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LABOR VISCERALITY? WORK STOPPAGES IN THE “NEW WORK” NON-UNION ECONOMY

MICHAEL C. DUFF*

ABSTRACT

COVID-19 work stoppages involving employees refusing to work because they are fearful of contracting coronavirus provide a recent dramatic opportunity for newer workplace law observers to grasp a well-established legal rule: both unionized and non-union employees possess rights to engage in work stoppages under the National Labor Relations Act (“NLRA”). This article explains that employees engaging in concerted work stoppages, in good faith reaction to health and safety dangers, are prima facie protected from discharge. The article carefully distinguishes between NLRA § 7 and § 502 work stoppages. Crucially, and contrary to § 502 work stoppages, the health and safety-related work stoppages of non-union employees protected by NLRA § 7 are not subject to an “objective reasonableness” test.

Having analyzed the general legal protection of non-union work stoppages and noting that work stoppages had already been on the rise during the preceding two years, the article considers when legal protection may be withdrawn from work stoppages because employees repeatedly and unpredictably engage in them—so called “unprotected intermittent strikes.” Discussing a recent National Labor Relations Board (“NLRB”) decision that could be misinterpreted, the article argues for an updated and strengthened presumption of work stoppage protection for employees wholly unaffiliated with a union who engage in repeated work stoppages that are arguably “intermittent.” The law should presume that the work stoppages of unorganized employees are not part of an illegitimate plan to drive an employer “into a state of confusion.”

Next, the article grapples with looming work stoppage issues emerging from expansion of the Gig economy. When workers are not “employees,” peaceful work stoppages may increasingly become subject to federal court injunctions. The Norris-LaGuardia Act (the venerable 1932 federal anti-injunction law) does not by its terms apply to non-employees—possibly including putative non-

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employee Gig workers—raising the specter of a new era of “Government by Injunction.” Under existing antitrust law, non-employee workers may be viewed as “independent businesspeople” colluding through work stoppages to “fix prices.” The article argues that First Amendment avoidance principles should guide Sherman Act interpretation when “non-employee” worker activity does not resemble price fixing; that, consistent with liability principles articulated in the Supreme Court’s recent opinion in Sessions v. Dimaya, antitrust law’s severe penalties should not be applied to Gig workers given the ambiguities in federal and state law employee definitions.

Finally, the article considers the potential for individual non-union private arbitration agreements to curtail the NLRA rights of employees to engage in work stoppages in light of the Supreme Court’s labor law-diminishing opinion in Epic Systems.

I. INTRODUCTION

This article is about work stoppages, events at the fulcrum of American labor relations policy. A conception of “labor relations” that imagines a perpetual street-chess-match between “labor” and “management” in which two “eternal” antagonists¹ are rationally planning their next moves leaves much to be desired.² A better understanding of labor relations is that of a never-ending, visceral encounter between people of very different social and economic stations and statuses periodically—often in times of broader social crisis—hurling themselves against each other to the point of exhaustion.³ The ensuing stasis produced by the exhaustion demarks the temporary boundaries of the law. Justificatory rules emerge later. COVID-19 disease may be this generation’s “labor” crisis because many workers have resisted working during a pandemic.⁴ It is, of course, tidy when labor antagonists conform themselves to facially elegant rules. It is also unusual. For, rules or no rules, lawful or unlawful, when workers get mad enough (or scared enough) about their working conditions, they may simply stop working; if they are ordered to wade into a pandemic, they may simply refuse.⁵ What else but to engage in work stoppages or to engage in mass picketing can they do?⁶ But especially if not represented by a union, these workers may not know (and temporarily, as a result of inflamed passions, may not care to know) the legal risks entailed in particular courses of action. Indeed, given the rapidly transforming legal terrain of the “new economy,” the “old economy” law governing labor disputes may be very difficult to apply, exposing

1. See generally *Vegeahn v. Guntner*, 44 N.E. 1077, 167 (Mass. 1896) (Holmes, J., dissenting) (noting an eternal conflict between man, who desires to get the most he can for his service, and society, which desires to get the services for the least possible expense).

2. See Orley Ashenfelter & George E. Johnson, *Bargaining Theory, Trade Unions, and Industrial Strike Activity*, 59 AM. ECON. REV. 35, 36 (1969) (noting a “presumption in some of the literature that a breakdown of negotiations cannot occur if the two parties are ‘rational’”).

3. *Vegeahn*, 44 N.E. at 1081–82.

4. Aaron Gordon, Lauren Kaori Gurley, Edward Ongweso Jr, and Jordan Pearson, *Coronavirus Is a Labor Crisis, and a General Strike Might Be Next*, VICE (Apr. 2, 2020), https://www.vice.com/en_us/article/z3b9ny/coronavirus-general-strike [https://perma.cc/73MD-SEFC].

5. Mike Elk, *Defying Trump’s Order, Nebraska Meatpackers Strike – PA National Guard Replaces Striking Nurses – Richmond Threatens to Fire Striking Bus Drivers*, PAYDAY REPORT (Apr. 28, 2020), <https://paydayreport.com/defying-trumps-order-nebraska-meatpackers-strike-pa-national-guard-replaces-striking-nurses-richmond-threatens-to-fire-striking-nurses/> [https://perma.cc/U6XK-G73S].

6. As Ahmed White has argued, it is easy to see the suppression of such tactics as “labor’s undoing.” Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 63 (2014). While it is true employees could “quit employment,” the option is hardly compelling, particularly where working conditions are universally bad.

labor activists to enhanced risks of job loss or legal liability.⁷ The old economy work-stoppage⁸ rules were difficult enough even when workers who were unambiguously “employees”—unionized employees at that—were engaged in “classical” labor disputes.⁹

Once upon a time, for example, when this writer was a much younger man, he found himself suddenly in the midst of a “wildcat strike”¹⁰ in Philadelphia. A union-activist co-worker had been fired on the job on—many were convinced—trumped-up charges. In response to the firing, about four hundred Teamster-represented airline fleet service agents walked off the job, leaving many jet aircraft and passengers stranded at their gates. It was a dramatic scene. This writer had been a union shop steward for just a few weeks and will never forget how rapidly the scene unfolded, how little he knew about the “rules of the game” in such situations, and how much even a little more knowledge could have helped him. The work stoppage violated a no-strike pledge in the collective bargaining agreement governing the workplace and was likely illegal,¹¹ though few employees lost their jobs.¹²

When union stewards are nonplussed by the potentially unplanned and sheer animal energy of a work stoppage, the possible confusion becomes evident for relatively unsophisticated non-union employees, especially those in which the

7. As will be developed, *infra*, the “old economy” is one that consisted of workers acting concertedly as “employees” who were not bound by arbitration agreements and who were much more likely than at present to be represented by unions.

8. A work-stoppage, when initiated by employees, is a strike. See *Work Stoppages*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/wsp/questions-and-answers.htm#Question_5 [<https://perma.cc/3HUV-29ZV>] (last visited Aug. 19, 2020).

9. The right to strike is protected activity under §§ 7 and 13 of the National Labor Relations Act but the “lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers.” See *The Right to Strike*, NAT’L LAB. RELS. BD., <https://www.nlrb.gov/strikes> [<https://perma.cc/KE72-4ED2>] (last visited Aug. 15, 2020).

10. A wildcat strike is a “work stoppage undertaken by employees without the consent of their respective unions. Such strikes are not necessarily illegal, but they often violate terms of a collective bargaining agreement. The name is based on the stereotypical characteristics associated with wildcats: unpredictability and uncontrollability.” See ENCYC. BRITANNICA, <https://www.britannica.com/topic/wildcat-strike> [<https://perma.cc/W9UM-3X3H>] (last visited Aug. 15, 2020). As an aside, this 80s-era strike may have foreshadowed changing structural dynamics in an emerging precarious work economy: the fired and striking employees were in the lower-tier of a two-tier wage structure, earning roughly ten dollars per hour less than their upper-tier co-workers. The strike was unwise from a legal perspective, but perhaps inevitable.

11. See *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960).

12. See, e.g., *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 385 (1974); *Boys Mkts., Inc. v. Clerks Union*, 398 U.S. 235, 247–48 (1970) (discussing unprotected strikes in context of no-strike pledges in collective bargaining agreements). The intense solidarity of the local union members at the center of the drama—Local 732, International Brotherhood of Teamsters (Airline Division)—made even legally permissible discharges difficult because of the real risk of generating additional work stoppages.

employee status of workers is not clear.¹³ Union stewards know about the general right of employees to strike and may even have vague intuitions about legal qualifications of that right; certainly, they will know that workers are statutory employees with collective bargaining rights.¹⁴ One doubts the same knowledge or intuitions are held by workers in a wide variety of non-union workplaces in which, among other factors, employee status is unclear given the hazy outlines of the “Gig economy.”¹⁵ Contemporary commentators observe that “workers involved in today’s labor struggles, are outlining the blueprint of a new labor law—a labor law that moves away from narrow, bureaucratic, and legalistic forms of worker representation toward more sectoral, worker-driven, and political forms of organization.”¹⁶ Implicit in this observation, in the very idea of a labor “struggle,” is an understanding that new “sectoral, worker-driven, and political forms of organization” will be fiercely resisted by employers or others who use labor.¹⁷ Most recently, a wide variety of COVID-19-related workplace disputes have highlighted the need for a better understanding of the complicated legal terrain upon which the new economy is built. A terrain that includes gig workers and the expansion of compulsory arbitration of workplace disputes in non-union workplaces.¹⁸

In all workplaces, if history is a guide, work stoppages starkly and abruptly coalesce employee grievances and expedite employers’ attention to them.¹⁹ International law implicitly recognizes work stoppages as a logical outgrowth of the freedom of association of workers.²⁰ Along similar lines, commentators

13. See generally *infra* Part II.

14. See *NLRB v. City Disposals Systems, Inc.*, 465 U.S. 822, 844 (1984) (O’Connor, J., dissenting) (discussing relative sophistication of union shop stewards on labor law matters in the workplace when compared to rank-and-file workers).

15. See discussion *infra* Part 0.

16. Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 *BERKELEY J. EMP. & LAB. L.* 135, 148 (2019) (hereinafter “Peril and Possibility”).

17. Beginning in about the last two decades of the twentieth century it has become clear that employer resistance to labor organization has increased with innovations in the American economy and increased product competition. Henry S. Farber, *The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?*, 8 *J. LAB. ECON.* S75, S76 (1990).

18. Robert Combs, *Analysis: COVID-19 Has Workers Striking. Where Are the Unions?*, *BLOOMBERG LAW* (Apr. 14, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-COVID-19-has-workers-striking-where-are-the-unions> [<https://perma.cc/DBN3-YNVP>].

19. See *Strike*, *NEW WORLD ENCYC.* (Jan. 4, 2020), <https://www.newworldencyclopedia.org/entry/Strike>.

20. The view is not without detractors. For arguments that the right exists, see Bernard Gernigon, Alberto Odero, and Horacio Guido, *ILO Principles Concerning the Right To Strike*, *INTERNATIONAL LABOUR ORGANIZATION* (1998), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_087987.pdf [<https://perma.cc/94EQ-A4LW>]. See also Janice R. Bellace, *The ILO and the Right to Strike*, 153 *INT’L LAB. REV.* 29, 47–48 (2014) (tracing the distillation of the right to strike under international law to the distillation of the right

question whether federal labor law would ever have emerged without a continuous, credible threat by workers of widespread interruptions of production.²¹ Whether labor insurgency, especially in the form of work stoppages, represents reflexive viscerality, romantic folly, or a constructive road to freedom,²² it is what workers have done throughout history in reaction to adverse working conditions.²³ In recent times, even before COVID-19 events, the Economic Policy Institute reported that workers in the United States were increasingly engaging in strike activity:

Data from the Bureau of Labor Statistics (BLS) show that there was an upsurge in major strike activity in 2018 and 2019, marking a 35-year high for the number of workers involved in a major work stoppage over a two-year period. Further, 2019 recorded the greatest number of work stoppages involving 20,000 or more workers since at least 1993, when the BLS started providing data that made it possible to track work stoppages by size.²⁴

Work stoppages may take new forms in the present technological era. If work is assigned by way of electronic “app,” for example, workers may refuse the assignment or may feign compliance with it. Workers may also utilize technology to engage in concerted protests short of work stoppages. As Professor Jeffrey Hirsch has noted, “[w]idespread Internet availability in the workplace has provided unions with an important tool—which they have actively used—to organize and communicate with employees, especially those

from the United Nations Right of Freedom of Association under the Freedom of Association Convention No. 87).

21. Professor Alan Hyde has written that “the transformative labor reforms with which we deal were indeed payoffs to insurgent working classes, though the word ‘payoff’ is not the one I would normally use. Moreover, the payoffs were not necessarily guided by notions of efficiency or the public good.” Alan Hyde, *A Theory of Labor Legislation*, 38 *BUFF. L. REV.* 383, 429 (1990); see also Ashenfelter and Johnson, *supra* note 2, at 35 (“Most union ‘power’ is derived from the threat of [the] strike . . .”).

22. See James G. Pope, *Labor’s Constitution of Freedom*, 106 *YALE L. J.* 941, 942 (1997) (discussing the right to strike as an essential part of labor’s conception of its own liberty).

23. JEREMY BRECHER, *STRIKE!* 12 (1972).

24. Heidi Shierholz and Margaret Poydock, *Continued Surge in Strike Activity Signals Worker Dissatisfaction with Wage Growth*, *ECON. POL’Y INST.* (Feb. 11, 2020), <https://www.epi.org/publication/continued-surge-in-strike-activity/> [<https://perma.cc/85Y9-5E5T>]. “BLS data on major work stoppages—work stoppages involving 1,000 or more workers lasting one shift or longer—show that 425,500 workers were involved in major work stoppages that began in 2019.” *Id.* A breakdown of 2019 work stoppages and employers involved includes North Carolina public school teachers (92,700); General Motors automotive workers (46,000); West Virginia public school teachers (36,400); Los Angeles public school teachers (33,000); Chicago public school teachers (32,000); Stop & Shop workers (31,000); University of California service and medical center workers (25,000); Kentucky public school teachers (22,900); Oregon public school teachers (20,400); AT&T workers (20,000). *Id.*

who are difficult to reach through traditional means.”²⁵ Even as technology is driving changes in labor organizing, protest, or other exercises of concerted activities,²⁶ work stoppages are where the “rubber hits the road” when agreement between workers and employers or other labor users over important working conditions cannot be achieved, as COVID-19 events have reemphasized.²⁷

As workers increasingly engage in work stoppages, the question arises as to what legal constructs will await them given new modes of industrial organization in the economy. Assessing this new employment landscape, one might first want to know how employers will preliminarily react to work stoppages. It has been somewhat surprising, for example, when public sector school teachers, engaging in often unlawful strikes over the last few years, have not been uniformly fired, as they legally might have been.²⁸ Perhaps this resulted from a high degree of community support for the teachers in some states.²⁹ Or perhaps public employers were simply “rusty” at deploying the “economic weapons” the law has historically afforded them.³⁰ Leaving to one side

25. Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA*, 76 GEO. WASH. L. REV. 262, 274 (2008).

26. *Id.* at 274-75.

27. Joshua Freeman, *Pandemics Can Mean Strike Waves*, JACOBIN (Apr. 7, 2020), <https://www.jacobinmag.com/2020/04/coronavirus-pandemic-strike-wave-spanish-flu> [<https://perma.cc/T872-CFK5>] (pointing out that during the Spanish Flu pandemic in 1919, four million workers struck, which at the time represented one-fifth of the workforce).

28. See Andrias, *supra* note 16, at 141-144. Teacher strikes are illegal in most states. Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, CTR. ECON. AND POL’Y RSCH., Chart 3, at 8 (2014), <https://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/2WC9-KBZG>].

29. In West Virginia, for example, “students walked picket lines with teachers, and superintendents in all 55 counties closed schools every day for seven days in support of the teachers. This prevented the walkouts from turning into an actual strike, which would have been illegal for teachers to perform in West Virginia.” Kate Cimini, *Teacher Strikes are Illegal in West Virginia . . . So How Did They Strike?*, MEDILL NEWS SERV. (Mar. 8, 2018), <https://dc.medill.northwestern.edu/blog/2018/03/08/67017/#sthash.9CKm29hN.dpbs> [<https://perma.cc/29US-JJ2U>] (last visited Aug. 21, 2020).

30. Other examples of this phenomenon exist. Many readers will be familiar with strikes by New York metro workers in apparent violation of the Taylor Law that did not result in employee discharges. See Nicole Gelinias, *Putting Teeth in the Taylor Law*, CITY J. (Dec. 14, 2005), <https://www.city-journal.org/html/putting-teeth-taylor-law-10137.html> [<https://perma.cc/MLE5-A MAV>]. The development nevertheless seemed surprising because of some of the conservative states in which strikes were occurring like Oklahoma, West Virginia, Kentucky, and Arizona. See Eric Levitz, *The Teachers’ Strikes Have Exposed the GOP’s Achilles Heel*, INTELLIGENCER (April 5, 2018), <https://nymag.com/intelligencer/2018/04/the-teachers-strikes-have-exposed-the-gops-achilles-heel.html> [<https://perma.cc/68YQ-VVU6>]. There has been some indication that state legislatures were attempting to “tighten up” state anti-strike laws in the summer of 2019 in the wake of successful strikes. See Jake Wartel, *States Push Anti-Protest Bills In Response to Teachers’ Strikes*, DEFENDING RTS. & DISSENT (Jun. 13, 2019), <https://rightsanddissent.org/news/states-push-anti-protest-bills-in-response-to-teachers-strikes/> [<https://perma.cc/Y2NN-SH5K>].

employers' preliminary, spontaneous responses to work stoppages, legal analysis of work stoppages must confront systemic, "new economy" legal complexities and reconsider the de facto legal status quo.

Three such especially pressing complexities surrounding work stoppages in the "new work" economy warrant extended discussion, for they suggest new arguments problematizing the lawfulness of work stoppages. Merely questioning the rights of workers to engage in work stoppages may have a chilling effect on worker organization, especially among the most fearful and precarious workers.

First, although non-union employees have long possessed the right to engage in work stoppages under the NLRA³¹ a principle relevant to recent non-union, safety-related COVID-19 work stoppages and to the Google Walkout of 2018,³² the NLRB arguably expanded a rule forbidding "intermittent strikes," which could more easily render non-union work stoppages unprotected under the NLRA.³³ Under the rule, non-union employees possess the right to engage in work stoppages, but multiple work stoppages may at a certain point become unprotected if part of a "plan" is to drive an employer into a "state of confusion."³⁴ The lines drawn by the NLRB are fine, and the potential for confusion is high over this slippery doctrine, especially among unsophisticated workers. This article will contend that "intermittency doctrine" should be sparingly applied to non-union employees.³⁵ As the COVID-19 work stoppages have demonstrated, panic by workers over repeated risk of exposure to dangerous disease is not part of a "plan," and reactive work stoppages of this type should *never* be denied NLRA protection under an intermittency theory when the employees involved are not members of a union.

31. 29 U.S.C. § 151 et seq. (2018); see *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–13 (1962); see also 29 U.S.C. § 163 (2018). It is also true, however, that in a number of contexts "[l]abor picketing, labor boycotts, and union associational activity are all routinely curbed by the state." Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 533 (2018), <https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/20> [<https://perma.cc/EP7A-29Z2>].

32. See Johana Bhuiyan, *The Google Walkout: What protesters Demanded and What They Got*, L.A. TIMES (Nov. 6, 2019), <https://www.latimes.com/business/technology/story/2019-11-06/google-walkout-demands> [<https://perma.cc/YRX3-E378>] ("On Nov. 1, 2018, some 20,000 Google employees walked off the job in protest of the company's handling of sexual harassment allegations.").

33. *Walmart Stores, Inc.*, 368 N.L.R.B. No. 24 (July 25, 2019). *Walmart* will be discussed *infra* Section II.C. The qualifier "may have" refers to an odd situation in which critical facts were stipulated in a manner calling into question the rule that was actually established. Nevertheless, *employers* may be under the impression that "intermittent strike doctrine" firmly applies in the context of non-union workplaces, a proposition with which the article will contend.

34. See *infra* at Part II.

35. *Id.*

A second legal complexity centers on the national legal uncertainty and volatility over which workers qualify as “employees.”³⁶ The employee definition is crucially important for labor law because only employees are protected by the NLRA³⁷ and only employees explicitly possess the right to engage in work stoppages.³⁸ Additionally, federal courts are normally prevented from issuing injunctions to suspend work stoppages in peaceful, private-sector labor disputes involving employees.³⁹ If only employee work stoppages are protected from federal court injunctions,⁴⁰ even peaceful strikes and picketing by non-employee workers—such as independent contractors or other types of Gig economy workers—could be lawfully enjoined at the federal level.⁴¹ This development could open the possibility of a new era of “Government by injunction” in which federal injunctions effectively quash nascent worker organizing.⁴²

Conjoined to renewed potential for federal courts quashing peaceful work stoppages over working conditions is the issue of whether non-employee workers could be subject to antitrust liability for engaging in work stoppages.⁴³ The question takes on heightened importance as increasing numbers of workers in the Gig economy are classified by companies as independent contractors.⁴⁴

36. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate In the Borderland Between an Employer and Employee Relationship*, 14 U. PA. J. BUS. L. 605, 608 (2012) (observing that legal definition of “employee” is unclear and arguing that the “lack of clarity is largely due to the fact that the statutory language defining employee status in virtually all of our nation’s employment laws is vague, conclusory, and largely useless.”)

37. 29 U.S.C. §§ 152(3), 157 (2018); Kerry Rittich, *Between Workers’ Rights and Flexibility: Labor Law in an Uncertain World*, 54 ST. LOUIS U. L. J. 565, 572 (2010) (“Contractualized work relations, for example, mean that many workers engaged in precarious and contingent work are legally designated as independent contractors and have no entitlement to bargain collectively.”).

38. 29 U.S.C. §§ 152(3), 157, 163 (2018).

39. *United States v. Hutcheson*, 312 U.S. 219, 231 (1941).

40. 29 U.S.C. § 113(a) (2018); *see discussion infra* Part III.B.

41. *Taylor v. Local No. 7, Int’l Union of Journeymen Horseshoers of U.S. and Can. (AFL-CIO)*, 353 F.2d 593, 606 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966).

42. For the classic discussion of the role of labor injunctions in early 20th century labor disputes, *see generally* FELIX FRANKFURTER AND NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

43. Antitrust jurisdiction is one of the better historical examples of when federal courts have been in a position to enjoin peaceful work stoppages. *See infra* Part III. B.

44. Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce*, NAT’L PUB. RADIO (Jan. 22, 2018), <https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now> [<https://perma.cc/LVQ4-HGJT>] (“NPR/Marist poll finds that 1 in 5 jobs in America is held by a worker under contract.”). There is some dispute as to the actual number of independent contractors given reporting by the Bureau of Labor Statistics suggesting that independent contractors made up only 6.9% of the workforce as of 2017. *Independent Contractors Made Up 6.9 Percent of Employment in May 2017*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/opub/ted/2018/independent-contractors-made-up-6-point-9-percent-of-employment-in-may-2017.htm>

Early in the twentieth century, labor activity conducted through unions was often deemed by courts “a conspiracy in restraint of trade,” in violation of the Sherman Antitrust Act.⁴⁵ Through long historical development, labor activity was substantially “exempted” from antitrust law.⁴⁶ The question now is whether widespread use of independent contractors in place of “employees” will reanimate the sorts of antitrust problems that have been exorcised by labor law.⁴⁷ Antitrust violations are subject to federal injunction and carry hefty substantive penalties.⁴⁸ The mere threat of antitrust liability has been shown by scholars to deter concerted activity directed at pressuring companies to improve the working conditions of their non-employee workers.⁴⁹

[<https://perma.cc/JBR3-M8R2>] (last visited Aug. 23, 2020). This figure is questionable for a number of reasons, not the least of which is that a large portion of the “Gig” economy is simply not included. Alastair Fitzpayne & Shelly Steward, *Nine Things to Know Before the 2017 Contingent Worker Supplement is Released*, ASPEN INST. (Jun. 6, 2018), <https://www.aspeninstitute.org/blog-posts/nine-things-to-know-before-2017-cws-release/> [<https://perma.cc/JE4G-2GCP>]. The central premise of the Gig economy is that workers are not employees, and it is the “not-employee” character of the workers that carries the potential for invocation of antitrust law.

45. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 471–72 (1921) (holding that even peaceful labor disputes involving “secondary” labor pressure were not “proximately and substantially concerned . . . in an actual dispute respecting the terms or conditions of their own employment, past, present or prospective” so as to shelter employees from the operation of the federal antitrust laws).

46.

Courts have recognized both ‘statutory’ and ‘non-statutory’ labor exemptions to the antitrust laws . . . The statutory exemption . . . establishes that labor unions are not combinations or conspiracies in restraint of trade and exempts certain union activities from scrutiny under the antitrust laws . . . However, the statutory exemption does ‘not exempt concerted action or agreements between unions and nonlabor parties.’ The non-statutory labor exemption . . . has been inferred from federal labor statutes. These ‘set forth a national labor policy favoring free and private collective bargaining,’ ‘require good-faith bargaining over wages, hours, and working conditions’ and ‘delegate related rulemaking and interpretive authority to the National Labor Relations Board.’

Cal. ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1124-25 (9th Cir. 2011) (internal citations omitted).

47. For a very early expression by the U.S. Supreme Court of the principle that independent contractors are excluded from labor exemptions from antitrust law, see *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 147 (1942).

48. For the scope of liability, see *Antitrust Guidance For Human Resource Professionals*, DEP’T JUST.: ANTITRUST DIV. AND FED. TRADE COMM’N (Oct. 2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/4UNH-Y88J>]. As Professor Paul has observed, the continued interplay of labor and antitrust law seems oddly anachronistic and may be ripe for broad challenge. Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA CHI. L. J. 969, 1030 (2016).

49. *Id.* at 982 (discussing chilling effect of specter of antitrust on organizing activities of drivers in deregulated trucking industry alleged to be independent contractors).

Third, workplace arbitration, which is now compulsory for over half the private-sector employees in the United States,⁵⁰ may complicate non-union employee work stoppages. Compulsory arbitration is frequently controversial. The practice itself was at the heart of the 2018 Google work stoppage: workers protested compulsory arbitration of sexual harassment and sexual assault cases.⁵¹ In the context of work stoppages, however, a more complicated problem may arise in the wake of *Epic System v. Lewis*,⁵² which has been understood as broadly subordinating the NLRA to the Federal Arbitration Act. Although the argument would previously have been unthinkable, it is now possible to anticipate the claim that the right under the NLRA to engage in non-union employee work stoppages is subordinate to an agreement by a non-union, individual employee and an employer to waive the right in lieu of individual employee arbitration.⁵³

II. NON-UNION EMPLOYEE WORK STOPPAGES AND INTERMITTENCY

This Part discusses non-union employee rights to engage in work stoppages and explains how those rights can be adversely impacted. The non-union context is important because the overwhelming number of employees in the United States are not represented by unions; and it is not widely known that non-union employees possess the right to engage in work stoppages under the NLRA, a statute that is often erroneously believed to apply only to unionized workplaces and employees.⁵⁴ The analysis of whether work stoppages are protected can change depending upon their frequency. This can become a problem for non-union employees who may have no idea that the timing of a work stoppage may, in any respect, impact its protection under federal labor law.

50. “Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.” Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/G6TE-PDG4>].

51. The company apparently agreed to suspend the policy. See Bhuiyan, *supra* note 32 and accompanying text.

52. 138 S.Ct. 1612, 1632 (2018).

53. See *infra* Part IV.

54. Christine Walters & Patricia Wise, *Viewpoint: The ABCs of the NLRA for Nonunion Employers*, SHRM (July 22, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/viewpoint-abc-nlra.aspx> [<https://perma.cc/BW26-DVJZ>].

A. *Non-Union Employee Work Stoppages Generally*

As noted, non-union employees possess the right to engage in work stoppages under American labor law.⁵⁵ Indeed, the right to engage in work stoppages, and other “concerted activities” runs to employees and not directly to “labor organizations,” or unions.⁵⁶ Unions’ rights are ultimately derivative of employees’ rights.⁵⁷ Furthermore, the right of non-union employees to engage in such work stoppages is tempered by the countervailing right of employers to replace “strikers,” as opposed to discharging them, a counterweight that applies equally in union and non-union workplaces.⁵⁸

Returning to the Google example, when thousands of non-union Google workers walked off the job for one day on November 1, 2018, to protest revelations “that Google had paid millions of dollars in exit packages to male executives accused of misconduct, while staying silent about the transgressions,”⁵⁹ the work stoppage was first a concerted activity within the meaning of § 7 of the NLRA.⁶⁰ In addition, to enjoy coverage under the NLRA,

55. See Weinrib, *supra* note 31. The right to engage in a work stoppage either by union-represented or non-union employees is not absolute. The right can be curtailed where the objective of a work stoppage is illegal, the work stoppage is carried out by tortious or criminal means, or the work stoppage contravenes statutory labor policy or specific sections of the NLRA. See Robert F. Koretz & Robert J. Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715, 716-28 (1973).

56. National Labor Relations Act, Section 7 states in relevant part, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157 (2018) (emphasis added).

57. *NLRB v. Jasper Seating Co.*, 857 F.2d 419, 422 (7th Cir. 1988) (“Nothing in the Act, however, limits the rights of nonunionized employees to engage in concerted conduct for their mutual aid regardless of whether or not their goal is supported by a majority of employees.”).

58. Replacement of strikers may be “permanent” or “temporary.” The distinction between the two categories is that a temporarily replaced striker must be reinstated after making an unconditional offer to return to work; an employer is not required to reinstate a striker who has been permanently replaced until the replacement has left employment with the “struck” employer. The same rules apply whether a work stoppage has arisen in a union or a non-union workplace. *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 N.L.R.B. 730, 733-34 (2015) (applying traditional strike replacement rules in the context of a non-union work stoppage) *enforced*, 657 Fed.App’x. 421 (6th Cir. 2016).

59. Daisuke Wakabayashi, Erin Griffith, Amie Tsang, & Kate Conger, *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N. Y. TIMES (November 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/HUG9-4PQ7>].

60. For the relevant text, see § 7, *supra* note 56. To enjoy coverage under the National Labor Relations Act conduct must be both protected and concerted. *Prill v. NLRB*. (“Prill II”), 835 F.2d 1481, 1482-83 (D.C. Cir. 1987); see also *Fresh and Easy Neighborhood Market, Inc.*, 361 N.L.R.B. 151, 152, 154 (2014) (finding concerted a non-union employee’s attempt to enlist her coworkers’ assistance in raising a sexual harassment complaint to management, by soliciting three of them to

concerted activity must be undertaken for the “mutual aid or protection” of employees—in other words, to enjoy “protection,” the activity must have some nexus to workers or working conditions.⁶¹ In the non-union Google Walkout, the protest had a clear nexus to working conditions because the alleged transgressions were related to workplace misconduct that adversely impacted workers.⁶² Accordingly, had Google fired the workers for engaging in the work stoppage, it might have been required to remit backpay for any lost wages incurred thereby and ordered to reinstate the workers.⁶³ Google also might have been lawfully entitled to “replace” employees engaging in a work stoppage, an option that is usually of little value in a work stoppage of very short duration.

B. *Non-Union Work Stoppages in a Health and Safety Context*

The law of work stoppages in health and safety contexts has become highly relevant during the COVID-19 era. A number of factual situations have emerged, but of particular interest to the public have been circumstances in which nurses or other health care workers refused to work, claiming not to have had adequate personal protective equipment.⁶⁴ Work stoppages have been occurring, however, across the occupational landscape.⁶⁵ Some of the highest COVID-19 infection and death rates in the economy have been in the meatpacking industry; it has been extraordinarily dangerous work.⁶⁶ In fact, meatpacking work has been so dangerous that the risk of contracting the COVID-19 disease has been suggested as a cause of the significant absenteeism

sign the piece of paper on which she had copied the altered whiteboard message in order to “prove” the harassment to which she had been subjected).

61. See *Washington Aluminum*, 370 U.S. at 12, 17.

62. See Bhuiyan, *supra* note 32 and accompanying text.

63. § 10(c) of the NLRA, 29 U.S.C. § 160(c); *Trompler, Inc. v. NLRB.*, 338 F.3d 747, 748, 755 (7th Cir. 2003).

64. Justin Wise, *Nurses Union Says Workers Were Suspended for Refusing to Help Coronavirus Patients Without N95 Masks*, HILL (Apr. 16, 2020) <https://thehill.com/policy/health-care/493095-nurses-union-says-workers-were-suspended-for-refusing-to-help-coronavirus> [<https://perma.cc/5RL2-PQKD>]; Madeleine Pauker, *Santa Monica Nurses Refuse to Enter Patients’ Rooms Without N95 Masks*, SANTA MONICA DAILY PRESS (Apr. 13, 2020), <https://www.smdp.com/santa-monica-nurses-refuse-to-enter-patients-rooms-without-n95-masks/189256> [<https://perma.cc/X9U2-Y5DQ>]; Janelle Griffith, *Nurses are Protesting Working Conditions Under Coronavirus—and Say Hospitals Aren’t Protecting Them*, NBC NEWS (Apr. 20, 2020), <https://www.nbcnews.com/news/us-news/nurses-are-protesting-working-conditions-under-coronavirus-say-hospitals-aren-n1181321> [<https://perma.cc/A9Z9-X293>].

65. See COVID-19 Strike Wave Interactive Map, PAYDAY REPORT, <https://paydayreport.com/COVID-19-strike-wave-interactive-map/> (last visited Aug. 19, 2020).

66. Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, THE ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/> [<https://perma.cc/6EFL-9DCA>].

suffered by the industry beginning in early-April 2020.⁶⁷ In an underreported part of the absenteeism story, some non-union meatpacking employees simply walked off the job in response to safety concerns. For example, in Kathleen, Georgia, fifty employees walked off the job in a Perdue chicken facility in protest of what they believed were unsafe working conditions. In the words of Perdue employee Kendaliyn Granville:

We're not getting nothing—no type of compensation, no nothing, not even no [sic] cleanliness, no extra pay—no nothing. We're up here risking our life [sic] for chicken . . . All we're asking now is just to sanitize the building. Sanitize the building. Everybody that's been exposed to it, they need to go home. These folks are still on the floor.⁶⁸

Similar events have been unfolding at Amazon warehouses across the United States. By the third week of April 2020, hundreds of non-union Amazon workers “pledged to stay home from work, according to the worker rights group United for Respect, as frustrations mount over protections and support for Amazon employees.”⁶⁹ According to news reports, “[p]rotesting employees say they will continue to call in sick until Amazon makes safety-related changes at warehouses.”⁷⁰ Similar reports also disclosed plans for walkouts in New York,⁷¹ Illinois,⁷² and Michigan.⁷³ In early April, U.S. Senators were “intensifying pressure for Amazon to improve working conditions for its warehouse employees during the coronavirus pandemic” and questioning “the company’s decision to fire an employee who demanded better health protections at the

67. Dan Charles, *Meat Processing Plants Suspend Operations After Workers Fall Ill*, NPR (Apr. 7, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/828873225/meat-processing-plants-suspend-operations-after-workers-fall-ill> [<https://perma.cc/M8XU-Q23C>].

68. Sarah Hammond, *'This is Not a Playing Matter': Perdue Plant Employees Walk Out Over COVID-19 Concerns*, 13WMAZ (Mar. 24, 2020), <https://www.13wmaz.com/article/news/local/perdue-employees-walk-out-as-coronavirus-concerns-grow/93-7c7bdccb-f3ec-439b-b541-9070e758b5cb> [<https://perma.cc/M6J6-A8GH>].

69. Kari Paul, *Hundreds of Amazon Warehouse Workers to Call in Sick in Coronavirus Protest*, THE GUARDIAN (Apr. 21, 2020), <https://www.theguardian.com/technology/2020/apr/20/amazon-warehouse-workers-sickout-coronavirus> [<https://perma.cc/5AXV-KLWE>].

70. *Id.*

71. Annie Palmer, *Amazon Workers Plan Strike at Staten Island Warehouse to Demand Coronavirus Protections*, CNBC (Mar. 29, 2020), <https://www.cnbc.com/2020/03/29/amazon-workers-in-staten-island-plan-strike-over-coronavirus-safety.html> [<https://perma.cc/ATH8-K923>].

72. Caroline O'Donovan, *As More Amazon Employees Contract the Coronavirus, Workers Are Walking Off The Job*, BUZZFEED NEWS (Mar. 31, 2020), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-employees-coronavirus-walkout> [<https://perma.cc/6GSY-EUKX>].

73. Josh Dzieza, *Exclusive: Detroit Amazon Workers Plan to Walk Out Over Handling of COVID-19*, THE VERGE (Apr. 1, 2020), <https://www.theverge.com/2020/4/1/21202745/amazon-coronavirus-walk-out-detroit-protests-warehouse-cleaning>.

company's facilities."⁷⁴ In response to this activity, Amazon has reportedly improved working conditions in a number of ways, but as of May 14, 2020, six Amazon workers had apparently died of coronavirus complications, and Amazon had still not released data on coronavirus infections.⁷⁵ In light of these events, the continued potential for work stoppages like sickouts or mass walkouts seems high.

At first blush, the law of work stoppages discussed in the preceding section would appear to apply uniformly to health and safety connected work stoppages because it is a form of concerted activity with a tight connection to working conditions,⁷⁶ and this is substantially a correct assessment. In *NLRB v. Washington Aluminum Co.*, for example, still the lead case in this area of law, non-union employees engaged in a work stoppage over cold working conditions.⁷⁷ The employer argued that the work stoppage was unprotected because the employer had in good faith been attempting to improve working conditions.⁷⁸ The Supreme Court rejected the argument that employees were acting unreasonably because they had presented no demand to the employer:

We cannot agree that employees necessarily lose their right to engage in concerted activities under s 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of s 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of s 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could.⁷⁹

Furthermore, and contrary to what is sometimes claimed, there is no requirement under controlling labor law precedent that the health and safety-related concerted work-stoppages of employees must be “objectively

74. Shirin Ghaffary, *Senators Are Demanding Answers from Amazon About How it Treats Warehouse Workers*, VOX (Apr. 8, 2020), <https://www.vox.com/recode/2020/4/8/21214117/amazon-warehouse-workers-coronavirus-senator-booker-chris-smalls-senators-letter>.

75. Annie Palmer, *Sixth Confirmed Amazon Worker Dies Amid Calls for the Company to Release Data on Coronavirus Infections*, CNBC (May 14, 2020), <https://www.cnbc.com/2020/05/14/sixth-confirmed-amazon-worker-dies.html> [<https://perma.cc/84U2-NLL9>].

76. See Wise, *supra* note 64.

77. 370 U.S. at 16.

78. *Id.* at 14.

79. *Id.*

reasonable” to enjoy protection under the NLRA. Some confusion in this area can arise because of the interplay of §§ 7 and 502 of the NLRA. § 502, a provision of the law not under discussion in *Washington Aluminum*, states in relevant part that “the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act.”⁸⁰ The purpose of § 502 is to make clear that workers engaging in a work-stoppage because of abnormally dangerous working conditions will not be deemed to have violated a no-strike pledge (and accompanying promise to arbitrate disputes) in a collective bargaining agreement.⁸¹ Violation of such a pledge may render a strike subject to injunction, and it is in this limited context that employee concerted activity is scrutinized for its objective reasonableness.⁸² The § 7 inquiry has nothing to do with objective reasonableness and is focused exclusively on whether an employee subjectively believed that a threat to health and safety existed.⁸³

C. *Intermittency and the Walmart Case*

Suppose that instead of engaging in a single work stoppage, Google workers had participated in a repetitive series of work stoppages over time. Or consider COVID-19 reactive work stoppages such as the sickouts at Amazon⁸⁴—stoppages in reaction to specific disease threats have been roiling the economy throughout the pandemic.⁸⁵ Such work stoppages, by definition, do not consist

80. § 502 of the NLRA (as amended by the Labor-Management Relations Act of 1947), 29 U.S.C. § 143 (2018).

81. Nicholas A. Ashford & Judith I. Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety and Health Act*, 52 NOTRE DAME LAWYER 802, 807 (1977).

82. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 380-81, 387-88 (1974) (“[A] union seeking to justify a contractually prohibited work stoppage under § 502 must present ‘ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.’”). This is not to suggest that there are no unresolved issues in the interpretation of § 502. For example, the NLRB and the Sixth Circuit seem to accept that the objective reasonableness requirement does not involve a danger-in-fact standard but rather requires that employees have a good faith belief *supported by* ascertainable, objective evidence. *TNS, Inc. v. NLRB*, 296 F.3d 384, 391, 393 (6th Cir. 2002). But as cases like *NLRB v. Tamara Foods, Inc.*, have noted, § 502 does not appear to apply at all outside of the collective bargaining context. 692 F.2d 1171, 1183 (8th Cir. 1982).

83. *Tamara Foods*, 258 N.L.R.B. No. 180 (1981) (“The general rule is that the protections of Section 7 do ‘not depend on the *manner* in which the employees choose to press the dispute, but rather on the *matter* that they are protesting.’ . . . Inquiry into the objective reasonableness of employees’ concerted activity is neither necessary nor proper in determining whether that activity is protected.”) (internal citations omitted) *enforced in relevant part*, 692 F.2d 1171, 1183 (8th Cir. 1982).

84. *See Paul*, *supra* note 69.

85. *See id.*

of the kind of unitary, union-context event tending to be at the heart of traditional labor law—for example, a bargaining unit strike following months of collective bargaining negotiations that break down,⁸⁶ or a single response to adverse working conditions.⁸⁷ The hypothetical Google or actual COVID-19 series of job actions would be, or are, something closer to the kind of “intermittent,” or repeated, short-duration work stoppages that have often been found by the NLRB, and the courts, to be unprotected.⁸⁸ The legislative history of the NLRA gives no indication that Congress ever considered the legality of such work stoppages, however.⁸⁹ Furthermore, the line between merely repeated, but protected, work stoppages and unprotected intermittent work stoppages is sufficiently hazy—indeed, the NLRB initially held such work stoppages lawful⁹⁰—that unrepresented employees might be hard-pressed to see it. The United States Supreme Court once held, in a union-context case, that the “recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby.”⁹¹ The NLRB has carried forward and refined this rule with the core principle remaining that “hit and run” work stoppages deliberately calculated—”planning” has repeatedly, but vaguely, been central to the analysis—to “harass the company into a state of confusion” are unprotected.⁹² Yet, as this author first wrote in 2007 and continues to think, “[t]o date, it does not appear that the NLRB has squarely addressed the legal status of intermittent work stoppages in a non-

86. See e.g., *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 277–78 (6th Cir. 1998) (chronicling the long and bitter Detroit Newspapers strike that commenced after collective bargaining negotiations broke down).

87. See e.g., *Quietflex Mfg. Co.*, 344 N.L.R.B. 1055, 1055 (2005) (discussing discharge of 83 employees for refusing to vacate its parking lot where those employees had engaged in a peaceful hour work stoppage to protest their terms and conditions of employment).

88. *Int’l Union, U. A. W., A. F. Of L., Local 232 v. Wis. Emp’t Relations Bd.*, 336 U.S. 245, 264–65 (1949) *overruled on other grounds*; *Lodge 76, Int’l. Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 140, 154 (1976).

89. See Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 239 (2000).

90. *Id.*

91. *Int’l Union*, 336 U.S. at 264–65.

92. *Pacific Tel. & Tel. Co.*, 107 N.L.R.B. No. 301, 1547, 1548, 1550 (1954). A second but lesser rationale appears to be that employees should not gain the “benefits” of striking without also being subjected to its “risks.” The “should not” portion of this formulation is another example of the NLRB’s penchant for employing terms like “indefensibility” or disloyalty when it wishes to “morally” condemn conduct that it does not like but is not easily condemnable under the National Labor Relations Act. See *NLRB v. Ins. Agents’ Int’l Union, AFL-CIO*, 361 U.S. 477, 495–96 (1960) (holding that “nonstandard” labor activity even if unprotected is not, as the NLRB had found, unlawful under the NLRA); *infra* note 123 and accompanying text; see also Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541, 563–64 (2007) (criticizing as extra-statutory the notion that employee misconduct described as “disloyal” may on that basis be denied protection under the NLRA).

union workplace directed against specific workplace grievances.”⁹³ The NLRB has consistently held over the years that “repeated” work stoppages are protected when they are “spontaneous attempts to pursue work-related complaints or grievances and/or [sic] . . . which are precipitated by, and in protest against, separate acts of the employer.”⁹⁴ It has also concluded that “recurrent” work stoppages are rendered unprotected when there is:

[t]he occurrence of more than two separate strikes . . . the strikes are not responses to distinct employer actions or problems with working conditions, but rather part of a strategy to use a series of strikes in support of a single goal because this would be more crippling to the employer and/or would require less sacrifice by employees than a single prolonged work stoppage during which strikers could be replaced; . . . the *union* announces or otherwise states its intent to pursue a plan or strategy of intermittent strikes, or there is clear factual evidence of an orchestrated strategy to engage in intermittent strike activity, and [] the strikes are of short duration and proximate in time.⁹⁵

It does not appear that the NLRB has ever found a work stoppage among employees who are wholly unaffiliated with a union to be rendered unprotected because intermittent. The proposition that such work stoppages *could* be unprotected in non-union situations is in clear tension with § 7 cases in other NLRA contexts affording non-union employees solicitude.⁹⁶

In light of this, it is noteworthy that the NLRB’s recent decision in *Walmart Stores, Inc.*⁹⁷ arose in a non-union workplace and deprived discharged employees of the protection of the NLRA for allegedly engaging in intermittent

93. Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 124 (2007).

94. N.L.R.B. Gen. Couns. Advice Mem. 31-CA-23538 (Apr. 27, 1999); Westpac Elec., 321 N.L.R.B. 1322, 1360 (1996); Meilman Food Indus., 234 N.L.R.B. No. 94, 698, 712 (1978); Overboard Door Corp., 220 N.L.R.B. 431, 431–32 (1975) *enforcement denied*, 540 F.2d 878, 885 (7th Cir. 1978); Blades Mfg. Co., 144 N.L.R.B. 561, 566 (1963).

95. Nat’l Steel and Shipbuilding Co., 324 N.L.R.B. 499, 510 (1997); Case 31-CA-23538, N.L.R.B. Gen. Couns. Advice Mem. 31-CA-23538 (Apr. 27, 1999) (emphasis added) *citing* Chelsea Homes, Inc., 298 N.L.R.B. 813, 831 (1990); Robertson Indus., 216 N.L.R.B. 361, 362 (1975) *enforced*, 560 F.2d 396, 397, 399 (9th Cir. 1976); GF Bus. Equip., 215 N.L.R.B. 872, 878–79 (1974), *enforced*, 529 F.2d 201, 202, 206 (8th Cir. 1975); Pacific Tel., 107 N.L.R.B. at 1550, *see infra* notes 120, 124 and 141; John S. Swift Co., 124 N.L.R.B. 394, 396 (1959); Polytech, Inc., 195 N.L.R.B. 695, 695, 697; Embossing Printers, 268 N.L.R.B. 710, 722–23 (1984). The Memorandum may leave some readers with the impression that the NLRB and courts have rather deliberately developed a factor test over time for assessing when strikes are “intermittent” and when they are not. The factual variety and dates of cited administrative and court decisions, however, reveal the haphazardness of this patchwork “doctrine.” The same can be said of the even more factor-laden test laid out in another NLRB administrative document. N.L.R.B. Advice Memorandum, WestFarm Foods, No. 19-CA-29147, at 8–9 (Jul. 22, 2004).

96. *See Washington Aluminum*, *supra* note 77 and accompanying text.

97. 368 N.L.R.B. No. 24, slip op. at 1 (2019).

work stoppages.⁹⁸ *Walmart* purports to reaffirm prior holdings of the type already discussed—that “a strategy to return to work from a strike only to strike again for the same purpose is inconsistent with a genuine strike and has no protection in the Act.”⁹⁹ The case involved a coordinated set of work stoppages at various Walmart stores in May and June 2013.¹⁰⁰ The work stoppages were together titled the “Ride for Respect” and “most of the strikers travelled by bus to Bentonville, Arkansas, where they participated in actions and protests at and around Walmart’s headquarters during Walmart’s annual shareholders meeting.”¹⁰¹ Ultimately, Walmart fired fifty-five employees for violating attendance policies by engaging in the work stoppages, and defended against ensuing NLRB charges over the discharges on the grounds that the work stoppages were unprotected under the NLRA.¹⁰² Close inspection of the case reveals that on its *facts*, application of intermittent strike doctrine was improper: very few employees engaged in work stoppages, the stoppages were announced well in advance of transpiring—allowing Walmart ample time to lawfully replace employees had it wished to do so—and less than a majority of the discharged fifty-five employees engaged in more than one work stoppage.¹⁰³ Furthermore, out of Walmart’s 1.3 million employees, roughly 280 employees engaged in “Ride for Respect” work stoppages.¹⁰⁴ In these circumstances, application of intermittent strike doctrine was not merely overbroad, it was incoherent.

Of central concern to this discussion, however, is the majority’s failure to emphasize, as a matter of *law*, the fired employees’ lack of formal union representation. The assumption in the case seems to have been that the employees’ affiliation with the United Food and Commercial Workers’ Union (“UFCW”) was sufficient as a matter of law to establish that they were responsible for the union’s plan to “harass the company into a state of confusion.”¹⁰⁵ That affiliation must be carefully examined, however. While the UFCW was leading the “Making Change at Walmart” campaign, which “challeng[ed] Walmart to help rebuild our economy and strengthen families,” it was not the employees’ certified union.¹⁰⁶ The campaign consisted of “a coalition of Walmart associates, union members, small business owners,

98. *Id.* at 13, 15.

99. *Id.* at 3.

100. *Id.* at 12.

101. *Id.*

102. *Walmart*, slip. op. at 13, 36.

103. Gen. Couns.’s Answering Brief to Respondent’s Exceptions to the Decision of the Admin. Law Judge at 20, (Mar. 24, 2016), <https://www.nlr.gov/case/16-CA-096240> [<https://perma.cc/M7A6-LPU4>].

104. *Id.*

105. *Walmart*, slip. op. at 18.

106. *Id.* at 15.

religious leaders, community organizations, women's advocacy groups, multi-ethnic coalitions, elected officials and ordinary citizens who believe that changing Walmart is vital for the future of our country" and sought to educate the public about this issue.¹⁰⁷

"The UFCW intended for the Making Change at Walmart campaign to be led by Walmart associates who wanted to see change at Walmart, and supported by community stakeholders who would join in calling on Walmart to be a 'better employer' since what happens at Walmart sets the tone for what happens across every aspect of private sector employment in the United States."¹⁰⁸

The UFCW was affiliated with Organization United for Respect at Walmart ("OUR Walmart"), an organization founded in Maryland by a group of Walmart employees.¹⁰⁹ UFCW considered OUR Walmart one of its "subsidiaries and lends it tactical, legal, and financial support."¹¹⁰ UFCW and OUR Walmart were thus connected, though membership in OUR Walmart was:

limited to current and former Walmart associates who complete the necessary membership paperwork and pay \$5 each month for membership dues (customarily by personal check, credit card, debit card or money order). The UFCW takes the lead on collecting and processing monthly dues payments, which go into OUR Walmart's bank account.¹¹¹

With respect to the case's factual chronology:

At an OUR Walmart leadership meeting held on August 22-23, 2012, OUR Walmart decided to begin using associate strikes as an additional tactic in its efforts to induce Walmart to change its policies . . . because its members did not believe that other tactics . . . were sufficiently effective in addressing OUR Walmart's concerns about retaliation against OUR Walmart members.¹¹²

OUR Walmart thereafter conducted work stoppages that were highly scripted—even theatrical.¹¹³ OUR Walmart carried out highly publicized work stoppages

107. *Id.* at 18.

108. *Id.*

109. *Id.*

110. *Walmart*, slip. op. at 18–19.

111. *Id.* at 19.

112. *Id.* at 21.

113. *Walmart*, slip. op. at 22:

To ensure that its members consistently adhered to the ULP strike strategy, OUR Walmart provided potential strikers with: a form letter to sign and deliver to Walmart when they went on strike; a script to read when they advised their store manager that they were going on strike; a form letter to sign and deliver to Walmart when strikers were ready to return to work; and a script to read when strikers advised their store manager that they were ready to return to work. Each of those documents emphasized OUR Walmart's ULP strike strategy by stating that the associates went on strike "to protest Walmart's attempts to silence Associates who have spoken out against things like Walmart's low take home pay, unpredictable work schedules, unaffordable health benefits, and Walmart's retaliation

and other concerted activities. On October 4, 2012 (at a Walmart store in Pico Rivera, California), October 9 and 10, 2012 (at various Walmart stores around the country and at a Walmart headquarters meeting of financial analysts), and “[t]hroughout November 2012 [when it] continued with its plan to hold additional actions and strikes at various Walmart stores, including multiple actions and strikes that occurred on Black Friday 2012, one of Walmart’s busiest shopping days.”¹¹⁴ At one point, Walmart filed an unfair labor practice charge against OUR Walmart for alleged unlawful picketing.¹¹⁵

Various similar OUR Walmart actions—strikes and “caravans” in the “Ride for Respect”—continued throughout the spring and early summer in 2013.¹¹⁶ At one point, in February 2013, Walmart decided that it would not discipline employees for strikes held in October or November 2012 but warned that it “would apply its attendance policy to any future strikes.”¹¹⁷ On about June 21, 2013, Walmart applied its discipline policy to employees engaging in work stoppages thereby missing shifts during the late-May and early-June Ride for Respect campaign.¹¹⁸ Walmart eventually fired fifty-five employees for violation of the company’s attendance policy; forty other employees received lesser discipline.¹¹⁹ Work stoppages and other concerted activities nevertheless continued into the summer and fall of 2013, including “Black Friday,” the day after Thanksgiving in November 2013.¹²⁰

Concern over this factually complex case has been expressed by commentators lamenting the generally uncertain contours of intermittency doctrine, and the NLRB’s unprecedented division of work stoppages into “genuine” and “non-genuine”;

I believe that the Board’s protection only for what it deems “genuine” strikes raises serious equity issues for many low-wage, non-union workers, effectively denying them the right to strike . . . Think about what it takes for workers to engage in a “genuine” strike; that is, a strike in which all the workers walk off the job and stay off until the underlying labor dispute is resolved, either by

against those who have spoken out.” . . . Similarly, OUR Walmart advised strikers that if they made signs to carry during a demonstration while on strike, the associates should write “Unfair Labor Practice Strike” on their sign, and select one of . . . six slogans . . .

114. *Id.* at 22–23.

115. This author has written about the uncertain liability of groups like OUR Walmart—that organize and advocate on behalf of employees without either having been certified by the NLRA or recognized as exclusive representatives by the involved employer—for unfair practice liability under § 8(b)(4) and 8(b)(7) of the National Labor Relations act. See Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATHOLIC U. L. REV. 837, 842 (2014).

116. *Walmart*, slip. op. at 27–28.

117. *Id.* at 25.

118. *Id.* at 29.

119. *Id.* at 29, 30, 59.

120. *Id.* at 30.

agreement or the union's capitulation. Because employers have the right to permanently replace economic strikers, a genuine strike is likely to go on for a long time, unless workers are highly skilled and therefore difficult to replace. To sustain a long strike, workers have to either be able to go without a paycheck for a substantial period of time or have access to a well-resourced strike fund. That makes a traditional strike a viable option primarily for well-paid workers or workers who are represented by large unions with significant reserves.¹²¹

Still, this vague bifurcation is not necessarily inconsistent with Board doctrine denying protection to work stoppages planned to "harass the company into a state of confusion."¹²² A "purely" harassing work stoppage under this rubric could be considered "non-genuine."¹²³ It might, of course, also be argued that the "genuineness" of a motive for a work stoppage is a slender reed on which to hang protection in any situation—all work stoppages, after all, are meant to drive a company into some state of confusion.¹²⁴ Work stoppages are, by definition, economic weapons.¹²⁵ Weapons do harm. That is the point of using

121. Sharon Block, *Making Bad Law Worse: The Inequity of the Board's Walmart Decision*, ON LABOR (Aug. 20, 2019), <https://onlabor.org/making-bad-law-worse-the-inequity-of-the-boards-walmart-decision/> [<https://perma.cc/JZX4-WXWE>].

122. *Walmart*, slip op. at 3.

123. There is no denying, however, that the NLRB has developed the tendency of classifying effective employee economic weapons as "ungenuine." See *Toering Electric Co.*, 351 N.L.R.B. 225, 225, 240, 244 (2007) (ruling that in any refusal-to-hire case where an employer puts at issue the applicant's interest in actually working for the employer, the General Counsel of the NLRB must produce evidence demonstrating the applicant for employment was *genuinely* interested in seeking to establish an employment relationship with the employer, thereby creating an entirely new burden for proving violations in such cases, and reversing the Board's presumption that any individual who submitted an application was entitled to the protection of the NLRA). The doctrinal development was in response to union "salting" campaigns in which unions had been having success in surreptitiously organized employees.

124. As the Supreme Court expressed this idea in *NLRB v. Insurance Agents Int'l Union*, a case in which it held that vexatious use by a union of nonstandard economic weapons could not independently violate the NLRA:

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.

361 U.S. 477, 489 (1960). In short, not even the NLRB can restrict these kinds of economic weapons. See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (NLRB cannot restrict employer lockouts).

125. The General Counsel cited in its Walmart trial papers for this proposition *Allied Mechanical Services, Inc.*, 341 N.L.R.B. 1084, 1102 (2004) ("a requirement that a strike not be

them. The manner in which any work stoppage harms an employer is to disrupt normal operating procedures, thereby raising costs. Confusion is part and parcel of the use of any economic weapon, as anyone who has ever been personally involved in a labor dispute will attest.¹²⁶ The critical issue for intermittent strike doctrine analysis, however, is *planning*—and, read in context, the cases are concerned with whether work stoppages were planned to confuse employers and to prevent them from permanently replacing employees engaged in a work stoppage. In *Pacific Telephone & Telegraph Co.*,¹²⁷ for example, the Communications Workers of America engaged in a pattern of “hit and run” work stoppages triggering scrutiny under intermittent work stoppage doctrine.

The scheme was designed to compel the Respondent to “get its defenses up” — or gather substitute workers wherever a stoppage was unexpectedly pulled— “only to have the picket line gone” when the emergency crews reached the picketed place. Thus, the traffic employees in a great many of the division’s more than 200 offices walked off their jobs on different days instead of all at the same time; at many offices they returned to work after a short time and then walked out again after a day or two; and in some offices they again returned to work briefly and later quit anew a third time. Meanwhile, CWA pickets ranged over the entire division, appearing sporadically at a great number of offices.¹²⁸

The NLRB’s objection was that the design of the hit and run tactics was to limit the ability of the employer to react quickly to changing tactics. It has always seemed very unclear why that should matter.¹²⁹ As the NLRB has

disruptive of an employer’s operations, or harassing to it, is a requirement that the strike not be conducted”), *enforced Allied Mechanical Services, Inc. v. N.L.R.B.*, 668 F.3d 758 (D.C. Cir. 2012); *Swope Ridge Geriatric Center*, 350 N.L.R.B 64, 67 (2007) (“It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer’s business operations”). Interestingly, the Taft-Hartley Act’s 1947 amendment of the National Labor Relations Act defined a strike as “*any* strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and *any* concerted *slowdown* or other concerted interruption of operations by employees.” 29 U.S.C. § 142(2) (2018) (emphases added).

126. The right, after all, has never been “absolute.” Employees may be disciplined for “‘slow-down,’ ‘sit-in,’ and arguably unprotected disloyal tactics.” See *Insurance Agents*, 361 U.S. at 494. Any strike might be seen as disloyal or as a “slowdown,” and there is little controversy in present times that strikes in which employees stop working but refuse to leave the employer’s premises are trespassory. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 266–67 (1939).

127. 107 N.L.R.B 1547, 1548.

128. *Id.*

129. As already mentioned, the conduct could not of itself violate the NLRA. *Insurance Agents*, 361 U.S. at 494–95, and although the NLRB clearly has the authority to make case-by-case determinations about the limits of protection afforded to “partial” strikes, *id.*, it would certainly also have the authority to draw careful lines in this area. See *Eastex, Inc. v. NLRB.*, 437 U.S. 556, 574–75 (1978) (“It may be that the ‘nature of the problem, as revealed by unfolding variant situations,’ requires ‘an evolutionary process for its rational response, not a quick, definitive

elsewhere frankly acknowledged, “the principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do.”¹³⁰ The prohibition sounds vaguely equitable. But more than this, these rules presume the existence of a sophisticated, organized *planner*, and it is hard to see how an ad hoc group of non-union employees could presumptively be considered as such. This is almost certainly why the NLRB has *never* found that intermittency deprived non-union work stoppages of protection. This background principle is in evidence in *Roseville Dodge v. NLRB*.¹³¹ In that case, the Eighth Circuit rebuffed an employer’s argument that non-union employees engaged in an unprotected intermittent work stoppage, and additionally lost the protection of the NLRA by remaining on the employer’s property during the stoppage, thereby rendering their conduct trespassory.¹³² In response to the arguments, the court said, “[t]he evidence shows that this work stoppage was a peaceful attempt by unsophisticated workers to notify the company—which did not have a grievance procedure—of their dissatisfaction with working conditions because other methods of communication had proven futile.”¹³³

D. *Marquess of Queensberry Rules Applied to Non-Union Employees*

However one might feel about these “equitable” Marquess of Queensberry Rules,¹³⁴ especially in light of employers’ robust rights to permanently replace and lock out employees engaging in (or even thinking about engaging in) a work stoppage,¹³⁵ the prototypical intermittent work stoppage case involves a union.¹³⁶ It has been tacitly assumed that only unions strategically plan work stoppages around organizing campaigns or contract bargaining disputes.¹³⁷ Indeed, “intermittent strike doctrine” carries in it a hint of union misconduct, though it is very clear that whatever else intermittent work stoppages may be they are not *unlawful*.¹³⁸ *Walmart* is disquieting because it vaguely exports this *union* misconduct theory—however unsupported by the text of the NLRA—to

formula as a comprehensive answer.”) (quoting *Local 761, Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961)).

130. *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

131. 882 F.2d 1355, 1358–59 (8th Cir. 1989).

132. *Id.*

133. *Id.* at 1359.

134. A code of “fair” rules of boxing that influenced modern boxing. See MARQUESS OF QUEENSBERRY RULES, ENCYC. BRITANNICA (Aug. 25, 2020), <https://www.britannica.com/sports/Marquess-of-Queensberry-rules> [https://perma.cc/8EFT-6NP5].

135. See Moshe Marvit, *Is It Time for the Courts to End Labor Lockouts?*, THE CENTURY FOUNDATION (Aug. 25, 2020), <https://tcf.org/content/report/time-courts-end-labor-lockouts/?agreed=1>.

136. See *Roseville Dodge*, *supra* note 131.

137. *Id.*

138. *Walmart*, slip op. at 3.

non-union employees, and maybe also to what, in context, was a civil society organization. Although the group was coordinated by a union, it consisted of a multiplicity of groups. A “coalition of Walmart associates, union members, small business owners, religious leaders, community organizations, women’s advocacy groups, multi-ethnic coalitions, elected officials and ordinary citizens who believe that changing Walmart is vital for the future of our country.”¹³⁹ It is as if employees who were not members of a union were being held responsible for alleged violations of the NLRA by a union that was not their own.¹⁴⁰ Though OUR Walmart and the UFCW were actors in the surrounding drama,¹⁴¹ the NLRB did not find OUR Walmart to be a labor organization, and the NLRB’s General Counsel did not plead the discharge of the employees engaging in the work stoppages as discrimination against union activity.¹⁴² In short, there was no union formally involved in the case. None of the cases cited by the NLRB as instances in which intermittent work stoppages were found unprotected involved non-union employees.¹⁴³ Thus, the distinction between unionized employees

139. *Id.* at 18.

140. The situation is distinguishable from those in which employees make common cause with other unionized employees known to be engaging in an unlawful work stoppage. *See* *Swift & Co.*, 124 N.L.R.B. 394, 398 (1959). Here, there is no finding that the union violated the NLRA. Thus, there is no unlawful conduct with which employees could have made common cause. And to be sure, well-organized, alternative labor organizations affiliated with traditional unions—so called “alt labor”—may themselves have some appreciation of when *their* activities may expose *them* to liability. *See generally* Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATHOLIC U. L. REV. 837, 837–38 (2014). But it is extremely questionable whether tactical work stoppage understandings by such groups could reasonably be attributable to loosely-affiliated alt-labor group members. Of course, the argument applies with even greater force where no labor organization of any kind is present.

141. *Walmart*, Sections II.B and II.C of ALJ’s decision. Slip op. at 27, 45.

142. Under section 2(5) of the NLRA, labor organization is defined as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (2018). OUR Walmart may satisfy the definition, but conflict with a “union” or application of intermittent strike doctrine in a unionized context.

143. *Farley Candy Co.*, 300 N.L.R.B. 849, 850 (1990) (union context); *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1807–1811 (1954) (unprotected where union admittedly designed scheme to strike only on weekends); *Pacific Telephone & Telegraph Co.*, 107 N.L.R.B. 1547, 1548–1550 (unprotected where “[CWA’s—a union’s] announced strategy consisted of a multiplicity of little ‘hit and run’ work stoppages deliberately calculated, in CWA’s own words, to ‘harass the company into a state of confusion’”). The NLRB might have cited *Yale University*, 330 N.L.R.B. 246, 253–54 (1999) (finding unprotected a graduate students’ grade strike withholding papers and test materials). Although the strike in that case was distinguishable as a “partial” strike, it is true that the graduate students involved were not represented by a union. The case is factually distinguishable, however, in that the students were members of the Graduate Employees and Students Organization, had been seeking formal recognition as a union with Yale for three years,

and non-union workers was ignored in the decision, as was the nature of the “Making Change at Walmart” campaign as multi-organizational.

The obliteration of the line between union-represented and non-union employees in the context of intermittency analysis is a mistake. A presumption of protection should be made explicit in non-union work stoppage contexts. It is possible to persuasively argue for this position from the NLRB’s reaffirmation in *Walmart* that “work stoppages responding to distinct employer actions or issues, even if close in time, are simply not pursuant to a plan to strike intermittently for the same goal and are therefore protected.”¹⁴⁴ A plan to “strike and strike again,” in response to “distinct employer actions or issues,”¹⁴⁵ is essentially a restatement of the right to engage in a work stoppage. After all, there is nothing legally problematic about a labor organization *planning* what it has a right to do. One is reminded of Oliver Wendall Holmes’s famous labor law observation that one may lawfully “threaten” what one has a right to do.¹⁴⁶ As the NLRB long ago stated in *Polytech, Inc.*,¹⁴⁷ a case in which non-union employees were alleged to have engaged in an unprotected intermittent work stoppage,

This analysis . . . demonstrated the existence of a presumption that a single concerted refusal to work overtime is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.¹⁴⁸

The strengthened presumption of protection embodied in *Polytech* should be explicitly extended. Where employees are not represented by a union, it should be understood that they must speak for themselves as best they can.¹⁴⁹ The

and was intertwined with the question of whether the graduate students were statutory employees. *Id.*

144. *Walmart Stores Inc.*, 368 N.L.R.B. No. 24, slip op. at 2 (2019).

145. See N.L.R.B. Gen. Couns. Advice Mem., *supra* note 94, slip op. at 3–4 (Apr. 27, 1999).

146. *Vegeahn v. Guntner*, 167 Mass. 92, 107 (1896)

(“I pause here to remark that the word ‘threats’ often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to ‘compulsion,’ it depends on how you ‘compel.’”).

So too, one may argue, may you “plan.”

147. 195 N.L.R.B. 695, 696 (1972).

148. *Id.* at 696–697. Possibly no greater example of the “reaction” versus “plan” idea could be conceived than the non-union work stoppages that spread during the COVID-19 pandemic which seem to come close to utterly unplanned, reflexive acts of survival. See *supra* at Part II.B.

149. See *Washington Aluminum*, *supra* note 31, at 14. Of course, none of this is to suggest that employers did not already possess the burden of showing that a lawful strike had for some reason

NLRB has probably implicitly been following this policy all along, since there are few (if any) reported cases in which employees wholly unconnected with a union were found to have engaged in unprotected intermittent work stoppages.¹⁵⁰ In *Walmart*, a presumption of protection may have been rebuttable given the nature of the “Making Change at Walmart” campaign and the union affiliation—even if informal—of the fired employees. But the NLRB and the courts have previously applied absence of union representation (or a formal grievance procedure) as a mitigating factor in determining whether employees’ work stoppages are unprotected,¹⁵¹ and it should strengthen and make more explicit that principle.¹⁵² It is deeply disturbing that the NLRB utilized a case like *Walmart*—in which intermittent strike doctrine was inapplicable on the facts—to increase the risk of clumsy application of the doctrine to the new, non-union economy.

III. SOME WORK STOPPAGE IMPLICATIONS OF A “NO ONE’S AN EMPLOYEE” ECONOMY

To this point, the discussion has centered on problems applicable to “employees” who are clearly covered under the NLRA, with the major analytical division in Part II focusing on distinctions between “union” and “non-union” employees. The next of the major complexities the article will consider, however—the issue of who is an employee under the NLRA, or for that matter under any labor or employment law—in some respects stands the previous discussion on its head.¹⁵³ Here, the discussion centers on problems potentially

lost its protection. *Silver State Disposal Serv.*, 326 N.L.R.B. No. 25, 84, 85 (1998) (holding that an employer bears the burden of showing that work stoppage is unprotected) (*citing* *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 277 (1956) (acknowledging that whether a work stoppage is unprotected because it violates a no-strike clause is an affirmative defense)). The point here is that the burden should be heavier in circumstances where employees are wholly unaffiliated with a union.

150. This author has been unable to locate any such cases and the General Counsel made the same observation in his briefing of *Walmart*. Gen. Couns.’s Answering Brief to Respondent’s Exceptions to Decision of Admin. Law Judge at 13, 21; *Walmart Stores, Inc.*, 368 N.L.R.B. No. 24 (2019) (No. 16-CA-096240).

151. *Quietflex Mfg.*, 344 N.L.R.B. 1055, 1057 (2005) (“whether employees were represented or had an established grievance procedure”); *First Nat’l Bank of Omaha v. N.L.R.B.*, 413 F.2d 921, 926 (1969) (upholding NLRB protection of a concerted employee work stoppage because “[h]ere, the employees were unorganized and were not covered by a collective bargaining agreement”).

152. Scholar George Schatzki once made an even more expansive argument: employees should not pay with their jobs when engaging in concerted activity they did not know to be wrongful. George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—“Protected” Concerted Activities*, 47 TEX. L. REV. 378, 402 (1969).

153. For extended description of the fragmentation of the employment relationship see DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 17, 21 (2014).

surfacing if workers engaging in concerted activity that would likely otherwise be protected under the NLRA are *not* statutory employees.

A. *No Protection*

It is elementary that if a worker engages in lawful concerted activity but is found not to be an employee within the meaning of the NLRA, she does not enjoy the protection of the NLRA.¹⁵⁴ It may seem odd to think of non-employees such as independent contractors engaging in work stoppages. The narrative of the Gig economy—a heavy utilizer of independent contractors, after all—is that such workers are free agents who are at complete liberty to come and go as they please. This narrative seems to render the idea of a work stoppage incoherent, since an “independent” worker could simply leave.¹⁵⁵ One might also assume that a non-employee would know she did not possess the right to engage in a work stoppage. But these assumptions may not comport with economic reality.¹⁵⁶ Gig work and alternative work arrangements are extremely heterogeneous.¹⁵⁷ Aside from the lawyerly problem of determining a worker’s actual employment status (often after an adverse action of some type has already been taken against a putative employee by a putative employer), is the problem of how a worker could be expected to accurately predict that status in advance of engaging in workplace-related concerted activities. In California, for example, a worker designated an independent contractor by the company for

154. NLRA, Section 7 states only “employees” have “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Moreover, it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” (emphasis supplied). NLRA Section 13 states, “Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” From the confluence of these two sections, the right of employees to strike has never been questioned but has been qualified. See NAT’L LAB. RELS. BOARD, THE RIGHT TO STRIKE, <https://www.nlrb.gov/strikes> [<https://perma.cc/Z7D4-B749>] (last visited Aug. 20, 2020).

155. See Guidance Letter from U.S. Department of Labor, Wage and Hour Division (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf [<https://perma.cc/43Y5-D7PR>] (discussing whether “service providers” are employees and answering in the negative based in part on fact that they “appear to maintain a high degree of freedom to exit the working relationship”) (on file with U.S. Department of Labor).

156. The United Nations, for example, recognizes that the identity of “employers” and “employees” is a challenge to attempting to apply law to the Gig economy. Hannah Johnston & Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*, INT’L LABOUR OFF. 1, 5 (2019).

157. See GIG ECON. DATA HUB, CORNELL U. ILR SCHOOL <https://www.gigeconomydata.org/> (exploring the great variety of “Gig” work arrangements and explaining in part that traditional definitions of “employee” and “independent contractor” are problematic), [<https://perma.cc/D4CV-B69S>] (last visited Aug. 20, 2020).

whom she works may in fact be an employee as a matter of state law.¹⁵⁸ The California definition, however, would not be controlling under the NLRA under a recent shift in employee definition by the NLRB which sharply departs from both the California and traditional common law employee definitions.¹⁵⁹ Perhaps even worse, different employee definitions under various state employment laws may apply in the worker's state.¹⁶⁰ Thus, even if a worker knows generally about the right of "employees" to engage in work stoppages, she may also realize that she—as a possible non-employee—engages in such conduct at her peril. In an economy in which millions of precarious workers are unilaterally designated independent contractors,¹⁶¹ or as other forms of "non-employee" Gig workers,¹⁶² the narrowed employee definition endangers workers' rights to engage in work stoppages in at least two ways. First, a worker may erroneously believe she is an employee, when in fact she is an independent

158. *Dynamex Operations West, Inc. v. Superior Court of L.A.*, 416 P.3d 1, 7 (Cal. 2018) (applying ABC employment test to a large swath of California economy in opinion expressing broad concern with widespread workers misclassification). With respect to the ABC test:

Some courts using this test look at whether a worker meets three separate criteria to be considered an independent contractor: 1) The worker is free from the employer's control or direction in performing the work; 2) The work takes place outside the usual course of the business of the company and off the site of the business; 3) Customarily, the worker is engaged in an independent trade, occupation, profession, or business.

LEGAL INFO. INST., CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/abc_test [<https://perma.cc/C53N-GZK3>] (last visited (Aug. 20, 2020)).

Dynamex and its ABC standard has now been codified under California law. Cal. Lab. Code § 2750.3 (2019). There is continuing confusion over who is or is not an employee under California law and employee standards differ within the state for purposes of workers' compensation law. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Rels.*, 769 P.2d 399, 404 (Cal. 1989) (establishing use of common law, multifactor test in workers' compensation cases).

159. *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019) (placing unusual emphasis on workers' "entrepreneurial opportunity" in contradistinction to the common law's traditional emphasis on control over working conditions). Whatever this new standard may come to mean, it is far different than California's ABC test, and seems much more likely to produce findings of independent contractor status.

160. *See, e.g., Carmago's Case*, 96 N.E.3d 673, 675 (Mass. 2018) (upholding different employee definitions under Massachusetts workers' compensation and independent contractor statutes).

161. The number of independent contractors in the U.S. is frequently disputed. The Bureau of Labor Statistics (BLS) found the figure to be 6.9% of the work force as of 2017. *Tracking the Changing Nature of Work: the Process Continues*, U.S. BUREAU LAB. STAT. (Feb. 12, 2019), <https://blogs.bls.gov/blog/tag/independent-contractors/> [<https://perma.cc/4E8R-72BS>]. On the other hand, the BLS also admits that it has no working definition for a gig worker. *Id.* Apparently the imprecision holds true in a number of quarters. For example, Edison Research Company polls have estimated that 24% of workers over the age of 18 are participating in the gig economy. *Gig Economy, Marketplace-Edison Research Poll*, EDISON RSCH. (Dec. 2018), <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf>. [<https://perma.cc/9RRZ-SQBB>].

162. *See* Schatzki, *supra* note 152, at 402.

contractor. This misapprehension may lead to legal consequences that will be discussed in the next two subsections if the worker does engage in a work stoppage. Second, confusion over employee status could severely chill employees' rights to engage in work stoppages. Workers may be unwilling to engage in the protected activity if there is any significant doubt about their employee status. Such statute-disrupting outcomes, if desired, should be implemented by Congress and not left to happenstance.

B. *The Labor Injunction*

A more subtle problem than non-protection exists if workers are broadly deemed not to be employees under the NLRA (or perhaps under any statute). Under the Norris-LaGuardia Act ("NLA"),¹⁶³ federal courts have been carefully restricted from issuing injunctions in peaceful "labor disputes" unless an injunction is specifically authorized under the NLRA.¹⁶⁴ A "labor dispute" is defined under the NLA as, "any controversy concerning terms or conditions of *employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of *employment*, regardless of whether or not the disputants stand in the *proximate* relation of employer and employee."¹⁶⁵ As will be discussed, some courts, focused on the statutory employment predicate of an NLA "labor dispute," have held that disputes between employers and independent contractors are *not* "labor disputes" within the meaning of the NLA.¹⁶⁶

It follows that, where courts determine workers are independent contractors, those same courts may conclude that they are authorized to enjoin peaceful protest activity by independent contractors, supplementing courts' explicit authorization to issue labor injunctions under the NLRA.¹⁶⁷ Thus, in the Google

163. 29 U.S.C. §§ 101-115 (2018).

164.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101 (2018).

165. 29 U.S.C. § 113(c) (2018) (emphasis added).

166. *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144-45 (1942) (dispute between fish buyers and fish sellers not labor dispute within meaning of NLA, so district court injunction of alleged underlying antitrust conduct upheld); *Taylor v. Local No. 7, Int'l. U. of Journeymen Horseshoers*, 353 F.2d 593, 601 (4th Cir. 1965) (farriers not employees and accordingly no labor dispute existed within meaning of the NLA).

167. Under the NLRA, federal courts may issue preliminary injunctions against parties where there is reason to believe the NLRA has been violated and where it is "just and proper" to do so. Federal courts may also issue injunctions against labor organizations for a variety of violations including, but not limited to, engaging in unlawful secondary activity, engaging in unlawful

example in which workers were protesting alleged “buyouts” of managers accused of sexual harassment, it is noteworthy that more than half of Google’s 220,000-person workforce are independent contractors.¹⁶⁸ Given what has just been said about the non-applicability of the NLA to independent contractors, a federal district court, not faced with an NLA “labor dispute,” might have had jurisdiction to enjoin the Google protest despite its peaceful character. A federal court must, of course, have some underlying jurisdiction over a dispute in order to have injunctive power in connection with it, but courts in the past seemed able to fashion a variety of jurisdictional theories, which was one of the major reasons Congress enacted the NLA to protect employees’ right to engage in peaceful labor activity.¹⁶⁹

It may not be immediately apparent why the ability of a federal court to issue an injunction in a peaceful “labor” dispute matters. In *The Labor Injunction*, a volume co-written by then-Harvard law professor and later Supreme Court Justice Felix Frankfurter and Nathan Greene,¹⁷⁰ the authors argued that a labor

picketing, and striking in violation of a contractual no-strike pledge. *See* 29 U.S.C. §§ 160(h), (j), (l) (2018).

168. Todd Haselton, *Senators Demand Google Make Contractors Full-Time Employees*, CNBC (Aug. 5, 2019), <https://www.cnbc.com/2019/08/05/senators-demand-google-make-contractors-full-time-employees.html> [<https://perma.cc/WC8Z-YFBY>]; Daisuke Wakabayashi, *Google’s Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html> [<https://perma.cc/P5KV-VWZR>].

169. Michael C. Duff, *Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall*, 2009 MICH. ST. L. REV. 669, 677–81 (2009).

170. *See generally* FELIX FRANKFURTER & NATHAN GREEN, *THE LABOR INJUNCTION* (1930); *see also* Thomas R. Haggard, *The Power of the Bankruptcy Court to Enjoin Strikes: Resolving the Apparent Conflict Between the Bankruptcy Code and the Anti-Injunction Provisions of the Norris-LaGuardia Act*, 53 GEO. WASH. L. REV. 703, 706 (1985). One commentator has alleged that the personal biases of Frankfurter and Greene influenced those authors’ conclusions. *See generally* Sylvester Petro, *Injunctions and Labor Disputes: 1880-1932. Part 1. What the Courts Actually Did - and Why*, 14 WAKE FOREST L. REV. 341 (1978). Even if this were true, *THE LABOR INJUNCTION* was nevertheless a primary influence on Congress and is therefore an indispensable resource for divining congressional intent in enacting the NLGA. For evidence that the Congress believed the conclusions of Frankfurter and Greene, and a good deal more, consider the statement of Rep. McGugin made on the House floor on March 8, 1932:

Some day and some time, when the history of this country is written, some historian will obtain a copy of one of these tyrannical labor injunction decrees and will point out how far the courts went in excess of their rights and contrary to human liberty and righteousness. Injunctions enjoining a man from talking to his neighbor about anything which he may want to discuss, whether it be a strike or a labor dispute, or what not, is contrary to the true principles of liberty. If there were not a single laboring man in the United States asking for this bill, we should curb the power of the courts in granting these injunctions, upon the broad principle that such injunctions are a menace to liberty. [Applause.]

injunction issued by a court against a union during the early stages of a work stoppage will tend to permanently defeat employees engaged in a labor dispute.¹⁷¹ The labor injunction has always been provocative.¹⁷² Throughout the late nineteenth and early twentieth centuries, the federal judiciary created legal doctrines to justify issuance of injunctions in labor disputes, grounded in various substantive areas, including breach of contract¹⁷³ and interference with railroad receiverships.¹⁷⁴ Although this labor injunction history emerged in the context of union activity, there is no reason to suppose that an injunction issued against non-union worker protest would not equally tend to suspend and chill work stoppages, effectively cloaking the merits of a workplace dispute in a manner benefiting the target of the protest.¹⁷⁵

How does an independent contractor protest “working conditions” free from the threat of federal injunction, if one is not an employee? A response to this non-union worker injunction conundrum was suggested in an older opinion of the Supreme Court in *Columbia River Packers’ Association v. Hinton*.¹⁷⁶ In that case, a packers’ association possessed plants for processing and canning fish in the Pacific Northwest.¹⁷⁷ It procured its fish primarily from independent fishermen, who, while members of the Pacific Coast Fishermen’s Union, were found to be independent “entrepreneurs,” and not employees of the packers’ association.¹⁷⁸ The union acted as a “collective bargaining agency” in the sale of fish caught by its members, and the union’s internal rules forbade its members from providing fish to producers like the packers’ association “outside of Union

75 CONG. REC. 5500 (1932). For a general critique of Petro’s methods see William E. Forbath, *The Shaping of the Labor Movement*, 102 HARV. L. REV. 1109, 1250–51 n.601 (1989) [hereinafter *Shaping of the Labor Movement*].

171. FRANKFURTER & GREENE, *supra* note 170, at 201.

172. *Id.*

173. *Id.* at 39–40. Indeed, the entirety of Section 3 of the NLGA is devoted to rendering unenforceable in federal courts the “yellow dog” contract, an agreement between an employer and employee that the employee would refrain from joining or remaining a member of a union. A union’s alleged interference with such a contract was one method by which employers had successfully “federalized” labor disputes, making them susceptible to federal injunction. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 19 (1915).

174. FRANKFURTER & GREENE, *supra* note 170, at 23.

175. *Jacksonville Bulk Terminals, Inc. v. Int’l Longshoremen’s Ass’n*, 457 U.S. 702, 716 (1982)

(“The legislative history is replete with criticisms of the ability of powerful employers to use federal judges as ‘strike-breaking’ agencies; by virtue of their almost unbridled ‘equitable discretion,’ federal judges could enter injunctions based on their disapproval of the employees’ objectives, or on the theory that these objectives or actions, although lawful if pursued by a single employee, became unlawful when pursued through the ‘conspiracy’ of concerted activity”).

176. 315 U.S. 143, 143 (1942).

177. *Id.* at 144.

178. *Id.* at 145.

agreements.”¹⁷⁹ The union’s standard contracts of sale also required buyers like the packers’ association not to purchase fish from nonmembers of the union.¹⁸⁰ The packers’ association refused these terms, and the union in turn induced its members to refrain from selling fish to the association.¹⁸¹ Because the union’s control of the fish supply was extensive, the association was unable to obtain the fish it needed to carry on its business.¹⁸² The packers’ association filed suit alleging that the union’s actions violated federal antitrust law.¹⁸³ A federal district court agreed with the association’s position, found a violation of the Sherman Antitrust Act, and issued an injunction requiring the union to cease and desist in its actions.¹⁸⁴ The Ninth Circuit reversed, finding that issuance of the injunction violated the NLA: “[t]he injunction . . . was granted without jurisdiction to do so, and the portion of the decree granting an injunction must be stricken.”¹⁸⁵ In other words, the Ninth Circuit found that the NLA applied to the dispute; but, in reversing that decision, the Supreme Court stated,

[t]he controversy here is altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary, their desire is to continue to operate as independent businessmen, free from such controls as an employer might exercise.¹⁸⁶

The issuance of the injunction did not therefore violate the NLA because the fish sellers were not employees, a condition precedent to establishment of a labor dispute under the NLA. Certain important implications flow from the foregoing passage. Had the underlying dispute been one in which the putative independent contractors sought to be employees, or had the independent contractors contended that they were in fact employees, the dispute might have fallen within the NLA’s definition of labor dispute.¹⁸⁷ Strictly read, the passage also suggests

179. *Id.*

180. *Id.*

181. *Columbia River Packers Ass’n v. Hinton*, 315 U.S. at 145.

182. *Id.*

183. *Id.*

184. *Id.* at 144–45.

185. *Hinton v. Columbia River Packers Ass’n*, 117 F.2d 310, 313 (9th Cir. 1941).

186. *Columbia River Packers Ass’n v. Hinton*, 315 U.S. at 147.

187. As will be explained in the next Part, whether workers’ actions are regulated by antitrust law is closely related to whether worker conduct is subject to injunction notwithstanding the contours of the NLA. Employee status thus bears on whether concerted action is exempted from the Sherman Antitrust Act and also whether the same concerted activity is an NLA-cognizable “labor dispute.” Professor Paul has argued that a minor exception to antitrust law’s regulation of non-employee concerted action applies to “independent contractor workers who are organizing specifically toward employee status, not those who are engaging in concerted action to *directly* better their conditions, or for other purposes” and that “organizing specifically for improved wages and working conditions ought to be within the scope of this exception, so long as employee status is also among the aims (under the test that the dispute must relate to terms and conditions of employment).” Paul, *supra* note 48, at 1033, n.240.

that had the independent contractors been the employees of “any other employer” the dispute might have been brought within the NLA. *Columbia River Packers* provides clues to the kinds of arguments that putative non-employee workers might make in an attempt to insulate themselves from federal injunctions. Chief among these arguments may be that non-employee workers should always explicitly contest their non-employee status while they are protesting the merits of the underlying workplace dispute. This might position them to argue the proposition such as that “[t]he term ‘labor dispute’ must not be narrowly construed,” and that “the employer-employee relationship [is] the matrix of the controversy,” a broad reading of the term followed by the Supreme Court in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen’s Association*.¹⁸⁸

Other cases seem to narrow the labor dispute definition, in tension with *Jacksonville Bulk Terminals’* broad reading of *Columbia River Packers*. In *Taylor v. Local No. 7, International Union of Journeymen Horseshoers*,¹⁸⁹ for example, the Fourth Circuit reversed a federal district court’s finding that certain horseshoers—also known as farriers—were employees.¹⁹⁰ Somewhat unusually, the circuit court itself analyzed the job functions of the workers that were at issue.¹⁹¹ Having concluded that the farriers and horse trainers and owners did not stand in the relation of employer and employee, the court next considered the defendant-workers’ alternative argument that, even if the workers were independent contractors, they were nevertheless engaged in a “labor dispute” as defined under the NLA.¹⁹²

The only interests sought to be advanced by the activities of these defendants are the interests of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed, per horse. They are independent businessmen, specialists in their line, who have banded together and who act in concert for their mutual benefit and improvement. We fail to discover the existence of any employer-employee relationship which is the ‘matrix’ of this controversy or any condition which, under the provisions of either the Clayton Act or the Norris-LaGuardia Act, would protect the activities of the defendants.¹⁹³

Despite the paucity of authority since *Columbia River Packers* touching on the question of application of the NLA to non-employee workers, the broad definition of labor dispute counseled by *Jacksonville Bulk Terminals* has been

188. 457 U.S. 702, 712–13 (1982) (quoting *Columbia River Packers Ass’n v. Hinton*, 315 U.S. at 147).

189. 353 F.2d 593, 593 (4th Cir. 1965).

190. *Id.* at 601, 606.

191. *Id.* at 599–600.

192. *Id.* at 602.

193. *Id.* at 606.

broadly embraced by the federal courts.¹⁹⁴ It is difficult to locate any narrowing authority. Although it would be unwise for independent contractors, Gig workers, or other actual or putative non-employees to enter into a dispute with their “employing” entity without appreciating the potential for federal court injunctions, it also seems clear that the NLA is likely to be interpreted broadly, diminishing, at least, the risk of that outcome.

1. Work Stoppages and Antitrust

When independent contractors or other non-employee workers engage in work stoppages, they run the risk of violating antitrust law.¹⁹⁵ The Sherman Antitrust Act states that, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹⁹⁶ Although this language is on the surface broad enough to encompass traditional labor activity, federal law has historically—though not without repeated struggles¹⁹⁷—exempted such activity from the Sherman Act.¹⁹⁸ Those exemptions, however, do not apply to non-employee workers when deemed independent businesses.¹⁹⁹ Despite legislative history that antitrust law was never meant to apply to combinations of workers,²⁰⁰ the number of non-employee workers has been expanding through operation of the Gig economy, thus bringing these new “combinations” to the edge of the black hole that is antitrust.²⁰¹ When non-

194. The Court has observed that “the statutory definition itself is extremely broad,” *Brady v. N.F.L.*, 644 F.3d 661, 671 (8th Cir. 2011) (quoting *Jacksonville Bulk Terminals, Inc.*, 457 U.S. at 712). “Congress made the definition broad because it wanted it to be broad.” *Brady*, 644 F.3d at 671 (quoting *Order of R.R. Teleg. v. Chicago & N. W. R. Co.* 362 U.S. 330, 335–36 (1960)). The courts have also demonstrated the continued broad reach of the NLA by rebuffing efforts by railroad employers to escape the NLA by obtaining injunctions to suppress secondary labor activity by railroad unions. (Unlike the NLRA, the Railway Labor Act provides courts with no secondary boycott injunctive authority). *Burlington N. R. Co. v. Bhd. of Maint. of Way Emp.*, 481 U.S. 429, 451, 453 (1987); *Richmond, Fredericksburg and Potomac R. Co. v. Bhd. of Maint. of Way Emp.*, 795 F.2d 1161, 1165 (4th Cir. 1986).

195. Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 793 (2019) (arguing that since the 1970s, federal courts “have renounced the congressional goals of the antitrust laws and held that the only appropriate objective is the promotion of economic efficiency or consumer welfare”).

196. 15 U.S.C. § 1 (2019).

197. Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW AND CONTEMP. PROB. 45, 58 (2019).

198. See *Cal. ex rel. Harris*, *supra* note 46.

199. Paul, *supra* note 48, at 1030.

200. Vaheesan, *supra* note 195, at 779–783.

201. *Id.* at 809–810 (“Given employers’ increasing classification—and misclassification—of workers as independent contractors across the economy, the Clayton Act’s exemption for labor, as currently interpreted, provides many workers with no protection from antitrust investigations and lawsuits.”)

employee workers—if considered independent businesses—agitate concertedly for improvements in working conditions, they may become subject to antitrust sanctions, which is a serious matter because under antitrust law,

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.²⁰²

It will be recalled that a number of the older cases discussing NLA injunctive authority arose in antitrust contexts in which it was alleged that antitrust violations should be enjoined.²⁰³ A close connection therefore exists with respect to the employment relation for purposes both of establishing NLA jurisdiction and opening the door to substantive and injunctive relief under antitrust law. In short, work stoppages by non-employee workers may be unprotected by the NLA and sanctionable under antitrust law.²⁰⁴

Even statutory employees may be derivatively subject to antitrust risk. In recent years, some employees have acted under the aegis of worker centers and other “alt-labor” groups.²⁰⁵ There is a serious question as to whether these groups fall under antitrust law’s safe harbor for labor activity.²⁰⁶ One case has (frighteningly) held that under antitrust law, the existence of a labor organization

202. 15 U.S.C. § 1 (2019).

203. *See e.g.* 180 Colum. River Packers Ass’n v. Hinton, 315 U.S. 143, 145 (1942).

204. 15 U.S.C. § 25, provides for antitrust injunctions sought by the Government. The section gives U.S. District Courts jurisdiction to prevent and restrain violations of the antitrust laws and directs U.S. Attorneys, under the supervision of the Attorney General, to file actions seeking to prevent and restrain the violations. 15 U.S.C. § 26 authorizes “any person, firm, corporation, or association” to seek injunctive relief against threatened loss or damage by a violation of the antitrust laws. Private parties may also seek injunctive relief under 15 U.S.C. § 26. *See* Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 668 (D.C. Cir. 1977).

205. *See* Josh Eidelson, *Alt-Labor*, THE AMERICAN PROSPECT (Jan. 29, 2013), <https://prospect.org/notebook/alt-labor>.

206. 15 U.S.C. § 17 states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

is a fact question for a jury.²⁰⁷ Though this seems somewhat doubtful given the law of the NLRA,²⁰⁸ Jeffrey Hirsch and Joseph Seiner have cautioned,

Among the potential disadvantages of nontraditional groups—and the most significant from a financial and criminal perspective—is antitrust law. Perhaps no issue better represents the knife’s edge facing nontraditional groups, which must carefully monitor whether their actions may constitute anticompetitive behavior under antitrust law and, if so, whether they will enjoy protection under the antitrust labor exception. This task is made all the more difficult by the opacity of antitrust law as it applies to nontraditional labor efforts.²⁰⁹

If alt-labor groups are not “labor organizations” within the meaning of the NLRA, *their* participation in various worker concerted activities may be deemed a “conspiracy in restraint of trade” in violation of antitrust law, with employee-members vulnerable as “co-conspirators.”²¹⁰

Ultimately, as Marshall Steinbaum has put it, if the only objective of antitrust law is lower prices for consumers, then “collective action by port truckers, home health aides, church organists, or gig economy workers is inefficient rent-seeking.”²¹¹ While a full discussion of the interplay between antitrust and labor law is beyond the scope of this article, the narrow question here is whether all non-employee work stoppages must boil down to unlawful “rent seeking” under the Sherman Act. Returning to the protesting, independent contractor-heavy Google workers, for example, the concerted activity in question was a complicated affair. First, the group may have consisted of both employee and non-employee workers because Google is a “mixed” work force.²¹² If the Google workers had consisted exclusively of non-employee independent contractors, however, the question would be whether a work

207. *Ring v. Spina*, 84 F. Supp. 403, 406 (S.D.N.Y. 1949). Frightening because a non-employee worker could be liable under antitrust through affiliation with a non-labor group the worker could not have known in advance was not protected by the antitrust labor exemption.

208. 29 U.S.C. § 152(5) defines “labor organization” as “*any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.*” (Emphases supplied).

209. Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 *FORDHAM L. REV.* 1727, 1776 (2018).

210. *Tex. Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634–38 (1981) (discussing difficult problems of liability allocation given potentially very large classes of co-conspirators).

211. *Id.* at 59; *see also* Vaheesan, *supra* note 195, at 793 (arguing that since the 1970s federal courts “have renounced the congressional goals of the antitrust laws and held that the only appropriate objective is the promotion of economic efficiency or consumer welfare”). Obviously, had this historically been the only policy cognizable under antitrust law, the general labor law exemption could never have come into existence.

212. Mark Bergen and Ellen Huet, *The Secret and Frustrating Life of a Google Contract Worker*, *LOS ANGELES TIMES* (Nov. 8, 2019), <https://www.latimes.com/business/technology/story/2019-11-08/the-secret-and-frustrating-life-of-a-google-contract-worker>.

stoppage over sexual harassment could implicate antitrust law. One should distinguish here between non-employee work stoppages aimed at “protest” and those aimed at affecting remuneration in a way that might lead to diminished consumer welfare in the form of higher prices—admittedly a narrow view of that welfare.²¹³ Increased remuneration to independent contractors seems rationally connected to increased consumer prices.

In *Federal Trade Commission v. Superior Court Trial Lawyers Association*,²¹⁴ a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government (which was not their employer) increased the lawyers’ compensation.²¹⁵ The ensuing boycott²¹⁶ was completely successful.²¹⁷ The Court stated that “[t]he agreement among the lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that [the lawyers] offered.”²¹⁸ The Court characterized the lawyers’ conduct as “the essence of price-fixing,” and concluded that “[t]he horizontal arrangement among these

213. This point does not seek to lend credence to the questionable primacy afforded “consumer welfare” to the exclusion of all other social goods. The executive branch and judiciary “have replaced congressional (and once-judicially validated) economic and political objectives with an ‘efficiency’ or ‘consumer welfare’ goal.” See Vaheesan, *supra* note 195, at 769. The point here is that, even taking the consumer welfare arguments at face value, there must still be some articulable linkage between collective activity and consumer harm.

214. 493 U.S. 411 (1990).

215. *Id.* at 414.

216. The dictionary definition of boycott is “the process or an instance of joining with others in refusing to deal with someone (as a person, organization, or country) as a way of protesting or forcing changes.” MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/>. Specialized definitions of the term under federal labor law are beyond the scope of this discussion.

217. See *Sup. Ct. Trial Law. Ass’n*, 493 U.S. at 418. Within two weeks the involved lawyers’ rates were increased from \$30 per hour for court time and \$20 per hour for out-of-court time to a temporary \$35 per hour rate to a subsequent permanent increase to \$45 an hour for out-of-court time and \$55 for in-court time. *Id.* at 416–418.

218. *Id.* at 422–23 (internal citations omitted).

competitors was unquestionably a ‘naked restraint’²¹⁹ on price and output.”²²⁰ The rule of *Trial Lawyers* as applied to independent contractors engaging in work stoppages for higher remuneration creates a seemingly bright line: regardless of one’s views of the broad fictitiousness of independent contractor designations throughout much of the economy, under current antitrust law, independent contractors risk work stoppages being designated by courts as illegal boycotts.²²¹ For worker advocates, the remedy to the problem will ultimately be pushing for amended statutory employee definitions across the economy to make misclassification of employees as independent contractors significantly more difficult.²²²

Antitrust scrutiny may appear irrelevant in cases of “pure” protest work stoppages, for example against Google for sexual harassment; or irrelevant in connection with safety-related work stoppages like those emerging from

219. In other words, the conduct was a “per se” violation of the antitrust laws.

Violations under the Sherman Act take one of two forms – either as a per se violation or as a violation of the rule of reason. Section 1 of the Sherman Act characterizes certain business practices as per se violations. A per se violation requires no further inquiry into the practice’s actual effect on the market or the intentions of those individuals who engaged in the practice. Some business practices, however, at times constitute anticompetitive behavior and at other times encourage competition within the market. For these cases, the court applies a “totality of the circumstances test” and asks whether the challenged practice promotes or suppresses market competition. Courts often find intent and motive relevant in predicting future consequences during a rule of reason analysis.

CORNELL LAW SCHOOL, LII, ANTITRUST, <https://www.law.cornell.edu/wex/antitrust> [<https://perma.cc/K72W-7XN6>].

220. *See Sup. Ct. Trial Law. Ass’n*, 493 U.S. at 423.

221. *Id. See also* Paul, *supra* note 48, at 1043 (describing “Trial Lawyers as an instance of the neoclassical price-fixing logic applied to worker collective action that looms as a serious threat, if not an outright blockade, to much nontraditional worker organizing, particularly on the part of independent contractor workers not affiliated with a traditional labor organization”).

222. In a bill passed by the House of Representatives in February 2020, the NLRA would be amended as follows:

“An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless. . . (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.”

H.R. 2474, 116th Cong. (1st Sess. 2019) <https://www.congress.gov/bill/116th-congress/house-bill/2474/text> [<https://perma.cc/282E-Y7PE>]. This statutory criteria, known as the “ABC test,” has been embraced by a number of states in various employment contexts, most notably under California law. *See* *Dynamex Operations West, Inc. v. Super. Ct.*, 416 P.3d 1, 35, 39 (Cal. 2018) (holding that a putative employer suffers or permits a putative employee to work if it cannot overcome three-part test for classifying workers as independent contractors).

COVID-19 contexts.²²³ A logical first reaction to the question might be that workers engaging in the Google protest, for example, should not have been liable under antitrust law because the work stoppage contained elements of speech or expressive content.²²⁴ As has been known throughout the history of labor law, work stoppages often involve picketing or other attempts to communicate the facts of a “labor” dispute and attempts to suppress the communication have routinely drawn First Amendment scrutiny.²²⁵ It might be argued that parallel scrutiny should be undertaken in the context of application of antitrust liability to non-employee work stoppages—indeed, this article will make this argument. As Sanjukta Paul has shown, however, this First Amendment theory was dealt a blow in *Trial Lawyers*.²²⁶ There, the Court distinguished its storied opinion in *Claiborne Hardware* by drawing a bright line between concerted boycotts (like work stoppages) for one’s own advantage and those motivated by “the equal respect and equal treatment to which [participants] were constitutionally entitled.”²²⁷ *Trial Lawyers* continued that the racial justice boycott in *Claiborne* “was not intended ‘to destroy legitimate competition.’ . . . Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it.”²²⁸ This nice phrase does nothing to clarify how its principle would apply in practice to, for example, the Google work stoppage. A protest against sexual harassment potentially seeks both personal advantage (to be personally free of sexual harassment) and the collective good of ridding the workplace of sexual harassment, both “preconditions of the free market, and not commodities to be haggled over within it.”²²⁹

Safety protests are similarly problematic. During the COVID-19 pandemic, several news stories suggested that Instacart²³⁰ workers were “striking” or

223. It is worth repeating that the issue in these scenarios is not whether workers are statutorily protected—assuming *arguendo* a finding of non-employee status under relevant statutes they would not be; rather, the question remains whether workers could be liable for such work stoppages under antitrust law.

224. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–912 (1982) (reversing on First Amendment grounds the Mississippi Supreme Court’s opinion upholding lower courts’ imposition of tort and state antitrust damages on various defendants participating in economic boycott of white merchants to pressure for racial and civil rights in Claiborne County, Mississippi).

225. See generally *Carlson v. Cal.*, 310 U.S. 106, 110–111 (1940).

226. Paul, *supra* note 48, at 1043 (arguing throughout that “an artificial distinction between the ‘economic’ and the ‘political’ keeps First Amendment protection for a classic workers’ boycott at bay.”)

227. *Fed. Trade Comm’n Superior Lawyers Assoc.*, 493 U.S. at 426.

228. *Id.* at 426–27.

229. *Id.*

230. According to Instacart’s web site, “[Its] services comprise a platform that presents you with a set of one or more retailer virtual storefronts from which you can select goods for picking, packing, and delivery by individual personal shoppers (‘Personal Shoppers’) to your location or, if available, for you to pick up in-store. Picking, packing, or delivery services may be performed by third parties including a retailer or third-party logistics provider (collectively, ‘Third Party

preparing to do so.²³¹ One New York publication reporting on the story inquired, “Is it really a strike if Instacart workers aren’t employees?”²³² According to published reports, Instacart, which was already operating in 5500 cities in North America, planned to “hire 300,000 ‘full-service shoppers,’ who are treated as independent contractors, in North America over the next three months due to increased demand spurred by the coronavirus pandemic. That would more than double its current workforce of full-service shoppers.”²³³

When the potential exists for hundreds of thousands of Instacart workers “striking” over both “hazard pay” and, for example, provision of personal protective equipment, a very difficult antitrust problem is presented that plainly differs in scope from antitrust disputes involving pockets of professional or trade workers that the Federal Trade Commission has occasionally prosecuted or found problematic under antitrust law.²³⁴ The “independent businessperson” model seems both inaccurate and wholly inadequate in assessing this broad Instacart/Gig economy problem. First, the independent businessperson model seems factually inaccurate. It is simply difficult to accept the often-repeated mantra that businesses like Instacart are “technology companies” only incidentally involved in any particular industry.²³⁵ It further strains the credulity

Providers’).” INSTACART TERMS OF SERVICE <https://www.instacart.com/terms> [<https://perma.cc/V69K-HCKC>] (last visited Jan. 12, 2021).

231. See Erik Ortiz, *Some Instacart workers strike, others demand more as coronavirus alters labor landscape*, NBC NEWS (Mar. 30, 2020), <https://www.nbcnews.com/news/us-news/some-instacart-workers-strike-others-demand-more-coronavirus-alters-labor-n1171521> [<https://perma.cc/manage/create?folder=7821>]; Alexandra Olson and Mae Anderson, *Some Instacart, Amazon Workers Strike as Jobs Get Riskier*, U.S. NEWS & WORLD REPORT (Mar. 31, 2020), <https://www.usnews.com/news/business/articles/2020-03-30/some-instacart-amazon-workers-strike-as-jobs-get-riskier>.

232. Samantha Christmann, *Is it Really a Strike if Instacart Workers Aren’t Employees?*, THE BUFFALO NEWS (Mar. 30, 2020) <https://buffalonews.com/2020/03/30/is-it-really-a-strike-if-instacart-workers-arent-employees/> [<https://perma.cc/78DT-KWQC>].

233. Sara Ashley O’Brien, *Instacart Plans to Hire 300,000 More Workers as Demand Surges for Grocery Deliveries*, CNN (Mar. 23, 2020), <https://www.cnn.com/2020/03/23/tech/instacart-hiring/index.html> [<https://perma.cc/2DBZ-3RQG>].

234. Vaheesan, *supra* note 195, at 810–13 (explaining that FTC has pursued and enforced antitrust law against animal breeders, electricians, ice skating teachers, managers of commercial and residential properties, music teachers, organists, public defenders [twice] and has investigated truck drivers at several ports for seeking to organize for higher wages, reduced hours, and improved working conditions). The actions appear to share in common some attempt by the involved groups to improve remuneration.

235. Jacob Rosenberg, *Gig Workers Are More Undervalued Than Ever Before. Tech Companies Are Spending Like Crazy to Keep It That Way*, MOTHER JONES (May/June 2020), <https://www.motherjones.com/politics/2020/04/gig-workers-are-more-undervalued-than-ever-before-tech-companies-are-spending-like-crazy-to-keep-it-that-way/> [<https://perma.cc/DV65-WHFG>] (“For their part, gig companies are doubling down on their opposition to [newly amended California employment law], which dared to question one of the tenets of Silicon Valley: A business

to accept that Instacart is comprised of hundreds of thousands of independent businesspeople who might have come together on their own, but have done so more efficiently through the serendipitous intervention of an “app.”²³⁶ Furthermore, applying the independent businessperson model of antitrust law to safety-related work stoppages seems legally inadequate: it does not seem compelled under the logic of cases like *Trial Lawyers*, or even much older cases like *Apex Hosiery v. Leader*,²³⁷ and it certainly does not respond to the looming and muddling problem of a multiplicity of employee definitions throughout the economy (though this is a criticism also applying to remuneration-based work stoppages): as mentioned previously, one may be an employee in California but not an employee under the National Labor Relations Board definition.²³⁸ Courts should be very hesitant about imposing severe antitrust sanctions where the statutory predicates for liability—here, the employee definition—are vague. As Justice Gorsuch said recently in his concurrence in *Sessions v. Dimaya*,²³⁹ fair notice of the law’s demands is required under the Constitution.²⁴⁰ Justice Gorsuch has also opined that “void for vagueness” concerns arise in civil no less than criminal contexts,

[C]ivil laws regularly impose penalties far more severe than those found in many criminal statutes . . . Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today’s ‘civil’ penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and

is not defined by the service it provides but by its technology—its platform.”); *see also* O’Connor v. Uber Tech., Inc., 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015)

(“Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs, John Deere is a ‘technology company’ because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a ‘technology company’ because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.”)

236. Katy Steinmetz, *Lawsuit Claims Instacart ‘Personal Shoppers’ Should Be Classified as Employees*, TIME (Mar. 18, 2015), <https://time.com/3748438/instacart-lawsuit/> [<https://perma.cc/ZGU5-5FU2>] (quoting plaintiff’s argument: “[There is] this narrative that I think companies like Instacart and Uber and Lyft want to become more mainstream . . . that somehow these antiquated laws don’t apply to these types of work relationships. And frankly it’s ludicrous. Just because a worker is directed and controlled by an algorithm that comes through a phone as opposed to a foreman doesn’t do anything to change the fundamental relationship of employment.”).

237. 310 U.S. 469 (1940).

238. *See* WEIL, *supra* note 153; 29 U.S.C. §§ 157, 158(a)(1), 163; *see* NATIONAL LABOR RELATIONS BOARD, THE RIGHT TO STRIKE, <http://www.nlr.gov/strikes> [<https://perma.cc/5L2P-6U3B>] (last visited Jan. 12, 2021).

239. 138 S.Ct. 1204 (2018).

240. *Id.* at 1228.

livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are ‘punitive civil sanctions . . . rapidly expanding,’ they are ‘sometimes more severely punitive than the parallel criminal sanctions for the same conduct.’²⁴¹

Given the civil and criminal severity of antitrust penalties, heightening the stakes of independent contractor misclassification beyond that which might be encountered in other areas of law, and the increasing ambiguity of the employee definition under federal and state law, the application of antitrust liability to ordinary citizens should give courts great pause.²⁴²

If an arrangement of “independent businesspersons” is found to be a violation of the Sherman Act, liability for individuals who are employees under state law seems problematic. In First Amendment contexts, “[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a *specific intent* to further those illegal aims.”²⁴³ A court must judge this intent “according to the strictest law.”²⁴⁴ It would be hard to derive intent to violate antitrust law from a worker’s good faith belief that she possessed employee status and was therefore exempted from a duty to comply with antitrust law. Of course, this presupposes the existence of a First Amendment problem. Some expressive or associative interest must accompany the work stoppage. Outside the context of independent contractor work stoppages for improvements in remuneration, however, *Trial Lawyers* does not deny First Amendment protection of all non-employee concerted action (including work stoppages).²⁴⁵ This antitrust liability limitation is consistent with the Court’s older opinion in *Apex Hosiery v. Leader*:

...that [conduct] activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to “monopolize the supply, control its price, or discriminate between its would-be purchasers.”²⁴⁶

Antitrust law is not, in other words, a generic enforcer of commerce wrongs. At all events, First Amendment interpretive difficulties in this area should be

241. *Id.* at 1229 (internal citations omitted).

242. *See* Steinbaum, *supra* note 197, at 57.

243. *Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 163 (3d Cir. 2001) (citing *Claiborne Hardware*, 458 U.S. at 920 (emphasis added)).

244. *Id.* (quoting *Claiborne Hardware*, 458 U.S. at 919).

245. *See Claiborne Hardware*, 458 U.S. at 911–912.

246. *Apex Hosiery v. Leader*, 310 U.S. 469, 512 (1940).

avoided. As the Supreme Court reaffirmed in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*,²⁴⁷ a labor speech case in which the Court declined to find peaceful, but arguably “secondary,” union leafletting unlawful under the NLRA, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”²⁴⁸ Similarly, in the context of work stoppages by non-employees—particularly where the stoppages contain strong expressive components, seek workplace safety, and do not directly seek an increase in remuneration—courts have no good reason to aggravate statutory antitrust vagueness or risk running afoul of the First Amendment in service of a volatile Gig economy that Congress could not possibly have foreseen during its deliberations on the Sherman Act.

III. THE POTENTIAL IMPACT OF PRIVATE ARBITRATION AGREEMENTS ON WORK STOPPAGES

Returning to the realm of employees rather than non-employee workers, the article now discusses the potential impact of private arbitration on the right of non-union employees to engage in work stoppages. In American labor law—the body of labor relations law applicable to unionized workplaces²⁴⁹—the resolution of labor disputes through arbitration has occupied an almost hallowed position.²⁵⁰ Under the *Steelworkers’ Trilogy*,²⁵¹ arbitration is a matter of collective bargaining agreements and the parties—employers and unions—need not arbitrate unless they have agreed to do so;²⁵² courts, not arbitrators, decide whether parties have agreed to arbitrate, unless the parties clearly and unmistakably provide otherwise.²⁵³ Arbitrators, not courts, decide underlying claims on their merits under applicable collective bargaining agreements, even if those claims appear frivolous to a given court; and if collective bargaining agreements contain arbitration clauses, particular employment disputes are presumed arbitrable.²⁵⁴ Arbitration is not to be denied unless an arbitration clause positively cannot be interpreted as covering a dispute. In other words,

247. 485 U.S. 568 (1988).

248. *Id.* at 575.

249. 29 U.S.C. § 151 (2018)

250. See generally Benjamin Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967).

251. *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593 (1960).

252. *Warrior & Gulf Co.*, 363 U. S. at 577–78, 582; *Am. Mfg. Co.*, 363 U.S. at 566, 568.

253. *Warrior & Gulf Co.*, 363 U.S. at 582–583. See *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241 (1962), *overruled in part on other grounds*, *Boys Markets, Inc. v. Retail Clerk’s Union*, 398 U.S. 235 (1970).

254. *Am. Mfg. Co.*, 363 U.S. at 568–69 (footnote omitted).

doubts are resolved in favor of coverage.²⁵⁵ Where unions and employers have entered into collective bargaining agreements containing grievance-arbitration provisions, the NLRB does not, absent unusual circumstances, investigate cases alleging violations of the NLRA, either before or after an arbitration over the dispute.²⁵⁶ Although these NLRB arbitration-deferral rules slightly change from time-to-time depending on the political makeup of the NLRB,²⁵⁷ the general outline, which is applicable only in unionized workplaces governed by collective bargaining agreements with a grievance process culminating in binding arbitration, has never been successfully challenged.²⁵⁸

Another longstanding principle of labor law is that “bargaining unit”²⁵⁹ employees may not lawfully engage in work stoppages if the collective bargaining agreement governing their workplace forbids it under a “no strike” pledge.²⁶⁰ Assuming that an underlying work dispute is arbitrable under a collective bargaining agreement, violation of the no-strike pledge, thereby evading arbitration, renders the work stoppage subject to federal court injunction.²⁶¹ When issued, such injunctions typically both suspend the work stoppage and compel arbitration of the underlying dispute.²⁶² Furthermore, the general rule is that, where a work dispute is arbitrable, a pledge not to engage in a work stoppage over the dispute is implied.²⁶³

However, the arbitral principles just discussed do not, and could not, apply outside of a unionized workplace because they presume the existence of a collective bargaining agreement between an employer and a recognized, or certified, exclusive representative of a majority of the employer’s employees.²⁶⁴ In *that very specific context* there are a set of policy rationales justifying

255. *Warrior & Gulf Co.*, 363 U.S. at 582–83.

256. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 841–42 (1971); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1081–82 (1955).

257. See Memorandum GC 19-03 from General Counsel of N.L.R.B (December 28, 2018).

258. See *AT&T Tech., Inc. v. Commc’ns Workers*, 475 U.S. 643, 648 (1986).

259. The parties to a collective bargaining agreement are an employer and a union representing a bargaining unit—or legally permissible and selected or designated grouping of employees—in a carefully defined workplace. *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 998 (9th Cir. 1997) (noting that Board unit determinations are based on common interest of employees and are rarely to be disturbed).

260. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 237–38, 248–49 (1970).

261. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 405 (1976).

262. *Id.* at 405–06, 407–08, 412–13 (declining to issue injunction for violation of a no strike provision where it was unclear that strike was motivated by an arbitrable grievance).

263. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 381 (1974) (“[A] contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.”) (citing *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95, 105 (1962)).

264. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 737 (1961) (“In their selection of a bargaining representative, § 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule.”) (internal citations omitted).

enforcement of no-strike pledges in favor of arbitration. First, the courts “went a long way towards making arbitration the central institution in the administration of collective bargaining contracts.”²⁶⁵ Next, “the unavailability of equitable relief [i.e., injunctions] in the arbitration context [would present] a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes[.]”²⁶⁶ Given the cabining of these rules in the NLRA context, it may not be apparent what they could possibly have to do with this section’s focus on the rights of non-union employees. Simply put, there is reason to think that some of these labor arbitration principles could be exported to non-union employment arbitration.

According to the Current Population Study of the Bureau of Census for the Bureau of Labor Statistics, 6.2% of private sector employees in the United States are union members, while 7.1% of private sector employees are covered by a collective bargaining agreement.²⁶⁷ In 1973, very close in time to when *Boys’ Markets* was decided,²⁶⁸ union membership in the United States stood at about 24%. Paralleling this retrogression, work stoppages at large employers began declining in the mid-1970s, and strikes at both large and small companies peaked in the late 1980s and underwent a sharp decline thereafter.²⁶⁹ Thus, the overall risk of work stoppages seemed to have been declining until recently, when the number of work stoppages began trending upwards.²⁷⁰ In other words, present day union density continues to be very low while work stoppages seem to be increasing.

As the foregoing trend has been unfolding, the number of non-union employees covered by private arbitration agreements has simultaneously been accelerating rapidly. As John Bickerman recently wrote,

In 1992, the year after the initial Supreme Court arbitration ruling [applying the Federal Arbitration Act to employment contracts], the percentage of employees subject to arbitration stood at two percent. By the early 2000’s, that percentage had risen to almost a quarter of the non-union workforce. Drawing upon a nationally representative sample of non-union employers from a survey . . . , mandatory arbitration now covers 56 percent of the non-union labor force. And

265. *Boys Markets*, 389 U.S. at 252 (internal citations omitted).

266. *Id.* at 253 (internal citations omitted).

267. See Barry Hirsch and David MacPherson, UNIONSTATS, <http://unionstats.com/> (last visited Jan. 12, 2021).

268. *Boys Markets*, 398 U.S. at 235.

269. Kate Bahn, *The Once and Future Role of Strikes in Ensuring U.S. Worker Power*, EQUITABLEGROWTH (Aug. 21, 2020), <https://equitablegrowth.org/the-once-and-future-role-of-strikes-in-ensuring-u-s-worker-power/> [<https://perma.cc/LM3F-SE4Z>].

270. See Shierholz & Poydock, *supra* note 24; see also Abigail Abrams, *The Number of U.S. Workers Involved in a Strike in 2018 Was the Highest Since 1986*, TIME (Aug. 24, 2020), <https://time.com/5525512/american-workers-strikes-bureau-labor-statistics> [<https://perma.cc/8Z2A-X8A8>].

among employers with 1,000 or more employees, a staggering almost two-thirds, or 65.1 percent, of companies have given their employees no option but to adjudicate their claims before an arbitrator. Translated to the non-union labor force, over 60 million workers in non-union private sector jobs have been denied access to the courts, where research has shown their claims would fare better than in arbitration.²⁷¹

The rapid growth of non-union arbitration at first blush has nothing to do with the policies of the NLRA. Yet, a primary objective of labor law is the elimination of industrial strife.²⁷² Arbitration is a favored means under federal labor law to achieve that objective.²⁷³ What happens when the non-union sector of the economy decreases in size? What happens when the use of arbitration in the workplace increases? Industrial strife *is* being experienced in non-union workplaces and private arbitration *could* be utilized to reduce the strife. From each of those premises, it seems a short step for courts to insist that non-union employees be held to their bargain to resolve work disputes through arbitration rather than through work stoppages. Such a freedom-of-contract principle guided the Supreme Court's opinion in *Boys' Markets*.²⁷⁴

Consistent with this principle, the Supreme Court has even previously enforced arbitration agreements in which unions and employers agreed that bargaining unit members must arbitrate *non-NLRA* statutory claims.²⁷⁵ More recently, in *Epic Systems Corp. v. Lewis*,²⁷⁶ the Supreme Court stated that § 7 of the National Labor Relations Act “does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that

271. John Bickerman, *Increase in Workers Subject to Arbitration Coincides with Supreme Court Rulings*, AM. BAR ASS'N (Jan. 16, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/increase-in-workers-subject-to-arbitration-coincides-with-supreme-court-rulings/> [<https://perma.cc/4ANS-SKT3>].

272. Earle K. Shawe, *The Role of the Wagner Act in Preventing Industrial Strife*, 32 VA. L. REV. 95, 98–100 (reviewing the history of extremely frequent strikes before passage of the NLRA).

273. Office and Professional Employees International Prof'l Emp. Int'l Union, Local 2 v. Wash. Metro. Area Transit Auth., 724 F.2d 133, 137 (D.C. Cir. 1983) (“It cannot be gainsaid that federal policy favors the peaceful resolution of labor disputes through arbitration . . . We would startle no one by recognizing arbitration as a preferred method to resolve industrial strife quickly and inexpensively.”).

274. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 252–53 (emphasizing the union “freely undertook” obligation to arbitrate disputes).

275. *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009)

(“As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange. ‘Judicial nullification of contractual concessions . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract’”).

276. 138 S.Ct. 1612 (2018).

much clearly and manifestly, as our precedents demand.”²⁷⁷ The culmination of this logic might be that an individual employee under freedom of contract principles should be able to agree with an employer not to engage in a work stoppage.

Consider the way in which the Court framed the issues at play in the three consolidated cases collectively making up *Epic Systems*: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, *no matter what they agreed* with their employers?”²⁷⁸ Why would that logic not apply to work stoppages, or to any collective right? The objection to that logic is merely reflexive: individual employees should not be compelled to arbitrate because they possess concerted rights to engage in work stoppages under the NLRA.²⁷⁹ However, the employees in *Epic Systems* appear to possess § 7 rights to concertedly bring grievances to their employers. Through the facility of the Federal Arbitration Act, the Court upheld the right of the employer to condition employment on waiver of collective rights. This seems very hard to distinguish from a Yellow Dog contract²⁸⁰ and its limiting principle is at best unclear.

The NLRB, in a leading arbitration case pre-dating *Epic Systems*, grappled with similar problems with a strong focus upon its labor law expertise. In *D.R. Horton, Inc.*,²⁸¹ a superintendent claimed that his employer had deprived him, and a class of similarly situated superintendents, of statutory protections under the Fair Labor Standards Act.²⁸² When the superintendent’s counsel provided notice to the employer of an intent to file a class action suit in connection with the alleged FLSA violations, the employer’s counsel “replied that [the superintendent’s counsel] had failed to give an effective notice of intent to arbitrate, citing the language in the [involved arbitration agreement] that bars arbitration of collective claims.”²⁸³

[The superintendent] filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1)

277. *Id.* at 1612, 1624.

278. *Id.* at 1619.

279. 29 U.S.C. §§ 157, 163 (2018).

280. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. L. REV. 1017, 1036–1037 (1996)

(“Like the yellow dog contracts of the past, the new mandatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent. They are designed by employers unilaterally and given to employees at the time of hire or inserted in employee handbooks, without mention of their existence and without discussion as to their terms.”).

281. 357 N.L.R.B 2277, *granting enforcement in part, reversing in part* Horton v. NLRB, 737 F.3d 344 (5th Cir. 2013) *abrogated* Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1612 (2018).

282. *Id.* at 2277.

283. *Id.*

by maintaining the [arbitration agreement] provision stating that the arbitrator “may hear only Employee’s individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”²⁸⁴

In finding a violation of the NLRA, the NLRB argued “[a]fter all, if the Respondent’s employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected.”²⁸⁵ However, the critical issue in *D.R. Horton* was not whether the superintendents’ concerted litigation would otherwise have been protected under the NLRA; rather, the issue was whether finding restrictions on collective actions unlawful under the NLRA would conflict with the Federal Arbitration Act.²⁸⁶

The NLRB argued in *D.R. Horton* that the collective industrial peace rationale was simply incompatible with the individual contract policies embedded in the Federal Arbitration Act—leaving to one side the large issue of whether those policies were ever meant to apply to employment contracts²⁸⁷—and that the NLRA, enacted in 1935, impliedly repealed—as the more recent of the statutes—conflicting Federal Arbitration Act (“FAA”) policies enacted in 1925.²⁸⁸ Justice Gorsuch, however, writing for the majority in *Epic Systems*, said “[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.”²⁸⁹

284. *Id.*

285. *Id.* at 2279.

286. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2283. As the NLRB noted in responding to an internal memorandum prepared by a prior General Counsel of the agency, arguing for a broad right of waiver, “[b]ased on the logic of [the internal memorandum], an employer would be privileged to secure prospective individual waivers of *all* future Section 7 activity, including joining a union and engaging in collective bargaining.” *Id.* And, one might add to the list, work stoppages.

287. *Id.* at 2284, n. 20 (“It seems fair to say, if immaterial to the Court’s construction of the FAA, that the legislative history contains no discussion evincing a congressional intent to bring employment contracts of any sort under the statute.”)

288. *Id.* at 2285. As the Supreme Court later stated in *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944):

Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. “The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.” . . . Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility (internal citation omitted).

289. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1619 (2018).

Despite this cramped reading of § 7 of the NLRA,²⁹⁰ the statement does not on its surface threaten wholesale FAA invasion of the NLRA—it evokes images only of the mode of “trying” legal disputes in a courtroom-like setting. Justice Gorsuch’s opinion steadily becomes more alarming, however. In response to the argument that, even if employees’ rights to file grievances collectively—the precise issue in *Epic Systems*—do not directly involve employees’ rights to organize unions, they may involve the right of employees to engage in other “concerted activities for the purpose of [other] mutual aid or protection.”²⁹¹ Justice Gorsuch said:

The employees direct our attention to the term “other concerted activities for the purpose of . . . other mutual aid or protection.” This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of “self-organization,” “form[ing], join[ing], or assist[ing] labor organizations,” and “bargain[ing] collectively.” And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to “embrace only objects similar in nature to those objects enumerated by the preceding specific words.”²⁹²

This alarming statement effectively cabins the collective rights of non-union employees to an unspecified degree. The “detailed list” of activities to which Justice Gorsuch referred apply effortlessly to union organizational activities, but not so effortlessly to non-union employee concerted activities of other types.²⁹³ The challenge will be determining what else might lay outside of “form[ing], join[ing], or assist[ing] labor organizations,” and “bargain[ing] collectively.” Taken to one logical conclusion, it might be possible to conclude that “nonorganizational” non-union work stoppages are not on Justice Gorsuch’s list. If these work stoppages are not on the official list of protected activities, and if

290. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (observing that employees’ rights extend beyond union or even collective bargaining contexts).

291. *Id.*

292. *Epic Systems Corp.*, 138 S.Ct. at 1625.

293. It is unclear, for example, how the construct squares with any of the social media “mutual aid or protection” law. In a non-union workplace concertedly clicking on a Facebook “like” seems worlds apart from even “self-organization” to say nothing of the more structured activities of forming, joining, or assisting a labor organization. See Ariana R. Levinson, *Solidarity on Social Media*, 2016 COLUM. BUS. L. REV. 303, 320 (2016) (discussing inconsistent applications of mutual aid or protection law to social media contexts). The discussion here could go on at great length given the wide variety of concerted activity that has been protected outside of a union or organizing context on a “mutual aid or protection” theory. Perhaps some space for non-union concerted activity remains unthreatened through increased deployment of the term “self-organization.” But the many battles over the decades that have been fought out on broad “mutual aid or protection” grounds may not be assimilable to the narrower idea of “self-organization.” See *e.g.* *Eastex, Inc. v. NLRB.*, 437 U.S. 556, 565 (1978) (“[Congress chose] . . . as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of ‘mutual aid or protection,’ as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining.’”).

it is the general policy of the United States to encourage industrial peace, it may be perfectly sensible to conclude that employers and employees, possessing freedom of contract, are free to agree that work disputes will be dealt with exclusively through arbitration and never through work stoppages. After all, it would be an “individual” agreement. Suppose an individual employee nonetheless engaged in a work stoppage in derogation of an agreement not to do so. One might appeal to the Norris-LaGuardia Act as preventing such a work stoppage from being enjoined. In *Boys Markets*, however, the Supreme Court adopted a Railway Labor Act holding in *Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co.*²⁹⁴ that,

... a strike in violation of a statutory arbitration duty was not the type of situation to which the Norris-LaGuardia Act was responsive, that an important federal policy was involved in the peaceful settlement of disputes through the statutorily mandated arbitration procedure, that this important policy was imperiled if equitable remedies were not available to implement it, and hence that Norris-LaGuardia’s policy of nonintervention by the federal courts should yield to the overriding interest in the successful implementation of the arbitration process.²⁹⁵

The Supreme Court has, in other words, *already* crossed federal statutory lines to advance the peaceful settlement of disputes through arbitration. The court at one time strongly expressed that labor arbitration could not defeat the NLA’s protection of peaceful work stoppages from labor injunctions when it said:

Nor can we agree with the argument made in this Court that the . . . [*Steelworkers’ Trilogy*²⁹⁶] requires us to reconsider and overrule the action of Congress in refusing to repeal or modify the controlling commands of the Norris-LaGuardia Act. To the extent that those cases relied upon the proposition that the arbitration process is “a kingpin of federal labor policy,” we think that proposition was founded not upon the policy predilections of this Court but upon what Congress said and did when it enacted s 301. Certainly, we cannot accept any suggestion which would undermine those cases by implying that the Court went beyond its proper power and itself “forged . . . a kingpin of federal labor policy” inconsistent with that section and its purpose. Consequently, we do not see how cases implementing the purpose of s 301 can be said to have freed this Court from its duty to give effect to the plainly expressed congressional purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act.²⁹⁷

A mere eight years later the Court swept that principle aside and allowed arbitration to overcome the NLA by authorizing courts to suspend peaceful work

294. 353 U.S. 30 (1957).

295. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251–52 (1970)

296. *AT&T Tech., Inc. v. Commc’ns Workers*, 475 US 643, 648 (1986).

297. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 213 (1962).

stoppages in favor of labor arbitration.²⁹⁸ Once a private, individual employee agreement not to engage in work stoppages is deemed enforceable, the Norris-LaGuardia Act may become irrelevant because the Federal Arbitration Act contains its own provisions to compel arbitration.²⁹⁹

One might in the final analysis object that if an individual employee generally agreed to resolve disputes by arbitration but did not explicitly agree not to engage in work stoppages, a no work stoppage pledge could not be implied. In the domain of labor law, however, this argument was rejected; except in situations where the right to engage in a work stoppage is specifically reserved, a pledge to arbitrate is implied.³⁰⁰

The foregoing argument requires a series of improbable leaps and bounds, but none of those leaps seem more improbable than the Supreme Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*³⁰¹ that applied the Federal Arbitration Act to employment law in the first place. As Justice Stevens wrote in his dissenting opinion in that case:

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court "has effectively rewritten the statute", and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration . . . Although I remain persuaded that it erred in doing so, the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other . . . Until today, however, the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship.³⁰²

When it comes to this Court and this statute (and apparently several Congresses), is any Federal Arbitration Act leap too large? In the end, it may be as pointless to ask whether private arbitrations over potentially low-impact work stoppages has anything to do with broad risks of "industrial strife" as it is to wonder how unreported private arbitral awards could possibly remedy the socially deep racial and gender injuries that our employment laws were meant to address.

IV. CONCLUSION

The right to engage in work stoppages, so firmly recognized under traditional labor law, is likely to encounter stressors and qualifications that were unknown and perhaps unknowable to the original architects of labor and

298. *Boys Markets*, 398 U.S. at 252, 254.

299. 9 U.S.C. § 4 (2018).

300. *See Gateway Coal Co.*, 414 U.S. at 381.

301. 500 U.S. 20 (1991).

302. *Id.* at 42 (Stevens, J., dissenting).

employment law. The changes may cause us to rethink the original policy rationales behind the original establishment of the right. The initial instinct of the common law was to deem employee concerted activities unlawful criminal conspiracies.³⁰³ To a certain kind of legal mind, the approach possesses the appeal of simplicity. That approach was nonetheless abandoned and we need to rediscover why.³⁰⁴

Antitrust law, as applied to non-employee workers, could come perilously close to reestablishing much earlier ideas of labor criminality. Work stoppage intermittency and compulsory arbitration backed by court injunctions—with its organizational-squelching historical parallel under the old labor law regime—would remove legal protection from work stoppages but not criminalize them. Taking a step away from the din, it is hard to ignore the astonishing transformation that has occurred. While scholars like Marion Crain and Kenneth Matheny rightly press the divide between “business unionism” and “social justice unionism,” and contend that “new” labor law is in reality “old” labor law³⁰⁵—a proposition that can be easily embraced—foundational legal terrain has cataclysmically shifted beneath our feet. The discussion now may not be centered on the boundaries or vision of the labor movement, but rather on whether any worker anywhere will possess any right following the onslaught on the employee definition (and its antitrust implications) and the march of the Federal Arbitration Act through the employment statute book. As a lawyer, one may strenuously object. But workers are likely to engage in work stoppages.

303. See Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 826, 832 (1926).

304. See Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 W. VA. L. REV. 961, 971 (2015) (discussing labor rights as a matter of worker self-defense).

305. Marion Crain & Kenneth Matheny, *The ‘New’ Labor Regime*, 126 YALE L.J. F. 478, 478–79 (2017).

