requests NLRB-2018-001366a (submitted 9/26/2018, completed 10/26/2018) and NLRB-2019-000178\$ (submitted 11/28/2018, completed 10/26/2018). NLRB records sometimes make it difficult to identify duplicate records; thus it is possible that some of the elections counted were duplicates, and the actual total of newly organized workers is less than that reported, but for purposes of this report this number is used as an upper-boundary estimate.
- 52 See *Tesla, Inc.*, 370 NLRB No. 101 (2021), pet. for rev. pending, No. 21-60285 (5th Cir.). The NLRB found that Tesla illegally terminated one union supporter and disciplined another in 2017, but Tesla appealed that ruling, and four years after the fact these workers have yet to be made whole.
- 53 American Factory (Higher Ground Productions 2019). See also Thomas Gnau, “Fuyao settled charges of firing union backers,” *Dayton Daily News*, August 28, 2019. <https://www.daytondailynews.com/news/local/fuyao-settled-charges-firing-union-backers/Ol60WtE7Yp1kYsHlpcwRfM>.
- 54 United States Government, National Labor Relations Board, *Settlement Agreement in the Matter of Nissan North America*, Cases 15-CA-118206 and 15-CA-123247, April, 2014.
- 55 United States of American, Before the National Labor Relations Board, Region 15. Order Further Consolidating Cases, Fifth Consolidated Complaint and Notice of Hearing, *Nissan North American, Inc. and Kelly Services, Inc. and International Union of United Automobile Aerospace and Agricultural Implement Workers of America (UAW)*, NLRB, August 30, 2017. This complaint includes charges stemming from illegal management actions occurring between January 2015 and June 2017.
- 56 *Phelps Dodge Corp. v. NLRB*, 313 US 177, 198-200 (1941); and *Retailer Delivery Systems, Inc.*, 292 NLRB 121, 125 (1988).
- 57 It should be noted that the Board considers illegally fired employees to have an affirmative burden to seek work proactively; a fired worker who does not look for another job after being illegally laid off may find his or her backpay cut as a result, even after winning the case. See e.g., *American Bottling Co.*, 116 NLRB 1303 (1956).
- 58 Quoted in Steve Norwood, *Strikebreaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America*, University of North Carolina Press, 2002, p. 247.
- 59 The following data, including that in the Table below, is reported in Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustanaun, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, Economic Policy Institute, December 2019.
- 60 Data on Federal Election Commission enforcement comes from U.S. Federal Election Commission, “FEC Enforcement Statistics 1977-2019,” October 17, 2019. The estimate of charges of illegal activity per voter is based on the fact that more 136 million voters participated in the fall 2016 election; see Federal Elections Commission, “Official 2016 Presidential General Election Results,” January 30, 2017.
- 61 Based on NLRB data for FY 2016. In fiscal 2016 there were just 1,193 representation elections conducted under NLRB, with just under 80,000 eligible voters. Election data for 2016-2017 was obtained from the NLRB through FOIA requests NLRB 2018-001366 and NLRB 2019-00178.

62 The two largest “union avoidance” lawfirms alone – Littler Mendelson and Ogletree Deakins – each boasted revenues above \$500 million in 2018. (John Logan, “The new union avoidance internationalism,” *Work Organisation, Labour & Globalisation*, vol. 13, no. 2 (2019): 57-77. <https://www.jstor.org/stable/pdf/10.13169/workorglaboglob.13.2.0057.pdf?refreqid=excelsior%3A6d421a04ab1775e3874b10d09b8c9809>.) In addition, there are a host of other lawfirms working in this field, along with an industry of non-attorney union avoidance consultants. It is difficult to estimate the size of this consultant industry, because federal reporting requirements are both loose and lightly enforced. One very conservative estimate is that employers spend at least \$340 million per year on non-attorney union avoidance consultants. Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, Economic Policy Institute, December 2019. Based on these figures, it seems clear that the total size of this industry, including both law firms and consultants, exceeds \$2 billion per year.

63 Bronfenbrenner, 2009, reports that 75% of employers in firms of 50 or more employees used such consultants.

64 Quoted in John Logan, “The new union avoidance internationalism,” *Work Organisation, Labour & Globalisation*, vol. 13, no. 2 (2019): 57-77. <https://www.jstor.org/stable/pdf/10.13169/workorglaboglob.13.2.0057.pdf?refreqid=excelsior%3A6d421a04ab1775e3874b10d09b8c9809>.

65 Littler Mendelson attorneys have represented Volkswagen in proceedings before the NLRB related to union campaigns at the company’s Chattanooga, Tennessee plant since 2014. Projections, an IRI company that promises to make employers “union proof,” reports that it “created the multimedia resources needed to aid VW Chattanooga in defeating the UAW.” <https://projectionsinc.com/about-us/#results>.

66 Thomas Gnau, “Fuyao spent nearly \$800k with consultant in union battle,” *Dayton Daily News*, December 26, 2017. <https://www.daytondailynews.com/business/fuyao-spent-nearly-800k-with-consultant-union-battle/zBlqg0WtbKGhVmJbtNQjI/>.

67 Mitchell Thompson, “How Honda’s anti-union monitor works,” *Briarpatch*, September 1, 2020. <https://briarpatchmagazine.com/articles/view/how-hondas-anti-union-monitor-works>. The profile of Terry Dunn, president of the Positive Management Leadership firm contracted by Honda, is at <https://www.pmlxperience.com/terrence-terry-c-dunn-jr>; Mitchell Thompson, “Union-Bashing is on the Menu at Tim Hortons,” *Jacobin*, January 2021. <https://www.jacobinmag.com/2021/01/positive-management-leadership-union-busting-canada>.

68 John Logan, “The new union avoidance internationalism,” *Work Organisation, Labour & Globalisation*, vol. 13, no. 2 (2019): 57-77. <https://www.jstor.org/stable/pdf/10.13169/workorglaboglob.13.2.0057.pdf?refreqid=excelsior%3A6d421a04ab1775e3874b10d09b8c9809>.

69 Among the consultants drawn on for this report are the Alfred DeMaria, Gene Levine Associates; Labor Relations Institute; Martin J. Levitt, and the law firm of Jackson, Lewis.

70 “It is of particular importance,” the Supreme Court has stated, “that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate ... their positions on vital public issues.” *Brown v. Hartlage*, 456 US 45 (1982), quoting *Budkley v. Valeo*, 424 US 1, 52-53 (1976).

71 State election laws vary on the amount of access to voter lists for political candidates, campaign committees and political parties, and members of the public, and the amount of information provided, but in all cases, the same access rules apply equally to all similarly situated individuals and groups. See National Conference of State Legislatures, *Access To and Use of Voter Registration Lists*, Aug. 5, 2019, <https://www.ncsl.org/research/elections-and-campaigns/access-to-and-use-of-voter-registration-lists.aspx>.

72 *Excelsior Underwear, Inc.*, 156 NLRB 1239-40 (1966).

73 Jackson Lewis, *Winning NLRB Elections: Avoiding unionization through preventive employees relations programs*, CCH, 1997, p. 87. Jackson Lewis advertises one component of its labor relations practice as assisting employers to “develop their strategic, preventive labor relations programs,” and for many years the firm annually held “Union Free” workshops for employers. Jackson Lewis, Labor Relations, <http://www.jacksonlewis.com/practice/labor-relations> (last visited Jul. 29, 2021). In 2020, the workshop promised “a focus on pre-petition organizing and card signing.” Jackson Lewis, *Brochure, Remaining Union Free, Preparing Your Team in 2020*, https://www.jacksonlewis.com/sites/default/files/docs/JL_Union_Free_2020.pdf (last visited Jul. 29, 2021). In 2005, the Jackson, Lewis website advertised a seminar on “How To Stay Union-Free In the 21st Century,” which included a session entitled “Pre-Petition: How to Lawfully and Effectively Shut Down Organizing Once It Starts.” www.eeiconferences.com/unionagenda. Accessed 7/7/05.

74 For instance, Levine 2005 stresses that it is critical for supervisors to be trained and prepared to “[begin] the employer’s campaign as soon as labor activity has been detected.” “Upon detection of union activity,” he explains, “your immediate and primary thrust should be to mount a counter-campaign that focuses on convincing employees not to sign union cards – to keep the union from getting the 30% show of interest” required for an NLRB election. Similarly New York attorney Alfred DeMaria insists that “employers should be prepared to nip union-card signing in the bud.” Wiley Periodicals, *From the Editor: Speech to Employees at the First Sign of Union Activity*, 27:3 *Management Report for Nonunion Organizations*, 4 (March 2004).

75 Stephen H. Norwood, *Strikebreaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America*, 240 (Univ. of N.C. Press 2002). The company referenced by the organizer was C.R. Bard of Glens Falls, NY.

76 For one example see Gene Levine Associates, *Complete Union Avoidance*, 2005, p. 2.

77 John G. Kilgour, *Preventive Labor Relations*, American Management Association, 1981, p. 53. Kilgour p. 54 notes that the greatest danger comes not from outside organizers, but from “the employee already on the payroll who, for one reason or another, is promoting the union from within.”

78 No-distribution and no-solicitation rules are recommended, among other places, by Lewis and Krupman (p. 31: “to restrict literature distribution in working areas, employers should adopt a no-distribution rule.”); Management Report for Nonunion Organizations (vol. 24, no. 3, March 2001, p. 8 “A good ‘no solicitation/no distribution’ rule is essential for controlling union organizing activity on the employer’s premises,” and vol. 25, no. 5, May 2002, p. 7 “The right no-solicitation policy can help employers prevent unionization by confining organizing activities only to certain times.”); and the Sodexo 1998 manual (“Insist that any solicitation of membership or discussion of union affairs be conducted outside of employee working time.”). Even a company that has a general “No Solicitation” rule in the workplace is permitted to violate its own rule by distributing anti-union literature while enforcing the rule against pro-union handouts. “Management prerogative,” the Board has explained, “certainly extends far enough so as to permit an employer to make rules that do not bind himself.” *NLRB v. United Steelworkers, CIO (NuTone, Inc.)*, 357 US 357 (1958); and *NLRB v. Babcock & Wilcox Co.*, 351 US 105 (1956).

79 When an Election is Neither Free Nor Fair: Nissan and the 2017 Union Election in Mississippi, United Auto Workers, October 2017.

80 James Rundle, “Winning Hearts and Minds in the Era of Employee Involvement Programs,” in Bronfenbrenner, et al, editors, *Organizing to Win: New Research on Union Strategies*, Cornell University Press, 1998, p. 219.

81 Alfred DeMaria, “From the Editor: The Use of Videos in the Employer Campaign,” *Management Report for Nonunion Organizations*, vol. 28, no. 8, August 2005, p. 3.

82 Management Report, vol. 27, no. 11, November 2004, p. 5, “Checklist for “Written Communications During an NLRB Election Campaign.” It is illegal for management to hand out “Vote No” stickers, buttons or clothing to employees, since employees are considered to be forced into a choice of whether or not to wear the item in question, and this is considered a form of illegal interrogation. However, management is free to make such items available – sitting on a display table in the company break room, for instance – for any employee who chooses to pick one up.

83 Quoted in Gordon Lafer and Lola Loustau, *Fear at Work*, Economic Policy Institute, July 2020. <https://files.epi.org/pdf/202305.pdf>.

84 There is a remarkable degree of consistency in the themes of employer campaigns over the past 40 years. In his Management Report for Nonunion Organizations newsletter, Alfred DeMaria describes the “themes commonly used by employers” as including “threat to remove jobs,” “disparaging the moral character of union supporters,” “inevitability of strikes,” and “threat to reduce wages.” See “From the Editor: Learning Lesson (Good and Bad) From a Real-Life Campaign,” *Management Report for Nonunion Organizations* vol. 24, no. 4, April 2001, pp. 3–5. Another Management Report article in the same issue (p. 5), titled “Campaign Threat of Plant Closure,” notes that “predicting the future of a business if it becomes subject to an obligation to bargain with the union, is a recurring campaign theme.”

85 When an Election is Neither Free Nor Fair: Nissan and the 2017 Union Election in Mississippi, United Auto Workers, October 2017.

86 One such example occurred in the 2017 Kumho Tire election, reported in Gordon Lafer and Lola Loustau, *Fear at Work*, Economic Policy Institute, July 2020. <https://files.epi.org/pdf/202305.pdf>.

87 *New York Times v. Sullivan*, 376 US 254, 270 (1964).

88 When an Election is Neither Free Nor Fair: Nissan and the 2017 Union Election in Mississippi, United Auto Workers, October 2017.

89 The NLRB has ruled that employers have “no statutory obligation to accord the employees the opportunity to speak” at such meetings. *Hicks-Ponder Co.*, 168 NLRB 806, 814 (1967). In *Litton Systems, Inc.*, 173 NLRB 1024, 1030 (1968), the NLRB supported an employer who fired an employee for leaving a captive meeting, affirming that employees have “no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management’s noncoercive antiunion [sic] speech designed to influence the outcome of a union election.” In one of the landmark cases concerning captive audience meetings, the NLRB acknowledged that an employer “did its best to inhibit the free play of discussion,” but nevertheless ruled the behavior legal. *Luxury of New York*, 185 NLRB 100 (1970).

90 Kate Bronfenbrenner, *No Holds Barred—The Intensification of Employer Opposition to Organizing*, Economic Policy Institute and American Rights at Work Education Fund, May 2009.

91 It is telling that, outside of labor law, the federal courts have recognized employees’ right to protection against captive audience communications in some other aspects of their work lives. For instance, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Suppl. 1486 (M.D. Fla. 1991), the court ruled that sexist speech created a hostile work environment for female employees because they were a captive audience, and therefore the speech must be restricted.

92 Consultants universally stress the power of using supervisors to convey anti-union messages to their subordinates. Gene Levine (2005) notes, “The most effective method for gaining the support of employees is one-on-one, eyeball-to-eyeball conversations between supervisors and employees.” Alfred DeMaria likewise states that “the most important factor influencing the individual’s choice of ‘Union’ or ‘Non-Union’ is his supervision—how well his supervisor communicates the company’s views during the organizing campaign.” See Alfred T. DeMaria, *The Supervisor’s Handbook on Maintaining Non-Union Status* (New York: Executive Enterprises, Inc., 1986), p. 37. Bruce Kaufman and Paula Stephan report that the management attorneys they interviewed believed that “effectively marshalling the cooperation and support of the supervisors was the single most critical ingredient to defeating the union.” See Bruce E. Kaufman and Paula E. Stephan, “The Role of Management Attorneys in Union Organizing Campaigns,” *Journal of Labor Research* 16, 1995, <https://doi.org/10.1007/BF02685719>, p. 447, p. 443.

- 93 Marty Jay Levitt, *Confessions of a Union Buster* (New York: Crown 1993), p. 10.
- 94 Quoted in Mike Elk, “Nissan, you made us mad’: union promises to fight Mississippi defeat,” *The Guardian*, August 5, 2017. <https://www.theguardian.com/us-news/2017/aug/05/mississippi-nissan-workers-vote-against-union>.
- 95 See, e.g. *Tri-Cast, Inc.* 274 NLRB 377 (1985) (employers are permitted to make statements based on their predictions of “the consequences of unionization” including a letter to employees that said (a) “if we have to bid higher or customers feel threatened because of delivery cancellations (union strikes) we lose business -- and jobs,” [Emphasis in original] and (b) employer will lose “flexibility” and “cannot stay healthy with union restrictions”); *NLRB v. Gissel Packing Co.*, 395 US 575, 618 (1969) (an employer “is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or promise of benefit’”).
- 96 TNT Logistics North America, Inc. 345 NLRB 290 (2005).
- 97 *Tri-Cast, Inc.* 274 NLRB 377 (1985).
- 98 Hollie Webb, “Watson says VW may lose state help if the UAW is voted in at Chattanooga plant; McCormick urges workers to reject Union; Corker to hold press conference,” *The Chattanooga* (Feb. 10, 2014). Available at: <https://www.chattanoogan.com/2014/2/10/269310/Bo-Watson-Says-VW-May-Lose-State-Help.aspx>
- 99 Brandon Magner, “Grand Theft Auto: Calibrating Laboratory Conditions to the New Normal in Union Elections,” 5 *Idaho Law Review* 2021. <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol5/iss1/3>.
- 100 Mike Pare, “Hamilton County legislators say UAW jeopardizes Volkswagen Chattanooga’s future growth as union discounts worries state incentives will be harder to come by,” *Chattanooga Times Free Press* (Jun. 7, 2019), available at <https://www.timesfreepress.com/news/business/aroundregion/story/2019/jun/07/legislators-uaw-volkswagen/496253/>.
- 101 There is some debate as to whether the NLRB should regulate this form of speech. See Brandon Magner, “Grand Theft Auto: Calibrating Laboratory Conditions to the New Normal in Union Elections,” 5 *Idaho Law Review* 2021. <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol5/iss1/3>.
- 102 Data in this table are Kate Bronfenbrenner, “Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform,” in Friedman, et. Al, eds., *Restoring the Promise of American Labor Law*, ILR Press, Ithaca, 1994, pp. 75-89; James Rundle, “Winning Hearts and Minds in the Era of Employee Involvement Programs,” in Bronfenbrenner, et. al, eds., *Organizing to Win: New Research on Union Strategies*, Cornell Univ Press, Ithaca, 1998, pp. 213-231; Kate Bronfenbrenner, *Uneasy Terrain*, U.S. Trade Deficit Review Commission, 2000; Nik Theodore, *Undermining The Right to Organize: Employer Behavior During Union Representation Campaigns in Chicago*, American Rights at Work, 2005; and Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy institute Briefing Paper #235, May 20, 2009.
- 103 Other researchers likewise found that, among nonunion workers who wished they had one, 55% believed that “management opposition” was the central reason why they had been unable to organize. See Phil Comstock and Maier B. Fox, “Employer Tactics and Labor Law Reform,” in Sheldon Freidman, et al. (eds.), *Restoring the Promise of American Labor Law* (Ithaca, N.Y.: Cornell University Press, 1994), p. 98, and Richard Freeman and Joel Rogers, *What Workers Want*, (Ithaca, N.Y.: Cornell University Press, 1999), p. 62.
- 104 Statement of Cynthia Harper before the U.S. House of Representatives, Committee on Education and Labor, Health, Employment Labor and Pensions Subcommittee, Hearing on “Protecting Workers’ Right to Organize: The Need for Labor Law Reform,” March 26, 2019.
- 105 Philip T. Reeker, Deputy Spokesperson, “Ukrainian Parliamentary Elections,” Press Statement, United States Department of State, Washington, D.C., April 1, 2002.
- 106 These problems are detailed in International Election Observation Mission, 2002 Elections to the Verkhovna Rada of Ukraine: Statement of Preliminary Findings and Conclusions, Organization for Security and Cooperation in Europe Parliamentary Assembly, Kiev, Ukraine, April 1, 2002 (available at www.osce.org/documents/odihr/2002/04/1292_en.pdf). The State Department’s Press Statement of April 1, 2002 affirms that “the United States concurs with the OSCE mission’s preliminary statement.”
- 107 Stephan M. Minikes, U.S. Ambassador to the Organization for Security and Cooperation in Europe, “Statement to the OSCE Permanent Council,” Vienna, Austria, February 27, 2003. www.state.gov/p/eur/rls/rm/2003/19833.htm.
- 108 For a detailed description of the provisions of the PRO Act, see Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, Economic Policy Institute, December 11, 2019.
- 109 Richard Freeman, Mark Barenberg and Joel Rogers, *The Legal, Economic and Business Case for Neutrality and Majority Verification of Worker Desire for Union Representation*, Center on Wisconsin Strategies, 2016. https://cows.org/wp-content/uploads/sites/1368/2020/12/2016_The-Legal-Economic-and-Business-Case-for-Neutrality-and-Majority-Verification-of-Worker-Desire-for-Union-Representation.pdf.
- 110 Rafael Gely and Timothy Chandler, “Organizing Principles: The Significance of Card-Check Laws,” *Saint Louis University Public Law Review*, vol. 30, no. 2, 2011. <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1148&context=plr>.
- 111 American Automotive Policy Council, State of the U.S. Automotive Industry 2020, <https://www.americanautomakers.org/sites/default/files/AAPC%20ECR%20Q3%202020.pdf>.
- 112 UAW Research Department, *Taking the High Road: Strategies for a Fair EV Future*, United Auto Workers, 2020. <https://uaw.org/wp-content/uploads/2019/07/190416-EV-White-Paper-REVISED-January-2020-Final.pdf>.



lerc.uoregon.edu

lerc@uoregon.edu

1289 University of Oregon
Eugene, OR 97403-1289
(541) 346-5054



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