

A PIVOTAL MOMENT: WHY THE RESURGENCE OF THE LABOR MOVEMENT & THE RISE OF E-COMMERCE MAY CALL FOR A MODERNIZATION OF NATIONAL LABOR LAW

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I. INTRODUCTION

The birth of the labor movement can be traced back to the developmental years of the United States when the free wage-labor market arose.¹ Following

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¹ *Labor Movement*, HISTORY (Mar. 31, 2020), <https://www.history.com/topics/19th-century/labor> [<https://perma.cc/G6Y3-N8MY>].

the earliest recorded strike in 1768, workers across the country soon began making demands in exchange for their continued work.² Official labor legislation came along later, but it did not include provisions addressing e-commerce employers, given that the legislation predated the development of the Internet.³ Although e-commerce began to grow in popularity prior to the COVID-19 pandemic, this crisis led to a global uptick in e-commerce sales.⁴ Subsequently, there was an increase in awareness of the lack of legislation that specifically addressed e-commerce employers, as well as a lack of substantive penalties that genuinely curbed e-commerce employers from engaging in unfair labor practices.⁵

This Note argues that the resurgence of the labor movement and the rise of e-commerce may call for a modernization of labor law as it pertains to e-commerce employers. The Note will first discuss the motives behind the recent resurgence of the labor movement, then expound upon the contemporary upward trend of e-commerce, and analyze how these two distinct shifts have positioned the United States for a modernization of its national labor law with respect to e-commerce. Finally, this Note will propose solutions to address the need for labor legislation aimed at e-commerce employers.

II. BACKGROUND

In order to understand the increased presence of labor unions in nontraditional industries, it is important to acknowledge the historical background of the labor movement in the United States and its related facets, the legislation that governs unions, and why e-commerce plays a role in this niche area of the law.

² *Id.*

³ See *National Labor Relations Act (1935)*, NAT'L ARCHIVES (Nov. 22, 2021), <https://www.archives.gov/milestone-documents/national-labor-relations-act> [<https://perma.cc/A3SL-75DA>]; see also *World Wide Web (WWW) Launches in the Public Domain*, HISTORY (Mar. 30, 2020), <https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain> [<https://perma.cc/7ZQ2-RJZY>].

⁴ See *Impact of COVID Pandemic on eCommerce*, INT'L TRADE ADMIN., <https://www.trade.gov/impact-covid-pandemic-ecommerce> [<https://perma.cc/A9QJ-QVG9>] (last visited Mar. 21, 2023); see generally *A Brief History of Ecommerce (and a Look at the Future)*, THE FULFILLMENT LAB, <https://www.thefulfillmentlab.com/blog/history-of-ecommerce> [<https://perma.cc/JX82-WY3M>] (last visited Mar. 21, 2023).

⁵ See *infra* Parts III, IV.

A. *The Ebb and Flow of the United States Labor Movement*

Following the end of the Civil War in 1865, a new era of industrialization hit the United States.⁶ The gross national product of the United States increased largely and rapidly between 1860 and 1920.⁷ Large profit accumulation quickly followed, and so did the number of workers attempting to organize.⁸ Companies vehemently opposed this increased interest in labor organization amongst workers.⁹ The National Labor Union was the nation's first labor federation, and it was mostly dedicated to establishing an eight-hour workday in 1866.¹⁰ Broadly, it "served as a forum for labor reformers and the union movement, as well as supported strikes and legislative activity."¹¹ Labor organizations continued to grow into the 1870s, with the establishment of the Knights of Labor and strikes that yielded huge victories against railroad employers.¹² In addition to maintaining the demand for an eight-hour workday, "higher wages, women's economic rights, racial equality, laws against child labor, and industrial unionism" were also prioritized by workers.¹³ The "Great Upheaval," a series of mass strikes, occurred in response to major social changes, including "wage cuts, depression, unemployment, and savage treatment by capitalists," in 1877.¹⁴ The American Federation of Labor soon replaced the Knights of Labor and is presently known as the American Federation of Labor and Congress of Industrial Organization, "AFL-CIO."¹⁵

In the late nineteenth century and the early twentieth century, employers and their lawyers used injunctions to end strikes.¹⁶ Employers often initiated *ex parte* hearings for temporary restraining orders, and with the court's power to punish contempt, injunctions were a powerful weapon to wield against workers.¹⁷ In *Commonwealth v. Hunt*, the judiciary finally established that the combination and agreement to strike could not be considered inherently criminal conduct, but the union must be pursuing lawful ends by lawful

⁶ *Labor Wars in the U.S.*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> [https://perma.cc/2U93-TZKS] (last visited Mar. 26, 2023).

⁷ DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 5 (4th ed. 2014).

⁸ See generally *id.* at 5–6.

⁹ See generally *id.* at 6.

¹⁰ Marx-lover, *Timeline of U.S. Labor History*, LIBCOM.ORG (Oct. 1, 2018), <https://libcom.org/article/timeline-us-labor-history> [https://perma.cc/DM33-Z39S].

¹¹ RAY ET AL., *supra* note 7, at 6.

¹² Marx-lover, *supra* note 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; The Editors of Encyclopaedia, *AFL-CIO*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/AFL-CIO> [https://perma.cc/U94X-67CG] (last updated Aug. 5, 2021).

¹⁶ RAY ET AL., *supra* note 7, at 6.

¹⁷ *Id.*; see e.g., *Vegehlahn v. Gutner*, 167 Mass. 92, 44 N.E. 1077 (1896).

means.¹⁸ However, strikes often failed one or both prongs of this ends/means test.¹⁹ This type of judicial intervention was prevalent and continued to increase significantly.²⁰

This era of judicial intervention was solidified with the passage of the Sherman Anti-Trust Act in 1890.²¹ This law is a prime example of how “judicial hostility toward labor unions also manifested itself in the application of the antitrust laws.”²² In 1909, the Shirtwaist Strike in New York City took place, where young women protested against low pay, long hours, poor working conditions, and retaliatory treatment for joining union efforts.²³ This led to the establishment of the International Ladies Garment Workers Union, which provided the necessary groundwork for industrial unionism.²⁴ Despite these types of labor movements gaining significant traction in the early 1900s, “yellow-dog contracts” became ubiquitous around this time.²⁵ Yellow-dog contracts are “agreement[s] between an employer and an employee in which the employee agrees, as a condition of employment, not to join a union during the course of his or her employment.”²⁶

Over two decades later, the Great Depression, the “worst economic downturn in the history of the industrialized world,” battered the country for ten years.²⁷ While the economic tragedy reduced membership in the American Federation of Labor to fewer than 3 million, it created sympathy for the plight of the working class, which aided the advancement of the labor movement.²⁸ President Franklin D. Roosevelt was elected in 1932, and his tenure of office was hallmarked by an adoption of more favorable attitudes by the government and the courts towards the labor movement.²⁹

¹⁸ RAY ET AL., *supra* note 7, at 6.

¹⁹ *Id.*

²⁰ *See generally id.*

²¹ *Id.* at 7.

²² *Id.* at 7.

²³ Marx-lover, *supra* note 10; *Our Labor History Timeline*, AFL-CIO, <https://aflcio.org/about-us/history> [<https://perma.cc/N6YZ-4EEU>] (last visited Mar. 26, 2023).

²⁴ Marx-lover, *supra* note 10.

²⁵ *See generally* The Editors of Encyclopaedia, *Yellow-Dog Contract*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/yellow-dog-contract> [<https://perma.cc/PK24-RYVZ>] (last updated Feb. 26, 2020).

²⁶ *Id.*

²⁷ *Great Depression*, HISTORY, <https://www.history.com/topics/great-depression> [<https://perma.cc/ZHB3-VSJU>] (last visited Feb. 21, 2023).

²⁸ *The Great Depression*, UNIVERSITY OF GRONINGEN, <http://www.let.rug.nl/usa/outlines/economy-1991/labor-in-america-the-trade-unions-role/the-great-depression.php> [<https://perma.cc/4QDV-EZ5B>] (last visited Feb 21, 2023).

²⁹ *See id.*; *A Momentous Political Realignment*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/parties-leadership/1932->

The Norris-LaGuardia Act became law in 1932, outlawing “yellow-dog contacts” and prohibiting federal courts from issuing injunctions in most labor disputes.³⁰ This signaled Congress’s intention to end the era of judicial oversight of labor disputes and labor policy.³¹ Promptly after, Congress passed the National Industrial Recovery Act in 1933, which aimed to aid the nation’s economic recovery during the Great Depression.³² The passage of the National Labor Relations Act (“NLRA”) soon followed in 1935 and was the first comprehensive labor protection with the goal of promoting peace among employers and workers.³³

Decades later, the COVID-19 pandemic brought the nation to a time of tumultuous political tension, death, and despair, but it also can be credited for the recent resurgence of the labor movement.³⁴ Workers modified the conversation about work in the United States in response to unfair labor practices that were exacerbated during the pandemic.³⁵ Workplace union efforts and struggles for social justice began to intertwine.³⁶ Workers began to organize with or without a union, which was a method that had not been seen for decades.³⁷

This resurgence has remained steady over the course of the pandemic, with unions reporting a heightened interest in involvement and organization.³⁸ National unions have seen a rise in less traditionally organized industries such as health care, food service, and retail who want to join the unionizing efforts.³⁹ This is partly due to the excessive profits that companies like Amazon, Costco, Kroger, and Walmart made during the pandemic, which is in stark contrast to the low wages and benefits they

political-realignment.htm [https://perma.cc/H72C-RQ3A] (last visited Mar. 26, 2023).

³⁰ The Editors of Encyclopaedia, *supra* note 25; see RAY ET AL., *supra* note 7, at 9.

³¹ See RAY ET AL., *supra* note 7, at 9.

³² See *National Industrial Recovery Act (1933)*, NAT’L ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/national-industrial-recovery-act> [https://perma.cc/A6W7-5T8V].

³³ See NAT’L ARCHIVES, *supra* note 3.

³⁴ See Abigail Abrams, *The Challenges Posed By COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME (Jan. 25, 2021, 12:46 PM), <https://time.com/5928528/frontline-workers-strikes-labor/> [https://perma.cc/K2WS-2QPZ].

³⁵ Jamie K. McCallum, *How the Pandemic Changed the Landscape of U.S. Labor Organizing*, IN THESE TIMES (Nov. 17, 2022), <https://inthesetimes.com/article/essential-workers-covid-pandemic-union-labor-strike> [https://perma.cc/BT9L-QLAM].

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Abrams, *supra* note 34.

³⁹ See *id.*

provide their workers.⁴⁰ Essential workers, in particular, represented a great number of those on the picket lines.⁴¹

“By April 2020, about a third of U.S. workers were designated as ‘essential’ or ‘frontline’ workers.”⁴² One of the many exceptions to stay-at-home orders during the pandemic was that all workers that were designated “essential workers” would continue to go to their jobs and serve the public in various capacities.⁴³ Some workers believed certain employer categorizations of “essential” workers were arbitrary, as employers often designated workers whose tasks had no imperative public benefit as “essential,” forcing them to work unnecessarily during the pandemic.⁴⁴ On the state level, the “essential” categorizations varied but typically included workers who “conduct[ed] a range of operations and services that [were] typically essential to continue critical infrastructure operations.”⁴⁵ Some of these services included energy, child care, water and wastewater, agriculture and food production, critical retail (grocery stores, hardware stores, and mechanics), critical trades (plumbers, electricians, and construction workers), transportation, nonprofits, and social service organizations.⁴⁶

The lack of a bright-line test to determine which workers were “essential” hindered the ability of many workers to organize collectively.⁴⁷ Multiple workers at healthcare facilities were terminated after their employers refused to allow them to wear masks in common areas out of concern it would instill fear in patients and staff.⁴⁸ Retail workers were made to feel ashamed upon calling in sick, often offered no paid leave if they were to get sick, and forced to live with no income when their stores closed.⁴⁹ Despite this hindrance, some workers successfully used their new “essential” status to highlight unfair labor practices and exploitation at the hands of their employers, as most of them were making less than \$15 an hour.⁵⁰ Notably,

⁴⁰ *Id.*

⁴¹ *See generally id.*

⁴² McCallum, *supra* note 35.

⁴³ NAT’L CONF. OF STATE LEGISLATURES, COVID-19: ESSENTIAL WORKERS IN THE STATES (2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx> [<https://perma.cc/S7T3-A3XZ>].

⁴⁴ McCallum, *supra* note 35.

⁴⁵ NAT’L CONF. OF STATE LEGISLATURES, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ *See* McCallum, *supra* note 35.

⁴⁸ *See* Christian Davenport et al., *As Coronavirus Spreads, So Do Reports of Companies Mistreating Workers*, THE WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/business/2020/03/31/worker-retaliation-mistreatment-coronavirus/> [<https://perma.cc/U5SE-DGMN>].

⁴⁹ *See id.*

⁵⁰ *See* McCallum, *supra* note 35; *see also* Molly Kinder & Laura Stateler, *Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a \$15 Minimum wage.*, BROOKINGS (Feb. 5, 2021), <https://www.brookings.edu/blog/the-avenue/2021/02/05/essential-workers-deserve-minimum-wage-increase/> [<https://perma.cc/27EN-L8X9>].

the United States government frequently declined to implement safeguards for the workers it said were “essential” to the critical infrastructure of the nation and should continue to work during the pandemic.⁵¹ Without the organization and calls to action from “essential” workers, the public may never have known about the mistreatment or exploitation these workers faced, and it may have taken longer to begin the creation of collaborative paths to improvement.⁵²

B. *A Brief History of the National Labor Relations Act*

The NLRA was the government’s second attempt to address relations between unions and employers.⁵³ It “[a]pplied to all employers involved in interstate commerce except airlines, railroads, agriculture, and government.”⁵⁴ The two main goals of the NLRA were to achieve industrial peace and to redress inequality of bargaining power.⁵⁵

At the time the NLRA was passed, industrial strife and unrest were prominent.⁵⁶ Violent strikes plagued the national economy and often required intervention by the National Guard or federal troops to restore order.⁵⁷ The nation was also suffering from the impacts of unequal bargaining power, including the burden it enforced on commerce and aggravation of recurrent business depressions.⁵⁸ Workers lacked bargaining power which prevented stabilized competitive wages and the achievement of sufficient working conditions amongst various industries.⁵⁹

The NLRB is an independent federal agency that was implemented solely to enforce the NLRA.⁶⁰ It is comprised of the Board, the General

⁵¹ See Abrams, *supra* note 34.

⁵² See McCallum, *supra* note 35.

⁵³ See NAT’L ARCHIVES, *supra* note 4.3

⁵⁴ *Id.*

⁵⁵ Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in RSCH. HANDBOOK ON THE ECON. OF LAB. AND EMP. LAW, 427, 427 (Cynthia L. Estlund & Michael L. Wachter ed., 2012) (discussing the economic and legal success of the NLRA); see also *National Industrial Recovery Act (1933)*, NAT’L ARCHIVES (a key piece of the legislation was also implemented to address the issues surrounding effective enforcement powers that the NIRA left unresolved), <https://www.archives.gov/milestone-documents/national-industrial-recovery-act> [<https://perma.cc/BP7A-VK8U>] (last viewed Mar. 25, 2023).

⁵⁶ Wachter, *supra* note 55, at 427.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Introduction to the NLRB*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> [<https://perma.cc/2PR7-9QLH>] (last visited Feb. 28, 2023).

Counsel, and the Regional Offices.⁶¹ The two main duties of the NLRB are the conduction of representation elections and result certification, and the prevention of unfair labor practices, by unions and employers.⁶² The NLRB gets its authority from Congress through the NLRA, and is permitted to act where Congress may not, directing and certifying elections and preventing unfair labor practices in cases of labor disputes, as long as it may, or does, affect commerce.⁶³ This threshold is met when there is “[t]rade, traffic, transportation, or communication” from one state to another, or two points within the same state.⁶⁴ Additionally, the legislation provides the NLRB with the authority to “[a]rbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employers.”⁶⁵

This legislation guarantees the right of most private sector workers to organize, engage in group efforts to improve their wages and working conditions, determine whether to have unions as their bargaining representative, engage in collective bargaining, and to refrain from any of these activities.⁶⁶ Ultimately, its goal is to prevent and remedy unfair labor practices that are weaponized against workers by private sector employers and unions.⁶⁷

In the early 1950’s, thirty-five percent of workers belonged to a union.⁶⁸ However, union membership has been in decline for the last fifty years.⁶⁹ Some experts believe that the reason for this decline is due to failures of the NLRA.⁷⁰ The NLRA was implemented to encourage worker organization, collective bargaining, and the promotion of quality bargaining power between employers and workers, but there are important issues that the NLRA could not address, such as the current oligarchical nature of wealthy e-commerce employers, and the influence of the rise of e-commerce in the twenty-first century.⁷¹

⁶¹ *Basic Guide to the National Labor Relations Act*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [<https://perma.cc/4886-VG6Q>] (last visited Feb. 28, 2023).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ Wachter, *supra* note 55, at 427.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Executive Order on Worker Organization and Empowerment*, THE WHITE HOUSE (April 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/> [<https://perma.cc/5ZPE-QPEP>]; *see also* NAT’L LAB. REL. BD., *supra* note 61.

C. *The Rise of E-Commerce in the 21st Century*

“E-commerce (electronic commerce) is the buying and selling of goods and services, or the transmitting of funds or data, over an electronic network, primarily the internet.”⁷² E-commerce began in the 1960’s “[w]hen companies used an electronic system called the Electronic Data Interchange to facilitate the transfer of documents.”⁷³ In 1994, the first transaction involved the sale of a CD between friends through a website called NetMarket.⁷⁴ These “[t]ransactions occurred from business-to-business, business-to-consumer, consumer-to-consumer, or consumer-to-business.”⁷⁵

The first e-commerce company—CompuServe—launched in Columbus, Ohio, in 1969.⁷⁶ In 1979, electronic shopping was invented.⁷⁷ The official acknowledgment of e-commerce came along a few years later in 1983, and California passed its Electronic Commerce Act shortly after, which imposed “[r]equirements on systems designed ‘to conduct the purchase of foods and services via a telecommunications network.’”⁷⁸ In 1990, the first web browser was made available, which became the new interface for e-commerce transactions.⁷⁹ Four years later, Jeff Bezos created Amazon.com for online bookselling.⁸⁰ In 1998, PayPal was created, which made online transactions more convenient for consumers.⁸¹ Walmart, one of the world’s leading e-commerce retailers, launched its website in 2000.⁸² E-commerce began to rise steadily until 2005, when Cyber Monday was created, which led to the domination of the holiday shopping seasons by the e-commerce industry.⁸³ Widespread use of large e-commerce platforms such as eBay and

⁷² Ben Lutkevich, Wesley Chai & Brian Holak, *Definition e-commerce*, TECHTARGET, <https://www.techtargget.com/searchcio/definition/e-commerce> [<https://perma.cc/LX92-SDYF>] (last updated June 2022).

⁷³ Andrew Bloomenthal, *Ecommerce Defined: Types, History, and Examples*, INVESTOPEDIA (July 6, 2022), <https://www.investopedia.com/terms/e/ecommerce.asp> [<https://perma.cc/LAK4-CMBV>].

⁷⁴ *Id.*

⁷⁵ Lutkevich et al., *supra* note 72.

⁷⁶ *A Brief History of Ecommerce (and a Look at the Future)*, THE FULFILLMENT LAB, <https://www.thefulfillmentlab.com/blog/history-of-ecommerce> [<https://perma.cc/JX82-WY3M>] (last visited on Feb. 28, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Mark Hall, *Amazon.com*, BRITANNICA (Feb. 22, 2023), <https://www.britannica.com/topic/Amazoncom> [<https://perma.cc/BJU8-ATL6>].

⁸¹ *A Brief History of Ecommerce (and a Look at the Future)*, *supra* note 76.

⁸² Zoe Malin, *Cyber Monday: How It’s Evolved and What 2022 May Bring*, NBC (Sept. 13, 2021, 4:04PM), <https://www.nbcnews.com/select/shopping/cyber-monday-evolution-ncna1278160> [<https://perma.cc/5A5R-3FZL>].

⁸³ *Id.*

Amazon have become increasingly popular within the last twenty years.⁸⁴ Originally in 2011, the United States Census Bureau noted that the e-commerce industry was responsible for five-percent of total retail sales.⁸⁵ In 2012, Instacart was established, which revolutionized the industry for grocery delivery services.⁸⁶ In 2017, the e-commerce industry generated \$29.267 trillion in global sales.⁸⁷ In 2020, the COVID-19 pandemic kept millions at home in quarantine, driving them to shop online out of boredom and necessity.⁸⁸

1. *Why E-commerce is Here to Stay*

The e-commerce industry was thriving by 2020, but the pandemic bolstered e-commerce sales percentages.⁸⁹ At the beginning of the pandemic, many states had stay-at-home orders that prohibited its constituents from traveling autonomously.⁹⁰ Many businesses suffered financially, especially small businesses.⁹¹ The ability to utilize e-commerce has helped those “[b]usinesses gain access to and establish a wider market presence by providing cheaper and more efficient distribution channels for their products or services.”⁹² E-commerce provides a faster buying process, reduced costs for sellers, flexibility for customers, price matching, and multiple payment options.⁹³ These advantages were of great appeal to individuals who were confined to their homes during the early days of the pandemic.⁹⁴

⁸⁴ *See id.*

⁸⁵ Lutkevich et al., *supra* note 72.

⁸⁶ *A Brief History of Ecommerce (and a Look at the Future)*, *supra* note 76.

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *See generally States' Covid-19 Public Health Emergency Declarations and Mask Requirements*, NAT'L ACAD. FOR STATE AND HEALTH POL'Y, <https://www.nashp.org/governors-prioritize-health-for-all/> [<https://perma.cc/3EGA-QR4W>] (last updated Mar. 21, 2023).

⁹¹ Jonnelle Marte, *Small U.S. Businesses Were Already Struggling. Then Coronavirus Hit*, REUTERS (Apr. 7, 2020, 3:38 PM), <https://www.reuters.com/article/us-health-coronavirus-fed-small-business/small-u-s-businesses-were-already-struggling-then-coronavirus-hit-idUSKBN21P34U> [<https://perma.cc/4QG9-RKQP>].

⁹² Bloomenthal, *supra* note 73.

⁹³ *A Complete Guide on the Advantages of Ecommerce to Business*, THE AMAZON SELLER BLOG: ALL ABOUT SELLING (June 6, 2021), <https://sell.amazon.in/seller-blog/advantages-of-ecommerce> [<https://perma.cc/7R3H-G9JU>].

⁹⁴ *See Susan Helper & Evan Soltas, Why the Pandemic Has Disrupted Supply Chains*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/why-the-pandemic-has-disrupted-supply-chains/> [<https://perma.cc/QD5R-4BJZ>] (At the beginning of the COVID-19 pandemic there were shortages of essential and non-essential

The aforementioned advantages of e-commerce allowed customers to search for the cheapest or least time-consuming options at a time when both funds and time were scarce, and faster buying processes guaranteed that customers would spend less time shopping for the products they desired.⁹⁵ This expedited shopping process has much to do with how easily the internet platforms allow customers to quickly browse through items.⁹⁶ It also allowed customers to check multiple locations for products, which was crucial during a time of shortages and need.⁹⁷ Liz Pagel, a senior vice president and consumer lending business leader at TransUnion, said that customers staying home due to pandemic restrictions and buying almost everything online created “[a] perfect storm for point of sale.”⁹⁸

III. THE PUSH FOR MODERNIZATION IN LABOR LAW

A. *The Labor Resurgence’s Rise in the Midst of COVID-19*

In 2020, unions began to report a surge in organizing and increased interest in organizing.⁹⁹ “[G]rocery stores, warehouses, hospitals, nursing homes, fast food restaurants, schools, and health clinics—unionized and not—all saw walkouts.”¹⁰⁰ In addition to the pandemic exacerbating already existing problems within the workplace, it also called attention to some of the harmful features of capitalist societies and the way that capitalism inherently fueled the pandemic.¹⁰¹ The consensus was that “[l]abor under capitalism puts our society . . . unnecessarily in harm’s way.”¹⁰² [L]arge and unruly strikes swept through the country’s basic industries, challenging the authority of our most powerful capitalists.¹⁰³ The union effort is not waiting for legislation to address its concerns.¹⁰⁴

products, due to pandemic supply chain issues. Part of this difficulty was due to a rising need for workers and the struggle businesses went through in attempt to keep their shelves stocked.)

⁹⁵ *A Complete Guide on the Advantages of Ecommerce to Business*, *supra* note 93.

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ Jessica Dickler, *Buy Now, Pay Later Plans are Booming in the Covid Economy*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/buy-now-pay-later-plans-are-booming-in-the-covid-economy.html> [<https://perma.cc/H4M8-JAM3>].

⁹⁹ *See Abrams*, *supra* note 34.

¹⁰⁰ *Id.*

¹⁰¹ *See* Jamie K. McCallum, *How the Pandemic Changed the Landscape of U.S. Labor Organizing*, IN THESE TIMES, (Nov. 17, 2022), <https://inthesetimes.com/article/essential-workers-covid-pandemic-union-labor-strike> [<https://perma.cc/XD96-F2HU>].

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*; *see also* POYDOCK ET. AL, ECONOMIC POLICY INSTITUTE, DATA SHOWED MAJOR STRIKE INCREASED IN 2021, BUT REMAINS BELOW PRE-PANDEMIC LEVELS (Feb. 23, 2022).

The NLRB has consistently found that Amazon violated workers' rights in 2022 after being confronted with multiple union efforts.¹⁰⁵ As recently as April, Amazon CEO Andy Jassy violated laws under the NLRA after speaking about his stance on unions during multiple interviews.¹⁰⁶ First, Jassy claimed that “[w]orkers who were represented by a union would be less empowered in the workplace, which would make it more difficult for them to have direct relationships with management.”¹⁰⁷ In the next interview, he stated that “[w]orkers were better without a union.”¹⁰⁸ Amazon is not alone in its efforts to minimize union efforts amongst its workers.¹⁰⁹

“[D]uring the first nine months of the 2022 fiscal year, the NLRB saw a 58% increase in union representation petitions.”¹¹⁰ On June 18th, 2022, Apple workers in Maryland successfully joined the International Association of Machinist and Aerospace workers.¹¹¹ This was Apple’s first union.¹¹² More workers at other locations followed suit across the United States.¹¹³ On July 28th, 2022, Trader Joe’s United was formed, an independent union for Trader Joe’s workers.¹¹⁴ Most recently, the campaign by Starbucks Workers United has influenced the newest surge in organizing.¹¹⁵ There have been votes conducted at nearly 300 Starbucks locations alone, and the unionization movement has won at roughly 200 locations.¹¹⁶

Companies like Starbucks and Chipotle responded to this surge in organization by closing locations, although they have insisted, they were not

¹⁰⁵ Lauren Kaori Gurley, *Regulators Allege Amazon CEO Andy Jassy’s Remarks Violated Labor Law*, THE WASHINGTON POST (Dec. 26, 2022), <https://www.washingtonpost.com/business/2022/10/26/amazon-nlr-andy-jassy/> [<https://perma.cc/2RZN-Y5SR>].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Robert Reich, *How Amazon, Starbucks and Other Companies Fight Unions*, PA. CAP. STAR (July 31, 2022, 6:30AM), <https://www.penncapital-star.com/commentary/how-amazon-starbucks-and-other-companies-fight-unions-robert-reich/> [<https://perma.cc/4CP7-6XJD>]; see also Alana Semuels, *Some Companies Will Do Just About Anything to Stop Workers from Unionizing*, TIME (Oct. 13, 2022, 10:12 AM), <https://time.com/6221176/worker-strikes-employers-unions/> [<https://perma.cc/2P3R-C86N>].

¹¹⁰ Ken Green, *Recent Labor Union Wins: 5 Union Victories in Summer 2022*, UNION TRACK (Sept. 27, 2022), <https://uniontrack.com/blog/union-victories> [<https://perma.cc/T9EY-RPXE>].

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ Chris Isidore, *Despite Union Wins at Starbucks, Amazon and Apple, Labor Laws Keep Cards Stacked Against Organizers*, CNN (Sept. 5, 2022, 4:25 PM), <https://www.cnn.com/2022/09/05/business/union-organizing-efforts/index.html> [<https://perma.cc/S57K-56Q7>].

¹¹⁶ *Id.*

retaliatory closures.¹¹⁷ While Chipotle claimed its closure was due to a lack of workers, Starbucks said its closure was a part of a broader plan to cut down stores across the nation due to safety issues.¹¹⁸ This is a frequent tactic by corporations that take action after there has been a union effort within their stores, and it is extremely difficult to prove that these kinds of closures are retaliatory, and thus violations of the NLRA.

There are few penalties for employers' anti-union actions.¹¹⁹ In general, the NLRA prohibits businesses from retaliating against workers for union organization.¹²⁰ However, in 1965 the Supreme Court held in *Textile Workers v. Darlington Mfg. Co.*, that closing a business in response to union organization is “[n]ot the type of discrimination which is prohibited by the [NLRA].”¹²¹ The ruling provided that while “[e]mployers cannot discriminate against employees for their union activities, the law simply does not prevent an employer from going out of business, even when the closure is based solely on anti-union sentiments.”¹²² An exception to the *Darlington* rule includes the prohibition of employers closing a location due to union activity in order to deter other union efforts at other locations.¹²³ Under the Biden administration's leadership, the NLRB has taken a more prudent approach to hold employers who interfere with workers' rights more accountable.¹²⁴

Sales made in physical stores are expected to be surpassed by e-commerce sales by 2024.¹²⁵ Workers are no longer willing to settle for anything less than safe and healthy workplace conditions that should be guaranteed to them.¹²⁶ The pandemic has also signaled a shift in union attitudes that indicates a present willingness to fight back against e-commerce giants.¹²⁷ This shift has great implications when the number of

¹¹⁷ *Id.*

¹¹⁸ Kate Rogers, *Starbucks Informs Workers at Two Stores of Closures, Union Claims Retaliation*, CNBC (Aug. 23, 2022, 6:19 PM), <https://www.cnbc.com/2022/08/23/starbucks-informs-workers-at-two-stores-of-closures-union-claims-retaliation.html> [<https://perma.cc/C4UW-GGBK>].

¹¹⁹ Isidore, *supra* note 115.

¹²⁰ See Andrew M. MacDonald, *One Response to Union Organizing—Shut Down Completely*, FOX ROTHSCHILD LLP (Nov. 30, 2017), <https://laborlaw.foxrothschild.com/2017/11/articles/general-labor-law-news-updates/one-response-to-union-organizing-shut-down-completely/> [<https://perma.cc/TGK3-2EZN>].

¹²¹ See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 272 (1965).

¹²² MacDonald, *supra* note 120.

¹²³ *Id.*

¹²⁴ Gurley, *supra* note 105.

¹²⁵ *A Brief History of Ecommerce (and a Look at the Future)*, *supra* note 76.

¹²⁶ Abrams, *supra* note 34.

¹²⁷ See Mia Sato, *Etsy Sellers Are Starting a 'Union' to Fight Policies They Say Hurt Merchants*, THE VERGE (Aug. 31, 2022, 1:27 PM), <https://www.theverge.com/2022/8/31/23330758/etsy-strike-boycott-indie-sellers-guild-union-fee-increase> [<https://perma.cc/8LG5-EUJZ>].

workers that e-commerce employers hire is taken into consideration, as well as the rise in popularity of e-commerce.

IV. THE SHORTCOMINGS OF THE NLRA AS APPLIED TO E-COMMERCE

The United States currently operates under the NLRA, which is enforced by the NLRB.¹²⁸ Despite numerous amendments and attempts at amending the NLRA, the legislation is not appropriate for modern employers, nor does it offer deterrence factors great enough to force legitimate compliance with fair labor practices.¹²⁹

While some of the inadequacies of the NLRA are certainly applicable to non-e-commerce employers, the focus of this note is on e-commerce for a number of reasons. First, the number of individuals that e-commerce companies employ is increasing exponentially.¹³⁰ “[B]etween December 1997 and December 2016, employment in electronic shopping increased by nearly 80%.”¹³¹ Second, the NLRA was last amended in 1974, to address policy concerns related to extended coverage and protection for workers of nonprofit hospitals.¹³² The NLRA has yet to be amended to encompass a forward-thinking view and technologically-advanced reality that the country has been quickly confronted with as it relates to employment protections for large e-commerce employees, or account for their wealth and influence.¹³³

¹²⁸ See *National Lab Relations Act (1935)*, NAT’L ARCHIVES (Nov. 22, 2021), <https://www.archives.gov/milestone-documents/national-labor-relations-act> [<https://perma.cc/HWY8-XM3C>].

¹²⁹ See generally *National Lab Relations Act*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law> [<https://perma.cc/U3Z2-L8P9>] (last visited Apr. 11, 2023).

¹³⁰ Elka Torpey, *Employment Growth and Wages in E-commerce*, U.S. BUREAU OF LAB. STATS. (Dec. 2018), <https://www.bls.gov/careeroutlook/2018/article/e-commerce-growth.htm> [<https://perma.cc/6ARJ-P3PJ>] (By 2026, the United States Bureau of Labor Statistics believes that employment in this industry will reach almost 450,000 jobs by the year 2026. E-commerce retailers need workers to complete tasks such as taking and filling orders, packing boxes, and creating websites. E-commerce retailers need workers to complete tasks such as taking and filling orders, packing boxes, and creating websites. In addition to filling these jobs, customer service representatives for e-commerce retailers are expected to have more new jobs than any other industry through 2026 in electronic shopping.).

¹³¹ *Id.*

¹³² *1974 Health Care Amendments*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/1974-health-care-amendments> [<https://perma.cc/DB9E-ZEKJ>] (last visited Mar. 27, 2023).

¹³³ See *id.* (the last time the legislation was effectively amended).

A. Legislative Scheme

As previously mentioned, the purpose of the NLRA was to assist American employers and their relationships with their workers, and unions.¹³⁴ While the legislation did include provisions to manage arbitrations, union elections, and penalties for unfair labor practices, it was not futuristic enough to address the rise or subsequent impact of e-commerce.¹³⁵ There are two main reasons why this is cause for concern in the twenty-first century. First, e-commerce is growing exponentially.¹³⁶ Second, the NLRA is particularly outdated with respect to e-commerce and the labyrinth of labor issues that have arisen from this exponential growth.¹³⁷

There are a few of the sections contained within the NLRA that are especially important regarding the management of employer and worker relations.¹³⁸ Section 7, 8, and 9 are essential provisions of the legislation that lays out workers' rights, as well as the penalties and protocols, when those rights have been violated by employers.¹³⁹

Section 7 of the NLRA describes certain employee rights.¹⁴⁰ "[E]mployees shall have the right to self-organization, to form, join, or assist labor organizations; to bargain collectively, through representative of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁴¹

Section 8 provides a safeguard of these guaranteed Section 7 rights by prohibiting certain actions as unfair labor practices.¹⁴² This can be seen specifically with "[S]ection 8(1) prohibiting employee interference, Section 8(2) prohibiting employer imposition, Section 8(3) prohibiting hiring and firing discrimination, Section 8(4) prohibiting retaliation for testifying or bargaining, and Section 8(5) requiring employers to bargain in good faith with the union a majority of their workers selected."¹⁴³

Finally, Section 9 created the process by which the NLRB must conduct its representation proceedings.¹⁴⁴ The Board has a wide array of discretion to

¹³⁴ See generally *National Labor Relations Act (1935)*, *supra* note 128.

¹³⁵ See *id.*

¹³⁶ See *supra* note 129.

¹³⁷ See generally *National Lab Relations Act (1935)*, *supra* note 128 (the legislation does not make mention of the internet, e-commerce, or related subjects as it was drafted in 1935).

¹³⁸ See DOUGLAS E. RAY, ET AL., *Understanding LABOR LAW* 11 (4th ed. 2014).

¹³⁹ See generally *id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See DOUGLAS E. RAY, ET AL., *Understanding LABOR LAW* 11 (4th ed. 2014).

impose remedies when an unfair labor practice has been committed.¹⁴⁵ The NLRB can “[i]ssue backpay for workers fired for protective activity, to cover the period of unemployment, and payment of dues, fines, or other costs.”¹⁴⁶ The Board can require employers to reinstate workers who were fired for protected activity.¹⁴⁷ It can also require notice posting at the workplace or an injunction.¹⁴⁸ These remedies lack substantial deterrence factors for employers, particularly those who have large coffers, like e-commerce companies such as Amazon, because the penalties for violations are so low that they can afford to be repeat offenders.¹⁴⁹

While these three provisions of the NLRA offer important protections, protocols, and remedies for workers and employers, they fail to address e-commerce specifically, allowing employers like Amazon to participate in unfair labor practices with penalties that are of little to no consequence.¹⁵⁰ While e-commerce employers are known for their expansive net worth and the mass number of jobs they provide, there is another factor that is unique to labor in e-commerce: extremely high turnover rates.¹⁵¹ This makes union organization especially difficult, as you need thirty percent of your workers to petition in favor of a union and fifty-one percent for union certification.¹⁵² Despite the NLRA’s shortcomings with respect to e-commerce employers, the labor movement’s resurgence signals that constituents want labor laws and policies that reflect new-age America and genuinely regulate its e-commerce employers.

¹⁴⁵ See *Monetary Remedies*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/remedies-achieved/monetary-remedies> [<https://perma.cc/XWW6-53VA>] (last visited Mar. 28, 2023).

¹⁴⁶ *Id.*

¹⁴⁷ Darrah N. Hinton et al., *Employers Beware: NLRB Special Remedies Are Becoming Extra Special*, DAVIS WRIGHT TREMAINE LLP (Feb. 16, 2022), <https://www.dwt.com/blogs/employment-labor-and-benefits/2022/02/nlr-general-counsel-special-remedies-memo> [<https://perma.cc/G7FC-BTXQ>].

¹⁴⁸ *Id.*; *Litigation-Injunction*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/litigation/litigation-injunction> [<https://perma.cc/K457-GHGG>] (last visited Mar. 28, 2023).

¹⁴⁹ Shane O’Callaghan, *Amazon’s War Against Unionization*, IGLLOBE NEWS (May 12, 2022), <https://www.iglobenews.org/amazons-war-against-unionization-2/> [<https://perma.cc/CED6-ZHJR>].

¹⁵⁰ See *supra* Part III.

¹⁵¹ Caroline Forsey, *Why Millions of U.S. Employees are Quitting Their Jobs and How Companies Can Navigate*, HUBSPOT (Nov. 22, 2021), <https://blog.hubspot.com/marketing/employee-turnover-rate> [<https://perma.cc/3N47-H7JA>] (retail and e-commerce saw a 30.7% turnover rate in 2021).

¹⁵² See *Your Right to Form a Union*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> [<https://perma.cc/RQ9H-3MTC>] (last visited Mar. 25, 2023).

B. Amazon's Resistance to the Labor Movement

In February 2020, Amazon fell egregiously short of “[h]iring its goal of 150,000 seasonal workers over the winter holiday, forcing the giant e-commerce employer to pay high rates of overtime wages to make up for the shortage”.¹⁵³ Amazon claimed that this problem existed largely because of the omicron variant of COVID-19, but also its projection of rising labor costs as it expanded its warehouses across the country.¹⁵⁴ In addition to its plan to expand its warehouse network, Amazon has also been accused of working to “[d]issuade workers from joining unions, by requiring them to attend meetings at which their representatives tried to convince them to vote no in their union elections, as well as hanging signs and sending antiunion phone messages.”¹⁵⁵ The company “[r]eportedly already spent \$4.3. million on anti-union consultants in 2022.”¹⁵⁶

In April of 2022, Amazon warehouse workers from Staten Island, New York, voted to join the new Amazon Labor Union, almost ensuring a major shift in relations between workers and Amazon.¹⁵⁷ In order to “[f]orm, join, or decertify an existing union, you must file an election petition.”¹⁵⁸ The agents of the NLRB will seek an election agreement between the employer and union, and this will determine a date, time, and place for balloting, the ballot language, the appropriate unit, and a way to determine who is eligible to vote.¹⁵⁹ This successful vote will likely carve a path for more union organizing amongst other Amazon warehouses in the United States.¹⁶⁰

Another Staten Island warehouse was also in the process of a union push under the name “Amazonians United.”¹⁶¹ This workers’ group made direct demands for raises and paid time off on behalf of the workers, and a group at a Seattle Amazon Fresh store declared itself a union, making similar demands.¹⁶² This activism and these levels of high demand can likely be attributed to the pandemic.¹⁶³ Two years under the stress of the pandemic are

¹⁵³ Laura Hautala, *Amazon To Face More Labor Organizing After Historic Union Win*, CNET (April 5, 2022, 5:00 AM), <https://www.cnet.com/tech/services-and-software/amazon-to-face-more-labor-organizing-after-historic-union-win/> [<https://perma.cc/U6FJ-TATE>].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Conduct Elections*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/conduct-elections> [<https://perma.cc/9GQR-JU46>] (last visited, Mar. 25, 2023).

¹⁵⁹ *Id.*

¹⁶⁰ Hautala, *supra* note 153.

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *See id.*

responsible for prompting workers to reevaluate their lives, leading to the Great Resignation.¹⁶⁴ This increase in activism for workers' rights comes at a time in economic history when most employers cannot find enough people to work.¹⁶⁵

Amazon is the world's biggest e-commerce employer, as it surpasses all other e-commerce employers in sales.¹⁶⁶ During the pandemic, there were multiple accusations that Amazon failed to provide safe and tolerable working conditions.¹⁶⁷ Although Amazon's sales and influence dominate that of other e-commerce employers, all will be impacted in some capacity by the union efforts happening at Amazon.¹⁶⁸ While some experts believe that the key to the labor crisis is e-commerce employment, because of the wide range of diverse employment the industry offers, it will not successfully address the labor relations crisis without swift changes in workers' rights.¹⁶⁹ This provides legislative bodies with the perfect opportunity to ensure that the NLRA can be amended to address these very prevalent problems plaguing workers' rights within the e-commerce industry.

V. SOLUTIONS

The NLRA contains multiple roadblocks for workers who are interested in engaging in union efforts.¹⁷⁰ For example, employers are able to draw out the union election process, are free to hold meetings to deliver anti-union messages, and can prolong a worker's reinstatement or reimbursement of backpay for years.¹⁷¹ Additional examples of these roadblocks include the prohibition of workers bringing civil lawsuits against their employers, employer evasion of collective bargaining, drawn out bargaining processes, state right-to-work laws, which can undermine union efforts, and limits on workers' rights to strike.¹⁷² The lack of civil penalties for employers who violate the NLRA allows for wealthy and influential e-commerce employers to be repeat offenders with no real deterrence factor for engaging in unfair labor practices.¹⁷³

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Stephanie Chevalier, *Biggest Online Retailers in the U.S. 2022, By Market Share*, STATISTA (Aug. 26, 2022), <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/> [<https://perma.cc/52QJ-9S67>].

¹⁶⁷ See *New York Says Amazon Failed to Protect Workers From COVID-19*, CBS (Feb. 17, 2021, 12:14 PM), <https://www.cbsnews.com/news/new-york-sues-amazon-covid-worker-safety/> [<https://perma.cc/GZB9-VBM2>].

¹⁶⁸ See Hautala, *supra* note 153.

¹⁶⁹ See *generally id.*

¹⁷⁰ See *supra* Part III, Section A.

¹⁷¹ See *infra* Part V, Section A.1.

¹⁷² *Id.*

¹⁷³ *Id.*

It is important to note that all legislative solutions must be proposed at the federal level.¹⁷⁴ “Where federal labor law is said to preempt state law, the state law in question . . . must give way in favor of the federal scheme.”¹⁷⁵ Constitutionally, “Congress has the power to legislate exclusively in the area of labor relations by virtue of the Commerce Clause and the Supremacy Clause.”¹⁷⁶ The legislative solutions proposed below will be directed at the 118th Congress.

A. *Amending the NLRA*

The most straightforward solution to address the deficiencies in labor law as it applies to e-commerce employers would be to amend the NLRA with the introduction of a new bill or the reintroduction of a previously drafted bill. The current legislation provides protection for workplace democracy by providing private sector workers the fundamental rights to seek better working conditions and designation of representation without fear of retaliation.¹⁷⁷ However, e-commerce giants seemingly have found ways around this prohibition of retaliation due to a number of different factors.¹⁷⁸ First, the NLRA was drafted in 1935, prior to the emergence of the internet and, subsequently, the invention of e-commerce.¹⁷⁹ Consequently, the legislation does not account for the unimaginable reach and influence of e-commerce companies, their deep coffers, or their ability to circumvent penalties for violations of various labor laws.¹⁸⁰

Since its drafting, the NLRA has been amended three times.¹⁸¹ In 1947, the amendment (The Labor Management Relations Act) “included (i) a rule applying the NLRB’s adjudication of unfair labor practices to labor unions, (ii) a state option to allow workers who dissent from union activities not to pay for union activities . . . and (iii) a prohibition on union picketing against businesses not directly party to labor disputes.”¹⁸² This amendment was

¹⁷⁴ See Legal Info. Inst., *Preemption*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/preemption> [<https://perma.cc/35PN-8D8T>] (last visited Mar. 23, 2023).

¹⁷⁵ See DOUGLAS E. RAY ET AL., *supra* note 7, at 311.

¹⁷⁶ *Id.* at 312.

¹⁷⁷ See NAT’L LAB. RELS. BD., *BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD* (1997).

¹⁷⁸ See *supra* Part V.

¹⁷⁹ See generally *National Labor Relations Act (1935)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/national-labor-relations-act> [<https://perma.cc/7F42-6YXP>]; see also *A Brief History of E-Commerce (and a Look at the Future)*, *supra* note 76.

¹⁸⁰ See NATIONAL LABOR RELATIONS BOARD, *supra* note 177.

¹⁸¹ *National Labor Relations Act (NLRA)*, INFLUENCE WATCH, <https://www.influencewatch.org/legislation/national-labor-relations-act/> [<https://perma.cc/AZH7-85PV>] (last visited Mar. 23, 2023).

¹⁸² *Id.*

designed to restore an equilibrium between union organizers and employers.¹⁸³ The next amendment (The Landrum-Griffin Act), which instituted a bill of rights for union members, became law in 1959 and it required of a series of disclosures that unions needed to file regarding expenditures.¹⁸⁴ The most recent amendment of the NLRA was in 1974, expanding the legislation to include nonprofit hospital workers and establishing stricter notice requirements for labor disputes within hospitals.¹⁸⁵ Notably, these amendments were mostly focused on addressing the proper surveillance of labor unions to prevent union corruption, to prevent mishandling of finances, and to increase transparency.¹⁸⁶ The amendments fail to properly address the change in the landscape of workplaces, workplace conditions, or the accountability of employers.¹⁸⁷

Between 1947 and 1974, there were major shifts in American history.¹⁸⁸ The economy was growing, civil liberties were being won, then the economy was stalling, and large American companies that were staples of the United States economy were feuding with labor unions.¹⁸⁹ The recent labor resurgence fueled by the pandemic has provided Congress with the perfect opportunity to amend the NLRA to explicitly address e-commerce employers and potentially offer substantive penalties to deter their participation in unfair labor practices.

In order to successfully address labor issues as they pertain to e-commerce employers, a bill would need to be introduced to address specific legislative shortcomings that do not deter e-commerce employers from engaging in unfair labor practices.¹⁹⁰ One of the largest issues is that, under the current NLRA, employers face penalties that are punitive in theory but not in practice.¹⁹¹ For example, employers can wait months or years to reinstate workers or to pay them backpay after being unlawfully discharged for joining union efforts.¹⁹² Additionally, there are no civil penalties for employer violations of workers' rights and there is a prohibition against filing

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See generally id.*

¹⁸⁷ *See generally id.*

¹⁸⁸ *See* Harold Meyerson, *Age of Crushing Anxiety: How the Bottom Fell Out in America*, UNITED STEELWORKERS (Jan. 1, 2014), <https://m.usw.org/blog/2014/age-of-crushing-anxiety-how-the-bottom-fell-out-in-america> [<https://perma.cc/PV73-HM9M>] (last visited Feb. 23, 2023).

¹⁸⁹ *See id.*

¹⁹⁰ *See generally* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021) (discussing solutions to enforce workplace protections that would have a substantial impact on e-commerce employers).

¹⁹¹ Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *How the PRO Act restores workers' right to unionize*, ECON. POL'Y INST. (Feb. 4, 2021), <https://www.epi.org/publication/pro-act-problem-solution-chart/> [<https://perma.cc/B9BQ-HY8K>].

¹⁹² *Id.*

civil lawsuits against employers for violating the law.¹⁹³ Lastly, forced arbitrations are permitted which include class action waivers.¹⁹⁴

As mentioned previously, the NLRA's past amendments have not targeted employers but instead focused on union organization and efforts, which was likely political.¹⁹⁵ Unfortunately, while this is the most direct solution to making sure that e-commerce employers are held accountable, it is the most difficult solution due to the current polarization of the American Congress.¹⁹⁶ Labor regulations, legislation, and unionizations have been hot-button issues since the beginning of the United States labor movement.

1. *The PRO Act*

The easiest route would be to amend and reintroduce a bill that has previously been drafted. House Resolution 842, the "Protecting the Right to Organize Act of 2021" (the "PRO Act"), was introduced by Democratic Representative Bobby Scott from Virginia.¹⁹⁷ The PRO Act addresses roadblocks for workers' in current labor law and provides solutions.¹⁹⁸ The solutions include: [a]ddressing the lack of civil penalties against employers who violate the NLRA, holding corporate officials personally liable for violations of the law, the implementation of an injunction requirement for the NLRB which would force an employer to immediately reinstate workers if the employer has illegally retaliated against workers for union activity, the creation of the right to file civil actions against employers, and a prohibition of collective action and class action waivers.¹⁹⁹

The PRO Act is controversial for a number of reasons. Some allege that it would "[u]ndermine workers' rights, trap employers in unrelated labor disputes, disrupt the economy, and force individual Americans to pay union dues regardless of whether they are a part of a union."²⁰⁰ Additionally, there are claims that the PRO Act "override[s] state right-to-work laws, threaten[s] independent contractor jobs, expand[s] joint-employer liability, undermine[s] secret-ballot elections, disclose[s] workers' personal information, prohibit[s] mandatory arbitration agreements, [and] allow[s]

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *National Labor Relations Act (1935)*, *supra* note 179.

¹⁹⁶ See Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/ZS3C-DCKH>].

¹⁹⁷ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

¹⁹⁸ See McNicholas, Poydock & Rhinehart, *supra* note 191.

¹⁹⁹ *Id.*

²⁰⁰ *Stop The PRO Act*, U.S. CHAMBER OF COM., <https://www.uschamber.com/major-initiative/stop-the-pro-act#:~:text=The%20PRO%20Act%20would%20undermine,dues%20regardless%20of%20their%20wishes> [<https://perma.cc/6HGZ-JMDB>] (last visited Feb. 23, 2023).

secondary picketing and strikes.”²⁰¹ The PRO Act has already passed in the House, but, with the current landscape of the United States Congress, the bill is stalling right now and would need fifty-one U.S. Senate votes to become law.²⁰² This requires bipartisan compromise which would only come to fruition with compromises made within the legislation, before the voting process.²⁰³

A compromise that could be made in order to pass these protections includes addressing the overbreadth of the bill, subsequently narrowing the scope.²⁰⁴ As of right now, the PRO Act addresses all employers in the private sector.²⁰⁵ E-commerce companies are some of the largest employers globally and nationally in the United States as well.²⁰⁶ If the PRO Act could be narrowly tailored to close one loophole for e-commerce companies, such as tailoring fines to the net worth of the company to create a deterrence factor, this could positively impact hundreds of thousands of workers across the nation.

A prominent concern is the bill’s alleged disregard for individual state rights, specifically the right-to-work laws.²⁰⁷ This concern stems from the provision in the PRO Act that permits collective bargaining agreements to instruct all workers to pay union fees as a requirement for their employment, regardless of whether they are a member of a union.²⁰⁸ Subsequently, this would force many workers to join a union in order to keep their jobs.²⁰⁹ More conservative members of the Senate are likely not happy with this provision, as the protection of state autonomy and rights is an important conservative

²⁰¹ See *The PRO Act: Bad For Workers, Bad For Businesses*, SENATE REPUBLICAN POL’Y COMM. (Mar. 26, 2021), <https://www.rpc.senate.gov/policy-papers/the-pro-act-bad-for-workers-bad-for-businesses> [<https://perma.cc/UW8G-TKRM>].

²⁰² *Protecting the Right to Organize Act of 2021*, H.R. 842, 117th Cong. (2021); see generally *About Voting*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/voting.htm> [<https://perma.cc/3DM7-2ZY3>].

²⁰³ See *The Legislative Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/> [<https://perma.cc/Y9C2-2LHS>] (last visited Feb. 23, 2023).

²⁰⁴ See *The Legislative Process: Resolving Differences (Video)*, CONGRESS.GOV, <https://www.congress.gov/legislative-process/resolving-differences> [<https://perma.cc/BS5F-CBBQ>] (last visited Apr. 11, 2023).

²⁰⁵ See McNicholas, Poydock & Rhinehart, *supra* note 191 (explaining that the PRO Act is a proposed amendment to the NLRA, which applies only to the private sector).

²⁰⁶ See Dan Ikenson, *E-Commerce Keeps U.S. Businesses and Global Consumers Connected Through Turbulent Times*, FORBES (Dec. 5, 2022, 4:00 AM), <https://www.forbes.com/sites/beltway/2022/12/05/e-commerce-keeps-us-businesses-and-global-consumers-connected-through-turbulent-times/?sh=6d9a59b51f21> [<https://perma.cc/RS3L-V73K>].

²⁰⁷ See *The PRO Act: Bad for Workers, Bad for Businesses*, *supra* note 200.

²⁰⁸ *Id.*

²⁰⁹ See *id.*

value.²¹⁰ A compromise that includes protection for state right-to-work laws while also providing for the protection of collective bargaining agreements could sway some votes toward the PRO Act's passage.²¹¹

Additionally, there is collective concern that employers will lose their autonomy in the way they run their businesses and that workers will be forced to participate or pay for union efforts that they are not interested in joining.²¹² Practically, an effective plan of action would be to amend this bill and take away some of the more controversial elements in order to implement substantive penalties for violators of the NLRA. However, if the bill was narrowly tailored to massive e-commerce employers, it may be easier to keep some of the more controversial elements because it would not impact small, family-owned businesses, which are of importance to more conservative members of the Senate, as conservatives are more likely to be business owners.²¹³ Realistically, it is likely that certain elements would need to be precluded in order to get any provisions passed, such as the provision that appears to conflict with right-to-work laws and the requirement for all employees to pay union fees.²¹⁴ The elements that should certainly be included are the aforementioned provisions that would genuinely deter e-commerce employers from violating the NLRA.²¹⁵

Broadly, this solution would be the least effective in addressing the shortcomings in the NLRA that e-commerce employers use to their advantage due to the legislative compromises that could prohibit the legislation from achieving the full goals of its sponsors.²¹⁶ On its face, a bill addressing at least some of these issues, specifically for e-commerce employers, should not be as difficult to pass. Be that as it may, the less than collaborative nature of the United States House and Senate in recent years makes bipartisan compromise for certain legislation few and far between, especially for proposed additional government regulation of a sensitive policy area, like labor.²¹⁷

²¹⁰ See *id.*; see *Stop the PRO Act*, *supra* note 200.

²¹¹ See *Stop the PRO Act*, *supra* note 200.

²¹² See *The PRO Act: Bad for Workers, Bad for Businesses*, *supra* note 201.

²¹³ See Gene Marks, *Small Business Owners Get a Lot of Hype—But Do Candidates Really Understand Them?*, THE HILL (Apr. 22, 2022, 2:00 PM), <https://thehill.com/opinion/finance/3459934-small-business-owners-get-a-lot-of-political-hype-but-do-candidates-really-understand-them/> [<https://perma.cc/DGG9-FNHT>].

²¹⁴ *Stop the PRO Act*, *supra* note 200.

²¹⁵ See *infra* Part V, Section B.

²¹⁶ See Amy Gutman & Dennis Thompson, *The Mindsets of Political Compromise*, AMERICAN POLITICAL SCIENCE ASSOCIATION (Dec.2010), https://www.jstor.org/stable/pdf/40984293.pdf?refreqid=excelsior%3A1749ace75adb0db861c68416d62c258&ab_segments=&origin=&initiator=&acceptTC=1 [<https://perma.cc/FMT7-L7DK>].

²¹⁷ See Dave Tomar, *Controversial Topic: Labor Unions*, ACAD. INFLUENCE, <https://academicinfluence.com/inflection/controversial-topics/controversial-topic-labor-unions> [<https://perma.cc/ANQ7-MYRX>] (last updated Feb. 13, 2023).

2. Congressional Committee

If the Senate is not persuaded by the legislative solutions proposed by the PRO Act or future bills alike, the United States House and Senate could choose to create a special or select bipartisan legislative committee in either, or both chambers.²¹⁸

In order to create a federal legislative committee, each party would introduce a resolution to assign its members to the committee, and each committee would assign those members to subcommittees.²¹⁹ Special, select, and other committees in the House have previously included the House Permanent Select Committee on Intelligence, Aging, Caucus on International Narcotics Control, Ethics, Indian Affairs, and Intelligence.²²⁰ Similarly, the Senate has special and select committees on Aging, Ethics, and Intelligence, as they are often joint committees.²²¹ Often, bills will stall in the House or Senate due to debate over legislative necessity or concerns of overbreadth in the particular policy area the legislation is meant to address, which is drawn from partisanship issues.²²² Additionally, there are sometimes areas of policy that require special attention and do not fall neatly within the standing committees' policy areas²²³. A special or select committee, like the House Select Committee to Investigate the January 6th Attack on the United States Capitol, could be created to help determine if the legislative area necessitates bipartisan support or to bridge the gap that precludes a legislative issue from being addressed if it does not fall within one of the standing committees.²²⁴ The legislative committee could be responsible for investigating the frequency with which e-commerce employers are able to successfully violate the NLRA, the harm of these violations, and the impact the current penalties

²¹⁸ See *Frequently Asked Questions About Committees*, U.S. SENATE, https://www.senate.gov/committees/committees_faq.htm#:~:text=Each%20party%20assigns%2C%20by%20resolution,may%20serve%20on%20and%20chair [https://perma.cc/758D-UK4J] (last visited Feb. 23, 2023).

²¹⁹ *Id.*

²²⁰ See *Committees of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/committees> [https://perma.cc/JZZ3-384A] (last visited Feb. 23, 2023).

²²¹ *Id.*

²²² See DeSilver, *supra* note 196.

²²³ See *Frequently Asked Questions About Committees*, U.S. SENATE, https://www.senate.gov/committees/committees_faq.htm#:~:text=Each%20party%20assigns%2C%20by%20resolution,may%20serve%20on%20and%20chair [https://perma.cc/758D-UK4J] (last visited Feb. 23, 2023).

²²⁴ Barbara Sprunt, *Here Are the 9 Lawmakers Investigating the Jan. 6 Capitol Attack*, NPR (June 8, 2022, 9:00 AM), <https://www.npr.org/2021/07/27/1020713409/here-are-the-9-lawmakers-investigating-the-jan-6-capitol-attack> [https://perma.cc/VDJ9-TSAP]; see *Frequently Asked Questions About Committees*, *supra* note 218.

have on these employers.²²⁵ The results of this investigation could increase the need for legislative action amongst members who did not think this oversight was necessary before. It could also provide the necessary bipartisan, collaborative effort that could influence compromises for the PRO Act, or bills alike, and finally implement penalties to deter this behavior.

Similarly, there may be pushback surrounding the creation of a House or Senate select or special committee to investigate this area of policy.²²⁶ Most importantly, the task of the committee would need to be narrowly tailored to e-commerce employers in a way that does not usurp any policy making power from a standing committee in order to maintain balance in the chambers. The jurisdiction and powers of the select or special committee must be specified, and in a good faith effort to get the committee created, it may be placed under the authority of a standing committee.²²⁷

B. *Legislative Workarounds*

Given that the biggest issues with respect to e-commerce employers are a lack of enforcement and substantive penalties encourage deterrence from violating the NLRA, there are solutions that could successfully deter employers without waiting for Congressional action. First, the Biden administration could issue executive orders addressing e-commerce employers or the creation of various constituent committees to address violations of the NLRA by e-commerce employers. Second, procurement may be an additional option for the executive branch. Lastly, if a bill such as the PRO Act is too contentious to pass in the Senate, there are potential federal and state legislative options that could provide opportunities to oversee the violations of the NLRA by e-commerce employers.

1. *Executive Orders*

President Biden could issue an executive order requiring the NLRB to enforce more substantive penalties against e-commerce employers, that take their yearly profits into account.²²⁸ Additionally, President Biden could issue

²²⁵ See *Frequently Asked Questions About Committees*, *supra* note 218.

²²⁶ Cf. *Banking Republicans Push Back on Efforts to Track Gun Purchases*, *Block Legal Commerce*, KEVIN CRAMER: U.S. SENATOR FOR N.D. (Sept. 22, 2022), <https://www.cramer.senate.gov/news/press-releases/sen-cramer-leads-banking-republicans-in-pushing-back-on-efforts-to-track-gun-purchases-block-legal-commerce> [<https://perma.cc/Y3RY-L9CN>] (discussing the apprehensions amongst Senate Banking Republicans to address controversial social issues).

²²⁷ WILLIAM HOLMES BROWN & CHARLES W. JOHNSON, U.S. GOV'T PRINTING OFF., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 238 (2003).

²²⁸ See *What Is an Executive Order?*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/ [<https://perma.cc/34TA-EMHG>].

an executive order creating a coalition, or task force, of community members and stakeholders to oversee e-commerce companies in a quasi-legislative capacity. “An executive order is a signed, written, and published directive from the President of the United States that manages the operations of the federal government.”²²⁹ The White House usually issues the order, followed by a publication in the Federal Register.²³⁰

President Biden’s executive order pertaining to enforcement could require the following of the NLRB: the enforcement of civil penalties against employers who violate the NLRA, the personal liability of corporate officials for violation of the law, a requirement for the NLRB to obtain an injunction to force employers to immediately reinstate workers if the employer has illegally retaliated against workers for union activity, the creation of a right for workers to file a civil action against their employer, and the banning of collective action and class action waivers.

President Biden’s executive order creating a coalition of community members and stakeholders could oversee e-commerce employers and their adherence, or lack thereof, to labor regulations prescribed within the NLRA. This could involve the requirement of reporting union activity and the employer’s response monthly, hiring and firing reports, and detailed plans explaining the closing of stores and evidence that it was unrelated to union activity.

Naturally, with any executive order, the consideration of it being incompatible with federal law and the likelihood it could be struck down by the Supreme Court is legitimate, although this does not happen frequently.²³¹ Specifically, an executive order compelling an agency to carry out specific measures may not be permissible, as executive orders should not bind anyone outside of the executive branch and should not be used as a placeholder for legislation.²³² Executive orders have historically been used sparingly, less and less over time, as to not degrade the legitimacy of the power they wield.²³³ Generally, there are concerns surrounding the constitutional separation of powers regarding executive orders.²³⁴ Depending on the specificity of the executive order that would oversee the accessibility of the

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Sharece Thrower, *What Is an Executive Order, and Why Don’t Presidents Use Them All the Time?*, THE CONVERSATION (Jan. 26, 2021, 8:29 AM), <https://theconversation.com/what-is-an-executive-order-and-why-dont-presidents-use-them-all-the-time-150896> [<https://perma.cc/FN9P-8WXL>]; see also *The Constitutional Problem With Governing Through Executive Orders*, NEW CIV. LIBERTIES ALL. (Mar. 9, 2021), <https://nclalegal.org/2021/03/the-constitutional-problem-with-governing-through-executive-orders/> [<https://perma.cc/BW66-JKL5>].

²³² *The Constitutional Problem with Governing Through Executive Orders*, *supra* note 231.

²³³ See Thrower, *supra* note 231.

²³⁴ See *id.*

loopholes of the NLRA specifically, it could be found to be an example of executive overreach.²³⁵

While the executive order solely governing agency oversight may be a bit of a stretch constitutionally, an executive order creating a community collative task force may be a much easier sell. It would seem less like the Executive Branch taking legislation of a certain policy area upon itself and instead tapping community members and stakeholders with a legitimate interest to ensure the fairness and adherence to the NLRA. This particular executive order is likely the best option constitutionally and for the encouragement of political legitimacy.

2. *Government Procurement of the Public Sector*

Broadly, “[g]overnment procurement is the process by which the government acquires the goods and services it needs by purchasing from commercial businesses.”²³⁶ This is done by the creation of legal contracts with suppliers, after the prices and terms and conditions are established beforehand.²³⁷ Businesses that have products or services that the government wants will bid to obtain work contracts, which are contingent on the proof of both “viability” and “legitimacy.”²³⁸

In 2014, President Obama signed Executive Order 13673, the “Fair Pay and Safe Workplaces” Executive Order.²³⁹ The order required businesses seeking federal “contracts to disclose their employment and labor law violations for the three previous years.”²⁴⁰ Prior to this order, President Obama implemented several executive orders raising minimum wage for federal contractors, and extending workplace anti-discrimination protections to LGBT workers of federal contractors, and it came soon after legislation aiming to bar contractors with certain Fair Standards Act violations from holding government contracts.²⁴¹ President Obama issued fifteen executive orders and presidential memoranda aimed at contractors, “[d]ictating their hiring and firing practices, compensation policies, and working

²³⁵ *See id.*

²³⁶ *What Is Government Procurement?*, GMP, <https://www.gmpgov.com/what-is-government-procurement/> [<https://perma.cc/72EP-QYWG>] (last updated Feb. 12, 2021).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Garen E. Dodge, *President Obama Signs Executive Order on Federal Contractor Blacklisting*, JACKSONLEWIS (Aug. 1, 2014), <https://www.jacksonlewis.com/resources-publication/president-obama-signs-executive-order-federal-contractor-blacklisting> [<https://perma.cc/XTR6-685Q>].

²⁴⁰ *Id.*

²⁴¹ *Id.*

conditions.”²⁴² In an attempt to increase the “[m]inimum wage, ensure paycheck fairness and provide paid time off for American workers” when the legislature would not, the President used his purchasing power to implement these changes.²⁴³ President Obama and his administration received substantial pushback following the issuance of Executive Order 13673, out of concerns of “[f]avoritism and abuse of government contractors by administrative officials.”²⁴⁴ Additionally, the public feared the compliance burden inflicted upon prime contractors and subcontractors who desired federal contracts.²⁴⁵

While President Obama’s attempt to implement social policy through his executive powers was not universally well-received,²⁴⁶ President Biden could try to implement similar executive orders. The order could prohibit public-sector contracting or subcontracting with any e-commerce business that has violated the NLRA or engages in unfair labor practices. Additionally, while legislative options must be geared toward the federal level, procurement by way of executive order could be an option for states without violating the preemption doctrine or the Supremacy Clause. This would likely receive pushback similar to President Obama’s efforts to implement change in labor relations by way of executive orders. However, it could draw attention to the gravity of the policy issue, highlight the need for solutions, or help the issue gain more legislative traction. It could also scare e-commerce employers into submission or signal to them that labor relations are something they need to take seriously if they want to continue their business operations.

VI. CONCLUSION

The United States and its global successes as an economic powerhouse can be largely attributed to the resiliency and strength of its labor force²⁴⁷. Throughout history, labor unions have consistently advocated for change and accountability from America’s employers when changes in society

²⁴² Gregory Korte, *Through Executive Orders, Obama Tests Power as Purchaser-in-Chief*, USA TODAY, <https://www.usatoday.com/story/news/politics/2015/10/11/obama-executive-orders-federal-contractors/22466397/> [https://perma.cc/BX4E-4F92] (last updated Oct. 11, 2015, 11:22 PM).

²⁴³ *Id.*

²⁴⁴ *See Obama Administration Releases ‘Blacklisting’ Proposal*, ABC (May 27, 2015, 3:23 PM), <https://www.abc.org/News-Media/Newsline/entryid/3919/obama-administration-releases-blacklisting-proposal-> [https://perma.cc/2RTD-4CGB].

²⁴⁵ *Id.*

²⁴⁶ Korte, *supra* note 242.

²⁴⁷ *See Growing the American Workforce Bolstering Participation Is Critical for US Competitiveness and Economic Strength*, CENTER FOR ECONOMIC DEVELOPMENT (Oct.30, 2019), <https://www.ced.org/reports/growing-the-american-workforce> [https://perma.cc/EN63-4NAN].

demanded they do so.²⁴⁸ The recent resurgence of the labor movement following the COVID-19 pandemic is no different. Some may argue that the change American workers are so desperately begging for cannot be found in legislation or executive strength. Notably, great changes in American history have come about in response to successful social movements: the Civil Rights Movement, the Women's Movement, and even earlier labor movements before the enactment of the NLRA.²⁴⁹ However, given the large demonstrations during the height of the COVID-19 pandemic, it has been made clear to the masses that this is an issue that American constituents want solved by their government. While there is great strength in numbers and there would be unification of society due to a collective goal, it is important that the American government produce solutions that mirror this desire for change.

While the likelihood that a polarized Congress will be able to come together and create a bipartisan solution regarding labor law, e-commerce employers, and workers is slim, there is a possibility that Congress will prioritize this issue and hear the demands of its constituency. Even if the solution cannot deliver enforcement of labor law for all industries alike, or even implement policies as strict as what the American workers desire, the policy area could benefit from even the slightest change to deter e-commerce employers from violating the NLRA.

The drafters of the NLRA did not envision a futuristic version of this country where large e-commerce employers had enough money and influence to routinely violate laws with little repercussions. It is the job of Congress to address and update this legislation that was drafted almost 100 years ago. The number of workers that e-commerce employers employ is significant across the United States and is only growing as society moves toward more technological advancement. Oversight of e-commerce adherence to labor legislation, and substantive penalties that deter e-commerce employers from engaging in unfair labor practices, are essential to the protection of e-commerce workers everywhere. It is imperative that the laws of the United States reflect the tradition and demand to protect workers from undesirable, unfair, and illegal treatment.

²⁴⁸ See *supra* Part II, Section B; see *supra* Part III, Section A.

²⁴⁹ See Kateryna Gordiyshuk & HyoJin Park, *The Perfect Social Movement—Is There a Recipe? This Expert Explains*, WORLD ECONOMIC FORUM, (Aug. 31, 2022), <https://www.weforum.org/agenda/2022/08/social-movements-hahrie-han-expert-explains/> [<https://perma.cc/C4LN-7RQ3>].