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978-1-108-42883-5 — The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century
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Part I
Introduction

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1 Union Trends

Richard Bales

American unions have weakened considerably over the last fifty years. A dramatic decline in private-sector union density has led to the inability of unions to use strikes as an effective economic weapon and to labor's diminishing political power. Right-to-work laws have proliferated, even in rust-belt states in which unions historically were strongest. The decline in manufacturing work rise in contingent and on-demand work both have contributed to union decline.

A Decline in Union Density

Union membership peaked in the 1950s and has been declining ever since.¹ Private-sector union density halved between the late 1970s and early 1980s, and again between 1990 and 2009, falling to the single digits where it has remained for the last eight years.² Although public-sector union density increased significantly in the 1960s and early 1970s, and now far exceeds private-sector density, the public-sector workforce is much smaller than the private-sector workforce,³ so union density overall is still in a steep net decline. But even if unions could organize public-sector workers in sufficient numbers to offset private-sector losses, there still would be a significant overall net loss to worker bargaining power for four reasons.

This Chapter is adapted from Richard A. Bales, *Resurrecting Labor*, 77 MARYLAND L. REV. 1 (2017).

¹ John Schmitt, *Union Membership Trends, 1948–2012*, NO APPARENT MOTIVE (Jan. 25, 2013, 10:13 AM), <http://noapparentmotive.org/blog/2013/01/25/union-membership-trends-1948-2012/>. For the most recent union density figures available as of the publication of this book, see the Department of Labor's tables at U.S. Department of Labor, Bureau of Labor Statistics, Union Members Summary USDL-19-0079 (Jan. 18, 2019).

² JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1 (2014); Schmitt, *supra* note 1. For data that can be analyzed, sliced, and diced every which way, see U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, DATA TOOLS, www.bls.gov/data/ (last visited Sept. 9, 2017); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ECONOMIC NEWS RELEASE: UNION MEMBERSHIP (2017), www.bls.gov/news.release/union2.toc.htm [hereinafter ECONOMIC NEWS RELEASE]; BARRY HIRSCH & DAVID MACPHERSON, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS, www.unionstats.com (last visited Sept. 9, 2017).

³ See, e.g., U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT EMPLOYMENT STATISTICS, www.bls.gov/ces/ (last visited July 3, 2017) [hereinafter CURRENT EMPLOYMENT STATISTICS]. Though roughly half of all union members are public, public employment is roughly one-sixth of all wage and salary employment. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (Jan. 26, 2017), www.bls.gov/news.release/union2.nr0.htm [hereinafter UNION MEMBERS SUMMARY].

First, the laws of many states impede the ability of public-sector workers to organize and forbid such workers from engaging in collective bargaining.⁴ Second, the percentage of American workers employed in the public sector has stayed largely constant – between 15–20 percent – since 1960; there are not enough public-sector workers to make up for the decline in private-sector union density.⁵ Thus, the total union density rate fell further in 2016 when private-sector union density declined to 10.7 percent, down 0.4 percent from 2015.⁶ Third, the union wage premium – the degree to which union wages exceed nonunion-member wages – is significantly lower in the public sector than it is in the private sector.⁷ Wages for public-sector workers, for example, often are set by legislators, not by collective bargaining.⁸ Fourth, the law often curtails the ability of public-sector workers to use economic weapons – such as the strike – to a much larger degree than their private-sector counterparts do.⁹

B Disappearance of Strikes as an Economic Weapon

Work stoppages have plummeted.¹⁰ Data from the Bureau of Labor Statistics (BLS) on work stoppages (both strikes and lockouts) involving 1,000 or more workers¹¹ peaked in the early 1950s, when 400–500 such stoppages occurred per year.¹² They dropped in the early 1960s, rose again in the mid-1960s, and then began a sustained decline beginning in the early 1980s that culminated in a nadir of five stoppages in 2009.¹³ Data from the Federal Mediation and Conciliation Service on private-sector, non-airline work stoppages is not restricted to large work stoppages.¹⁴ It reflects a similar pattern for the limited number of years for which data are available.¹⁵ Moreover, these are absolute numbers – not percentages of the total workforce. Thus, even as the American workforce has nearly tripled in size since 1950,¹⁶ the number of work stoppages has fallen drastically.

Historically, a decline in work stoppages was not necessarily a sign of union decline.¹⁷ Work stoppages in the 1950s and 1960s were counter-cyclical – workers struck in good economic times when economic growth was increasing, unemployment was falling, and wages were slow to respond to these economic pressures.¹⁸ However, the current forty-year decline in work stoppages is constant – notwithstanding fluctuations in the business

⁴ ROSENFELD, *supra* note 2, at 34–35.
⁵ CURRENT EMPLOYMENT STATISTICS, *supra* note 3.
⁶ UNION MEMBERS SUMMARY, *supra* note 3.
⁷ ROSENFELD, *supra* note 2, at 44–54.
⁸ See MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 619–734 (3d ed. 2016) (describing the wide variation among the states on the scope of permissible collective bargaining by public-sector workers).
⁹ *Id.* at 735–798 (describing how, in the public sector, strikes are primarily a *political* rather than economic weapon, and often either are prohibited or are highly restricted and regulated).
¹⁰ ROSENFELD, *supra* note 2, at 89.
¹¹ *Id.* at 89 fig. 4.1.
¹² *Id.* at 89.
¹³ *Id.* at 89 fig.4.1.
¹⁴ *Id.* at 88–89.
¹⁵ *Id.* at 89 fig. 4.1.
¹⁶ See Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 16 tbl. 1 (noting that the size of the labor force was 62,208 people in 1950 and 140,863 in 2000).
¹⁷ ROSENFELD, *supra* note 2, at 90.
¹⁸ *Id.*

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cycle. Instead, the decline in work stoppages seems strongly tied to the decline in union leverage.¹⁹

C Labor's Diminishing Political Power

Unions traditionally have influenced politics in two ways: by delivering votes and by spending money on political campaigns. Both sources of influence have diminished significantly in the last several decades.

In the middle part of the twentieth century, organized labor served as a political counterweight to the political power of big money and big business.²⁰ Although voter participation correlates strongly with socioeconomic status (SES) (lower-SES status correlates with lower voter participation), unions historically cut across that grain by delivering the vote of a relatively high proportion of low-SES workers who, as a group, supported pro-labor policies that were economically progressive.²¹

The ability of organized labor to deliver votes obviously diminishes commensurately with union density. But even more than that, as Jake Rosenfeld has recently demonstrated, the union vote premium – i.e., the participation rate above what demographics otherwise would suggest²² – has fallen significantly in recent years as the face of unions has changed.²³ For example, as described above, union workers today are much more likely to be employed in the public sector than they were forty years ago.²⁴ Public-sector workers – regardless of whether they are in a union – vote more often than private-sector workers.²⁵ This leaves relatively little room for unions to create a union vote premium by increasing their voter participation. Rosenfeld estimates that in the 2008 election, the private-sector union vote premium was 5.1 percent, the public-sector vote premium was 0 percent, and the total union vote premium was 3.3 percent.²⁶

The second way unions can influence politics is by donating money (and to some extent, their members' volunteer time) to political campaigns.²⁷ However, unions' ability to influence elections this way has been constrained significantly over the last several decades by two developments. First, the Supreme Court has significantly restricted the ability of public-sector unions to use union dues to fund political campaigns.²⁸ Second, in *Citizens United v. Federal Election Commission*,²⁹ the Court held that the First Amendment's freedom of speech protection prohibits the government from restricting independent political expenditures by corporations³⁰ (and, presumably, unions).³¹

¹⁹ *Id.* at 92.

²⁰ *Id.* at 159.

²¹ *Id.* at 163.

²² Richard B. Freeman, *What Do Unions Do . . . to Voting?* 16 (Nat'l Bureau of Econ. Research, Working Paper No. 9992, 2003).

²³ ROSENFELD, *supra* note 2, at 166–173.

²⁴ *Id.* at 44–45.

²⁵ *Id.* at 167.

²⁶ *Id.* at 180 fig. 7.8.

²⁷ *Id.* at 159.

²⁸ *See, e.g.*, *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–236 (1977); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012).

²⁹ 558 U.S. 310 (2010).

³⁰ *Id.* at 365.

³¹ *Id.*

There is a false equivalence, however, in the assumption that the effect of *Citizens United* is nonpolitical because its principles apply to both companies and unions. Unions – especially given membership declines both in absolute terms and as a proportion of the population – cannot hope to match the campaign expenditures of companies.³² For example, in the 2000 election cycle (before *Citizens United*), business-related interests outspent unions by a ratio of fourteen to one.³³ Unions historically might have countered being outspent by organizing their members to volunteer their time to political organizing, but diminished union numbers (and revenues from dues, which helps fund organizing of new members as well as political contributions) have removed whatever counter-balance they might once have provided.

D Right-to-Work Laws: A Demonstration of Union Political Futility

Union shops and agency shops are union security clauses,³⁴ negotiated by an employer and union as part of a collective bargaining agreement, that function as critical organizing and funding tools for unions. A closed shop requires membership in the union as a condition for being hired and continuing employment. A union shop allows an employer to hire a nonunion worker but requires that the worker must join the union within a specified amount of time as a condition of continued employment. An agency shop does not require the worker to join the union, but instead, requires the worker to pay a fee to the union to cover collective bargaining costs.

Union security clauses are important to unions for two reasons. First, there is bargaining strength in numbers. Justice Holmes articulated this argument in *Vegelahn v. Guntter*.³⁵ “Combination on the one side is patent and powerful,” he wrote, referring to the right of employers to organize in corporate and other combinations.³⁶ “Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.”³⁷

The second reason union security clauses are important to unions is because they prevent “free-riders.” The federal labor law principle of exclusive representation³⁸ requires unions to represent all members of a bargaining unit – in both contract negotiation³⁹ and in grievance resolution⁴⁰ – regardless of whether the bargaining-unit member is a member of the union or pays union dues. A union that fails in this “duty of fair representation” to a member of the bargaining unit is subject to being civilly sued by the bargaining-unit member,⁴¹ and may be liable for part of the member’s damages that were caused by the employer’s violation of the collective bargaining agreement.⁴²

³² ROSENFELD, *supra* note 2, at 181.

³³ Marick F. Masters, *Unions in the 2000 Election: A Strategic Choice Perspective*, 25 J. LAB. RES. 139, 167 tbl. 12 (2004).

³⁴ For a general definition and discussion of each type of union security clause, see TIMOTHY J. HEINSZ ET AL., *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 893 (6th ed. 2009).

³⁵ 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

³⁹ *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991).

⁴⁰ *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

⁴¹ *Id.* at 179–180.

⁴² *Bowen v. USPS*, 459 U.S. 212, 222 (1983).

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Thus, without a union-security clause, unions are forced to bargain for, and to represent in costly grievance proceedings, bargaining-unit members who are not members of the union and who do not financially support it. Such “free-riding” workers get all the benefits of union representation without shouldering any of the cost; rational economic theory would predict that given this option, most workers would opt out of the union.⁴³

The Taft–Hartley Act⁴⁴ outlawed closed shops but allowed union and agency shops, thus forbidding unions from requiring employers to only hire union workers.⁴⁵ This Act further limited union security clauses by allowing individual states (but not local governments, such as cities or counties) to outlaw the union shop and agency shop for employees working in their jurisdictions.⁴⁶ Twenty-two states, largely in the South, the Great Plains, and the West, adopted such “right to work” laws by the early 1950s.⁴⁷ From then until the 2000s, there was almost no change in the list of right-to-work states, though demographic migration from Rust Belt to Sun Belt states during that time significantly increased the proportion of workers affected by right-to-work laws.⁴⁸

In recent years, however, the right-to-work landscape has changed dramatically.⁴⁹ From 2012–2015, three key Rust Belt states (Indiana, Michigan, and Wisconsin) became right-to-work states, and West Virginia followed in 2016.⁵⁰ State-level Republican gains in the 2016 election in Missouri and Kentucky turned those states right-to-work in 2017.⁵¹

E Decline in Manufacturing Work

Manufacturing is a critical part of the U.S. economy – and a source of life support for unions that, as described above, otherwise are in deep trouble. Manufacturing industries generated \$2.1 trillion in U.S. gross domestic product (12.5 percent of total) in 2013.⁵² However, this significantly understates the role of manufacturing in the economy. Manufacturing provides a significant source of demand for goods (for example, energy to power a factory, construction to build it, and natural resources to serve as raw materials) and services (for example, engineering, accounting, and legal work) in other sectors of the economy, and these “intermediate inputs” are not captured in measures of manufacturing sector GDP.⁵³ They are counted in the broader measure of its gross output.⁵⁴ Manufacturing is similarly critical to U.S. employment. The manufacturing

⁴³ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 88 (1971) (arguing that a rational worker would not voluntarily contribute to a union).

⁴⁴ 29 U.S.C. §§ 401–531 (2012).

⁴⁵ See *Local 357, Int’l Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 673 & n.7 (1961) (explaining that the Act outlaws closed shops except within specific circumstances).

⁴⁶ 29 U.S.C. § 164(b) (2012) (codifying Section 14(b)).

⁴⁷ HEINSZ ET AL., *supra* note 34, at 893.

⁴⁸ HEINSZ ET AL., *supra* note 34, at 893.

⁴⁹ NAT’L RIGHT TO WORK COMM., *RIGHT TO WORK STATES TIMELINE*, <https://nrtwc.org/facts-issues/state-right-to-work-timeline-2016/> (last visited Sept. 13, 2017).

⁵⁰ *Id.* (providing the dates of enactment for state right to work laws).

⁵¹ *Id.*

⁵² ROBERT E. SCOTT, ECON. POLICY INST., *BRIEFING PAPER NO. 388, THE MANUFACTURING FOOTPRINT AND THE IMPORTANCE OF U.S. MANUFACTURING JOBS* 6 (2015), www.epi.org/publication/the-manufacturing-footprint-and-the-importance-of-u-s-manufacturing-jobs/ [hereinafter *BRIEFING PAPER NO. 388*].

⁵³ *Id.* at 7.

⁵⁴ *Id.*

sector in 2013 was responsible, directly or indirectly, for 29.1 million U.S. jobs, or more than one-fifth (21.3 percent) of total U.S. employment.⁵⁵

Manufacturing is a particularly important provider of jobs with good wages for workers without a college degree.⁵⁶ Much like unions create a union wage premium, manufacturing provides a manufacturing wage premium – the dollar amount by which the average manufacturing worker wage exceeds the wage of an otherwise comparable non-manufacturing worker.⁵⁷ Union density in manufacturing is considerably higher than in the private sector as a whole (9.4 percent vs. 6.7 percent in 2015),⁵⁸ but is falling.⁵⁹

Unfortunately, both manufacturing output and the absolute number (not just the proportional number) of jobs in manufacturing are on a steady decline. Manufacturing has historically had large footprint on the American economy, but had declined relatively consistently as a share of national GDP from 1997–2013.⁶⁰ Over that time, the United States lost 5.7 million manufacturing jobs.⁶¹ Employment from manufacturing declined commensurately from 1970–2013.⁶² The primary reasons for declines in manufacturing are globalization and trade.⁶³

The decline of manufacturing work in the United States hurts unions in at least four ways. First, as described above, workers in manufacturing are more likely to be organized, so declining manufacturing jobs means declining union rosters. Second, workers in manufacturing jobs tend to think of themselves as workers rather than small-business entrepreneurs, as many workers in the gig economy do.⁶⁴ Strict divisions between workers and their managers reinforce a sense of commonality among the workers, making them more amenable to union-organizing efforts.

Third, factories are ideal places to organize. Workers arrive and leave at uniform times on uniform shifts, making it relatively easy and efficient for unions to identify and reach out to them. In a factory, the cost of labor is low relative to other costs of production such as the cost of the factory, machinery, and raw materials. This means marginal increases in labor costs have relatively little effect on profits or product costs, giving management less incentive to resist organization than in the service or gig economy where labor costs represent a much higher percentage of the cost of production.

Fourth, and related, high capital costs (i.e., the cost of the factory, machinery, and raw materials) make factories more vulnerable to strikes than employers in the service or gig economy, making employers more willing to negotiate at the bargaining table and in turn

⁵⁵ *Id.*

⁵⁶ ROBERT E. SCOTT, ECON. POL'Y INST., BRIEFING PAPER NO. 367, TRADING AWAY THE MANUFACTURING ADVANTAGE: CHINA TRADE DRIVES DOWN U.S. WAGES AND BENEFITS AND ELIMINATES GOOD JOBS FOR U.S. WORKERS 6 & tbl.1 (2013).

⁵⁷ BRIEFING PAPER NO. 388, *supra* note 52, at 8–9.

⁵⁸ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS – 2015, USDL-16-0158 at 1, 7 tbl.3 (2016), www.bls.gov/news.release/archives/union2_01282016.pdf.

⁵⁹ *Cf.* BRIEFING PAPER NO. 388, *supra* note 52, at 9 (noting that in 2013, the union density rate in manufacturing was 10.1 percent).

⁶⁰ *Id.* at 7–8 fig. A.

⁶¹ *Id.* at 9.

⁶² *Id.* at 10 fig. B.

⁶³ *Id.*

⁶⁴ *See infra* text accompanying note 89 (noting the differences in identities between gig workers and employees).

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making the union more attractive to workers. Unlike in many parts of the service and gig economy, workers are not fungible and easily replaced, because manufacturing jobs often are skilled – even specialized – jobs.

F Rise in Contingent and On-Demand Work

Existing labor and employment laws are predicated on the assumption of long-term, stable employment relationships.⁶⁵ This assumption, however, has been eroding consistently for at least the last couple of decades. It started with the transition from long-term employment relationships to contingent work – work expressly designed to be short-term, including independent contractors (also called freelancers or consultants), on-call workers, and workers provided by temporary help agencies.⁶⁶ That erosion has accelerated into a landslide over the last two to three years with the explosion of the on-demand or “gig” economy.⁶⁷

There is no set definition of gig work.⁶⁸ It typically involves a single task or project and often is on-demand.⁶⁹ The gig could last for weeks or months (in which case it resembles a short-term job) or for only a few minutes.⁷⁰ A gig worker may take one gig at a time or juggle several at once.⁷¹ The recent explosion in the quantity of gig work is largely attributable to the rise of companies (such as Uber⁷²) connecting workers with gigs through websites or mobile applications (“apps”).

The BLS stopped counting “contingent workplace” arrangements after 2005,⁷³ though it will start counting such arrangements again as part of the May 2017 Current Population Survey.⁷⁴ As of 2005, the BLS estimated that contingent work accounted for 1.8–4.1

⁶⁵ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE ix (2004); Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 249–250 (2017), (noting that a traditional employment relationship is “the conventional legal form for engaging labor,” against which “nontraditional” work is described, and which is both constituted and assumed by our current framework of labor regulation, originating in the New Deal).

⁶⁶ STONE, *supra* note 65, at ix. The Government Accountability Office estimates that approximately forty percent of American workers are contingent. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015) (noting that under a broad definition of contingent work, 40.4 percent of the workforce were contingent workers in 2010).

⁶⁷ See *infra* notes 77–79 and accompanying text (providing statistics on the growth of the gig economy).

⁶⁸ Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LABOR STATISTICS: CAREER OUTLOOK (May 2016), www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, e.g., Richard A. Bales & Christopher Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 466–467 (2017) (describing how the internet allowed companies, including Uber, to expand the sharing economy).

⁷³ Ian Hathaway & Mark Muro, *Tracking the Gig Economy: New Numbers*, BROOKINGS (Oct. 13, 2016), www.brookings.edu/research/tracking-the-gig-economy-new-numbers/ (Brookings analysis of data from U.S. Census Bureau and Moody’s).

⁷⁴ David McCabe, *Administration Plans Labor Survey that Will Include On-Demand Jobs*, THE HILL (Jan. 25, 2016, 4:58 PM), <http://thehill.com/policy/technology/266954-labor-department-revives-survey-with-on-demand-economy-implications>.

percent of total employment, and that independent contractors constituted an additional 7.4 percent of total employment.⁷⁵

The void left by the BLS's hiatus in counting contingent workers has led to widespread speculation about the size and growth of the gig economy.⁷⁶ For now, the best estimate of the number of workers in the gig economy comes from a Census Bureau dataset of "nonemployer firms," which count "'businesses' that earn at least \$1,000 per year in gross revenues (or \$1 in construction) but employ no workers."⁷⁷ Approximately 86 percent of these "firms" are "self-employed, unincorporated sole-proprietors . . . In the rides and rooms industries, some 93 percent of the 'firms' are freelancers or contractors. These are exactly the types of workers who seek part-time work in the gig economy."⁷⁸ Thus, this dataset provides the best snapshot currently available of American workers in the gig economy. In the entire economy, these nonemployer firms grew from 15 million in 1997 to 22 million in 2007 to 24 million in 2014.⁷⁹

The rise of the gig economy is even more dramatic when limited to the ground transportation industry. The number of nonemployer firms in the ground transportation industry rose sharply in 2010, the same year Uber launched in San Francisco.⁸⁰ It then exploded in 2014 – a trend that likely continues to the present.⁸¹ Ian Hathaway and Mark Muro explain: "In [2014] the nonemployer firm growth rate in ride-sharing was 34 percent, compared with 4 percent for payroll employment in the industry. Between 2010 and 2014, nonemployer firms in ride-sharing grew by 69 percent while payroll employment grew by just 17 percent."⁸²

The consequence of the rise in the gig economy, especially if it occurs at the expense of traditional employment relationships, is that gig workers are much more difficult to organize into unions. This is so for two reasons. First, they may be "independent contractors" instead of "employees." Independent contractors are specifically excluded from protection by the NLRA,⁸³ and attempts by independent contractors to organize

⁷⁵ BUREAU OF LABOR STATISTICS, U.S. DEPT' OF LABOR, ECONOMIC NEWS RELEASE: CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, USDL 05-1433, at 1 (2005), www.bls.gov/news.release/conemp.nr0.htm.

⁷⁶ See, e.g., Micha Kaufman, *Five Reasons Half of You Will Be Freelancers in 2020*, FORBES (Feb. 28, 2014, 11:45 AM), www.forbes.com/sites/michakaufman/2014/02/28/five-reasons-half-of-you-will-be-freelancers-in-2020/#31d7ddb66d39; Jeremy Neuner, *Forty Percent of America's Workforce Will Be Freelancers by 2020*, QUARTZ (Mar. 20, 2013), <https://qz.com/65279/40-of-americas-workforce-will-be-freelancers-by-2020/> (noting a study that estimates 60 million people will be contingent workers by 2020); Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll/> (estimating that at least 14 million people currently work in the gig economy); see generally Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017) (advocating for systematic reforms in light of the growing gig economy).

⁷⁷ Hathaway & Muro, *supra* note 73.

⁷⁸ *Id.* at n. 5.

⁷⁹ Hathaway & Muro, *supra* note 73. Total U.S. payroll employment was 129 million in 1997 and 145 million in 2014. *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ National Labor Relations Act, 29 U.S.C. § 152(3) (2012); see also NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968) (applying general agency law principles to determine whether insurance agents were employees or independent contractors under the NLRA).

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and bargain collectively may violate antitrust laws.⁸⁴ The status of gig economy workers as employees versus independent contractors has been widely litigated⁸⁵ and theorized,⁸⁶ but almost exclusively in the context of wage, hour, and benefit disputes,⁸⁷ not in the context of whether the workers can organize into unions.⁸⁸

Second, workers in the gig economy may think of themselves as individual entrepreneurs and not as workers with a collective interest.⁸⁹ Uber drivers, for example, set their own schedules, work alone, and drive their own cars.⁹⁰ However, as Catherine Fisk has shown, Hollywood writers have bargained collectively for eighty years despite working in a gig (albeit non-web-based platform) economy.⁹¹ Independent, entrepreneurial, short-term workers can organize and bargain collectively if given the opportunity, motive, and legal protection to do so.⁹²

* * *

No matter how one slices or dices the numbers, union density, bargaining power, and political power all have seen a dramatic decline in recent decades. In the next chapter, Jake Rosenfeld describes the consequences of that decline.

⁸⁴ See Catherine Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. (forthcoming 2017) (manuscript at 15–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858572 (analyzing historical precedent on whether independent contractors violate antitrust laws by acting in concert); Paul, *supra* note 65, at 11 (describing the legal theory under which Uber workers would violate antitrust laws by engaging in collective bargaining); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977 (2016) (discussing the status of independent contractors under antitrust laws); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 169–170 (2005) (describing the Supreme Court’s treatment of independent contractors under the Sherman Act).

⁸⁵ See Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, (St. Louis Univ. Legal Studies Research Paper No. 2016-9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776213 (listing cases where gig economy workers sought the benefits associated with employment).

⁸⁶ See, e.g., Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 39 COMP. LAB. L. & POL’Y J. (2017), [ssrn.com/abstract=2734288](https://papers.ssrn.com/abstract=2734288) (discussing litigation surrounding gig economy workers’ status and analyzing how the gig economy is transforming work); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673 (2016) (advocating for a new approach to delineating employment); Bales & Woo, *supra* note 72 (arguing that current legal tests do not provide clear answers as to whether Uber drivers are employees or independent contractors).

⁸⁷ Cherry, *supra* note 85.

⁸⁸ Cf. Fisk, *supra* note 84 (using Hollywood writers as a case study in whether gig-like workers can, both legally and practically, organize into a union).

⁸⁹ V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 104–120 (2017); Fisk, *supra* note 84, at 1.

⁹⁰ Bales & Woo, *supra* note 72, at 6.

⁹¹ Fisk, *supra* note 84, at 2.

⁹² See generally *id.* (discussing why and how Hollywood, a gig economy, decided to unionize).