

## Becoming Too Small to Bail? Prospects for Workers in the 2011 Economy and 112th Congress

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The query in the title is actually a two-part question, and will be addressed as such. First, what is the current state of the economy, in particular for labor, and is there change in it that signals hope for workers, that is, do workers still need some bailing out or will the nascent recovery provide sufficient employment and income earning opportunities? Second, what, if anything, can the Obama administration do with policy to help bail out workers and working families, as it had intervened to help bring the “too large to fail” financial and auto companies back from the brink? Or have workers become “too small to bail”? What can be done short term and what can be done long term to bring about further hope and change to workers’ standard of living prospects in the United States in the second decade of the twenty-first century?

The answer to the first question will be yes, there are indeed some positive developments for workers’ well-being in the last year, but more support is necessary so that they do not fizzle out. The answer to the second is also yes, but this might have to wait until 2013, given the direction of the U.S. 112th Congress, specifically the House of Representatives’ Education and Workforce Committee. Among those who cast votes in the midterm elections, many seem to have expressed their impatience with the pace of job growth in the current economy.<sup>1</sup> The recovery, which began in late 2009, has been tepid. Gross Domestic Product (GDP) rose in 2010 by 2.9%, bouncing back from the -2.6% rate in 2009, and closing with a relatively healthy 3.2% annual rate in the final quarter of 2010. However, real GDP growth slowed a bit in the middle first two quarters of 2011, to 1.3% and 2%, respectively.<sup>2</sup> Despite GDP expansion, by the middle of 2011, the unemployment rate remained stubbornly high, above 9%, before dropping to 8.6% in November, despite employment level increases in each month in the last year.<sup>3</sup> Indeed, this pattern has been characteristically similar to recoveries from the previous two recessions, which in the first couple of years following were “jobless

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1. In the Associated Press exit poll, 62% said the economy was the most important issue facing the country, dwarfing that for the second place issue, health care at 18%, and all others. *2010 Exit Polls: What Happened Election Night*, NPR, (Nov. 3, 2010), <http://www.npr.org/templates/story/story.php?storyId=131065423>. As to economic policy going forward, 39% indicated that reducing the deficit should be the highest priority for the next Congress, about tied with 37% saying spending to create jobs should be the priority. *Id.* Only 18% said cutting taxes should be. *Id.*

2. News Release, Bureau of Economic Analysis, U.S. Dep’t of Commerce, *GDP Growth Accelerates in Third Quarter, Second Estimate of GDP*, Nov. 22, 2011.

3. Bureau of Labor Statistics, News Release, *The Employment Situation, USDL-11-1691*, Nov. 2011.

recoveries.”<sup>4</sup> But the 2007–2009 recession was deeper and longer in duration than those that occurred in 2001 and in 1990–1991.<sup>5</sup>

The state of the economy clearly played a major role in the 2010 mid-term elections, as many restless voters who had voted for Obama in 2008 swung largely toward Republicans, particularly in U.S. House races. In contrast to the many young progressives who sat out the 2010 election, conservatives, who had been out of power in both houses of Congress and the White House, proved more motivated. With the majority of voters decrying “the direction of the country,” and the virtually incompatible priorities of more robust job creation, smaller deficit, and lower taxes, it remains to be seen at this point in time whether Obama will have a partner or an opponent in any effort to bail out the workers. Preliminary results do not appear very promising, as the White House expediently agreed to a two-year extension of Bush-era income tax rate cuts in return primarily for a one-year extension of various other tax cuts, including a temporary reduction in social security payroll tax rates.<sup>6</sup> While this was done ostensibly to avoid undermining household spending that is helping to fuel a recovery, tax reductions, particularly tilted toward the higher end of the income spectrum, are widely agreed by many, if not most, macroeconomists to be the least expansionary tool in the toolbox.<sup>7</sup> Moreover, this may turn out to be at best ineffective, if not counterproductive, in improving labor’s well-being, which depends not only on job availability but on more income-earning opportunities and their relative incomes.

In a recent forum regarding the efficacy and future of labor law, Richard B. Freeman provided four recommendations regarding a modernization of existing labor laws.<sup>8</sup> One was permission for employers to set up in-house employee

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4. For evidence of this pattern of increasingly delayed growth in employment following a recovery, see, for example, Robert J. Gordon, *The Jobless Recovery: Does It Signal a New Era of Productivity-Led Growth?*, 1993 BROOKINGS PAPERS ON ECON. ACTIVITY 271, 271–306; Erica L. Groshen & Simon Potter, *Has Structural Change Contributed to a Jobless Recovery?* 9 CURRENT ISSUES IN ECON. & FIN., no. 8, Aug. 2003 at 1; Stuart Glosser & Lonnie Golden, *The Changing Nature of Hours and Employment Adjustment in U.S. Manufacturing: A Contributing Cause of the Jobless Recovery?*, 25 INT’L J. MANPOWER, no. 7, 2004 at 618; Kristie M. Engemann & Michael T. Owyang, *Whatever Happened to the Business Cycle? A Bayesian Analysis of Jobless Recoveries*, 14 MACROECONOMIC DYNAMICS, no. 5, July 2010 at 709.

5. See Robert Dixon, John Freebairn & Guay C. Lim, *Net Flows in the U.S. Labor Market, 1990–2010*, 134 MONTHLY LAB. REV., no. 2, Feb. 2011 at 25, 27.

6. David M. Herszenhorn & Jackie Calmes, *Tax Deal Suggests New Path for Obama*, N.Y. TIMES, Dec. 7, 2010, at A1.

7. See, e.g., Daniel Alpert, Robert Hockett & Nouriel Roubini, *The Way Forward: Moving from the Post-Bubble, Post-Bust Economy to Renewed Growth and Competitiveness* (New Am. Found., Washington D.C.), Oct. 2011, at 11.

8. Richard B. Freeman, *What Can We Learn from NLRA to Create Labor Law for the 21st Century?*, 26 ABA J. LAB. & EMP. L. 327, 340–43 (2011); see also Bruce E. Kaufman, *The Origins and Purpose of the Wagner Act in Light of the Current Economic Crisis*, NYU LAB. & EMP. L. NEWSL. (Ctr. for Lab. & Emp. L.), Spring 2009, at 2; Theodore J. St. Antoine, *The Future of American Labor and Employment Law: Hopes, Dreams, and Realities*, 21 EMP. RESPS. & RTS. J. 133 (2009). For an early assessment of reform potential, see Kieran Dosanjh Zucker & Bruce Zucker, *The Spring of Hope: Labor and Employment*

committees that tackle general issues that deal with employees' well-being, including working hours or the intensity of work, as one path to improved productivity.<sup>9</sup> The latter represents a microcosm of the trends and challenges they pose for employment reform advocates at the national level, addressed herein. This Article will provide the macroeconomic backdrop behind proposed labor and employment law reforms. The scope will be a wider, macro view of these variables—employment, unemployment, and productivity versus wages, union density, and worker subjective well-being. It explores what can be done to improve the lot of labor (lowercase “l”) via employment law, more generally, than just labor law (although the fates of the seven out of every eight workers who are not formally represented by a collective bargaining contract surely are wrapped with the prospects for organized labor). It will then present a summary of pending legislation and regulations that could have a potentially positive impact on workers' prospects and well-being. Will economic conditions ripen conditions for resurgence of organized labor, as took place in the aftermath of the Great Depression with passage of the National Labor Relations Act (NLRA)? Or, conversely, will the relevance of the NLRA continue to dwindle as it did in the 1980s and 2000s, either via formal amendments or in practice? The path to improvements for workers likely lies more in broad employment law and regulatory reforms than with specific labor law reforms, such as occurred with the passage of the Fair Labor Standards Act (FLSA) toward the tail end of the Depression. Fostering unionization and collective bargaining was a cornerstone of American labor law, created by establishing a system of industrial democracy and parity with employers.<sup>10</sup> This was set up in part to facilitate unions' pursuit of their longstanding, general objectives of better wages, hours, and working conditions. These goals were largely achieved, beginning with the recovery in the 1940s, and to a degree, continue to be.<sup>11</sup> More generally, can the United States adopt pro-labor policies in the twenty-first century that provide a basis for both a more robust macroeconomic recovery in the short term and a foundation for longer-term economic growth that shares prosperity with labor (for example, as occurred from the mid- through late 1990s)? The evidence of the 2000s decade of pro-financial capital economy has proven its limits—it produced neither sustainable income growth nor shared gains.<sup>12</sup> The gain

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*Rights in the Early Days of the Obama Era*, 60 LAB. L.J. 210 (2010).

9. Freeman, *supra* note 8, at 342–43.

10. See Kenneth Dau-Schmidt, *An Alternative Economic Analysis of the Regulation of Unions and Collective Bargaining*, in LAW & ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES (Margaret Oppenheimer & Nicholas Mercurio eds., 2005). For an abbreviated description of the conventional, neoclassical view of the effects on labor markets of legal rules governing employment relations, see, for example, Henry N. Butler & Keith W. Chauvin, *Economic Analysis of Labor Markets: A Framework for Analyzing Employment Law Issues*, 8 KAN. J.L. & PUB. POL'Y 1 (1999). For a rich and wide host of views on the role of unions specifically on employment and wages, see WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE (James T. Bennett & Bruce E. Kaufman eds., 2007). For a comprehensive survey of the effects and the promise of employment law and several proposed employment policy reforms, see STEPHEN F. BEFORT AND JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS (2009).

11. See, e.g., WHAT DO UNIONS DO?, *supra* note 10, at 4–6.

12. U.S. CONG. JOINT ECON. COMM., 111TH CONG., INCOME INEQUALITY AND THE GREAT

in job creation through the decade was wiped out entirely by the 2007–2009 recession, with a net loss of over eight million jobs.<sup>13</sup> This failure to produce gains in workers’ material well-being is evidenced herein by presenting recent trends in employment, unemployment, and real earnings—and the unprecedented shift in national income toward the already wealthy. While few voters identified taxes as their prime motivation for voting, it is likely that sensitivity to any hint of higher income taxes is merely reflective of a frustration with the trend of before-tax earnings—that is, the flatlining of wage rates over the last decade, not only relative to key components of inflation (for example, college tuition rates and medical care costs), but also relative to the much-publicized bonuses that returned to the financial sector in 2009–2010 after a one-time blip downward in 2007–2008 before the first and second waves of the Troubled Asset Relief Program (TARP or “bailouts”) money. Indeed, tax rates on income are lower, not only because of the income tax rate reductions and one-time rebates enacted in the Bush era, but the rate reductions as part of the 2009 American Reinvestment and Recovery Act (ARRA or “stimulus”) package, in Making Work Pay.<sup>14</sup>

I. WAGES, HOURS, AND EMPLOYMENT CONDITIONS (JOB QUALITY): WILL THIS WORLD REMAIN FLAT FOR MOST WORKERS?

A. Unemployment

It is well propagated that unemployment has lingered at a similar rate to what it was at the officially designated end of the recession in summer of 2009, hovering at over 9% (see Figure 1, bottom line).<sup>15</sup> At the time of this writing, it remains stuck at over 9% of the workforce.<sup>16</sup> The overall labor underutilization rate, which includes those workers in jobs with fewer than thirty-five hours per week but prefer more than thirty-five, is now 17% of the labor force.<sup>17</sup> Somewhat less well known, however, is the historically high share of the unemployed—over 45% in May 2010 and still over 44% through 2011—that have been unemployed for a very long spell—at least twenty-six weeks, that is, over half a year.<sup>18</sup> Indeed, this proportion is about twice what it was in the previous three recessions (see Figure 1, top line).

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RECESSION (2010); Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States (Update with 2007 Estimates)* 2–3 (Univ. of Cal., Dep’t of Econ., 2010), available at <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2007.pdf>.

13. Megan M. Barker & Adam A. Hadi, *Payroll Employment in 2009: Job Losses Continue*, 133 MONTHLY LAB. REV., no. 3, Mar. 2010, at 23–27. By November 2011, not quite three million of those net eight million jobs lost have been restored. News Release, Bureau of Economic Analysis, *supra* note 2.

14. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115. “In 2009 and 2010, the ‘Making Work Pay provision of the American Recovery and Reinvestment Act of 2009’ provided a refundable tax credit of up to \$400 for working individuals and up to \$800 for married taxpayers filing joint returns. *The Making Work Pay Tax Credit*, I.R.S., <http://www.irs.gov/newsroom/article/0,,id=204447,00.html>.

15. Steven F. Hipple, *The Labor Market in 2009: Recession Drags On*, 133 MONTHLY LAB. REV., no. 3, Mar. 2010 at 3, 7.

16. *The Employment Situation*, *supra* note 3.

17. *Id.*

18. *Id.*

The long-term unemployment rate rose to historic, puzzling, and worrisome highs.<sup>19</sup> The brisk job creation that might be expected from the vaunted “labor market flexibility” character of the U.S. economy so far exhibited only downward, not yet much upward, employment adjustment. Curiously, this phenomenon cannot be attributed solely to any increased incidence of “structural unemployment.” Thus, the re-employment of the long-term unemployed rests more on a return to brisker growth in output than on a fundamental shift in a somehow inherently different nature of today’s unemployed. Figures 1 and 2 both show the variability of the unemployment rate over the last ten years.<sup>20</sup> The predominance of long-term unemployment means fewer workers have passed through a spell of unemployment in a given time period. However, this is a double-edged sword because fostering re-employment of such workers is going to be an even more Herculean task and more gradual than initially projected by economists and the Obama administration. Re-employment is hamstrung further by the snail’s-pace growth of private-sector employment, although positive throughout all of 2010 so far.<sup>21</sup> Unemployment is compounded by the recent layoffs of state and local government (and U.S. Census) employees, as public sector stimulus funds become exhausted (a tangible manifestation of “smaller government”). Moreover, Figure 2 shows that the ratio of unemployed individuals to job openings remains stubbornly high, though it began to tack downward late in 2009 and continued so every month in 2010.

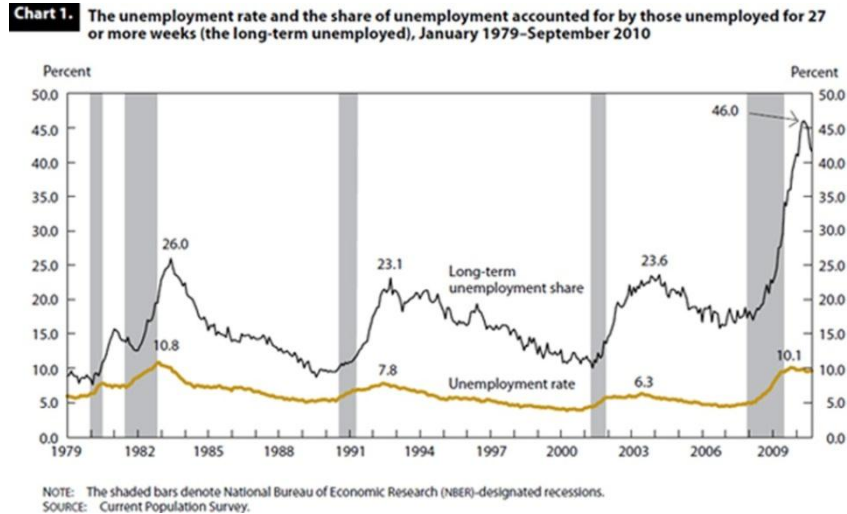
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19. See Robert J. Flanagan, *Labor Policy in the Great Recession*, 87 IND. L.J. 43 (2012); Stephen Nickell, *Unemployment and Labor Market Rigidities: Europe Versus North America*, 11 J. ECON. PERSP., no. 3, Summer 1997 at 55. For a critique of this view, see Dean Baker, Andrew Glyn, David R. Howell & John Schmitt, *Labor Market Institutions and Unemployment: A Critical Assessment of the Cross-Country Evidence*, in FIGHTING UNEMPLOYMENT: THE LIMITS OF FREE MARKET ORTHODOXY 72 (David R. Howell ed., 2005).

20. See Sylvia Allegretto & Devon Lynch, *The Composition of the Unemployed and Long-Term Unemployed in Tough Labor Markets*, 133 MONTHLY LAB. REV., no. 10, Oct. 2010 at 3–5.

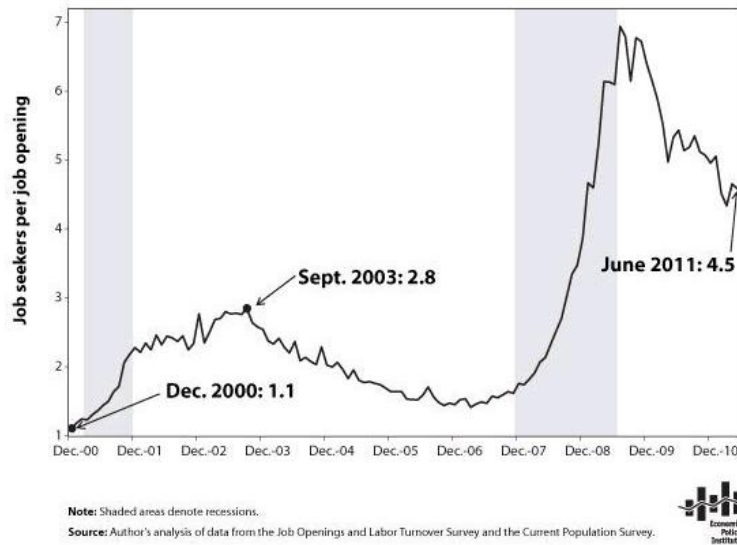
21. *The Employment Situation*, *supra* note 3.

**Figure 1: Unemployment rates, all workers, ages 16 and over**



Source: Sylvia Allegretto & Devon Lynch, *The Composition of the Unemployed and Long-Term Unemployed in Tough Labor Markets*, 133 MONTHLY LAB. REV., no. 10, Oct. 2010 at 3, 5.

**Figure 2: Unemployment rates, ratio of job seekers to job openings for the last 10 years**

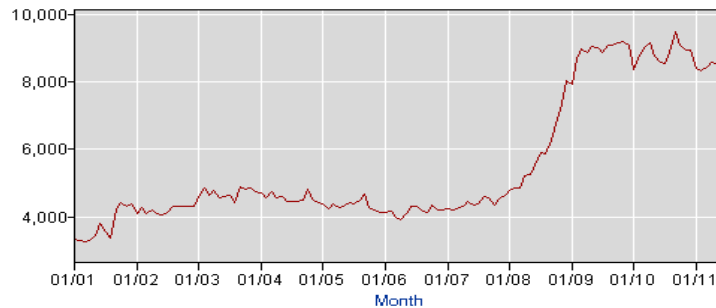


Source: Heidi Shierholz, *Two-and-a-Half Years of Job-Seeker's Ratio Above 4-to-1* (Econ. Pol'y Inst., Aug. 10, 2011), available at [http://www.epi.org/publications/entry/two-and-a-half\\_years\\_of\\_a\\_job-seekers\\_ratio\\_above\\_4-to-1/](http://www.epi.org/publications/entry/two-and-a-half_years_of_a_job-seekers_ratio_above_4-to-1/).

The other troubling trend in employment has been the presence of high underemployment—“Involuntarily Part-Time”—and its persistence through the recovery (see Figure 3). With the average workweek increasing somewhat, this will

likely abate soon. However, in the meantime, it is adding an additional 7% to the labor force underutilization rate of 17%.<sup>22</sup>

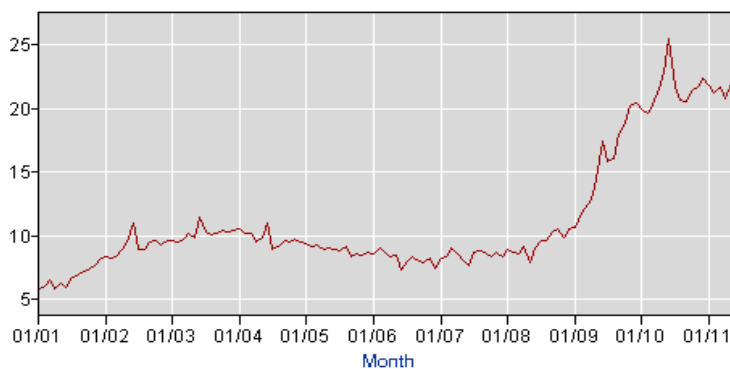
**Figure 3: Part-time workers due to economic reasons, in thousands**



Source: Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*.

Investigating the duration of unemployment gives a more complete picture of the depths of the challenges faced by the unemployed, and by policy makers intent on curbing unemployment and its adverse consequences on individuals, families, communities, and public sector budgets. Figure 4 shows the median weeks of unemployment among the unemployed, over the last decade. At its peak, the typical unemployed person remained so for about a full half of a year. It has since dropped to twenty weeks, but is still well above pre-recession levels, when a typical worker's spell of unemployment lasted about ten weeks.

**Figure 4: Median weeks of unemployment, among the unemployed**



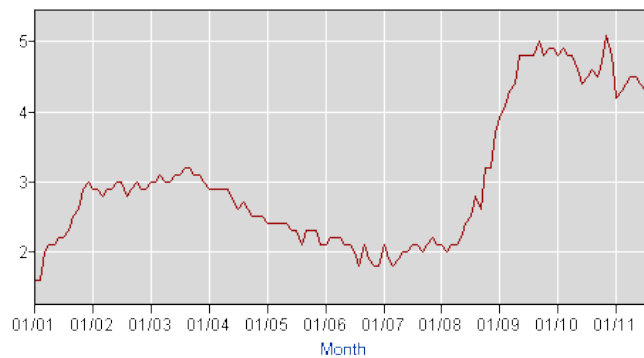
Source: Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*.

The chances of being unemployed in previous downturns have been very much reflective of a worker's education level, and this has been no different in the recent recession. Figure 5 shows that while those with college degrees experience about

22. *Id.*

half the national rate, at just over 5%, and about one third the rate of those who have not completed high school, there is a remarkable consistency through time in the difference between each level of education.<sup>23</sup> This suggests that the recent spike in unemployment is not primarily a structural type unemployment traced to a shortfall of educated workers.

**Figure 5: Unemployment rates, workers with a bachelor's degree and higher, ages 25 and over**



Source: Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*.

### B. Employment

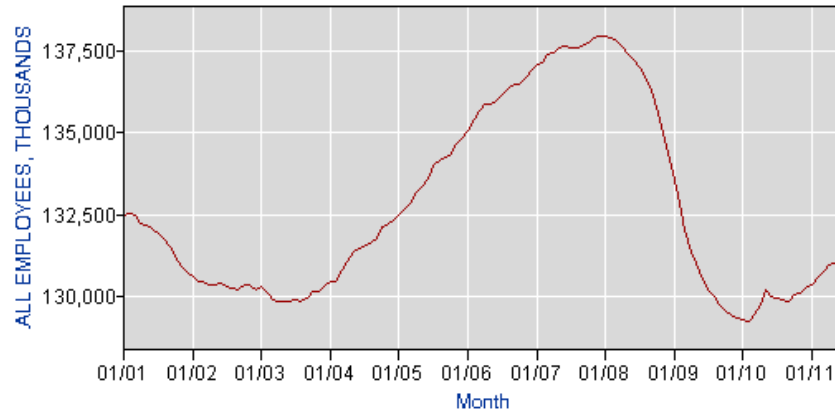
Clearly, the key reason unemployment remains high is the pattern of overall level of job creation. Measured officially as the level of payroll employment, massive job shedding occurred throughout 2008 and 2009. But at the same time, more private-sector jobs have been created this past year alone in the nascent recovery, 1.1 million new jobs, than in all eight years under the Bush administration—becoming more than a drop in the bucket to replace the 8.4 million jobs eliminated during and after the recession.<sup>24</sup>

23. *Id.*

24. While the brunt of the recession was borne disproportionately by men and relatively older workers, one often overlooked casualty has been the acceleration of the already declining rate of teen employment. In particular, the decline has been trending during the summer months. In 2000, summer employment rates of sixteen- to nineteen-year-olds was 52% but by 2010 was nearer to 35%. Bureau of Labor Statistics, News Release, *Employment and Unemployment Among Youth, USDL-10-1175*, Summer 2010. On the one hand, such employment is far less likely to overlap or interfere with schooling or studying, and the trend might reflect a newfound commitment in students' human capital building during the school year or summertime. Nevertheless, this does not necessarily bode well for their future employment prospects or general skills building.



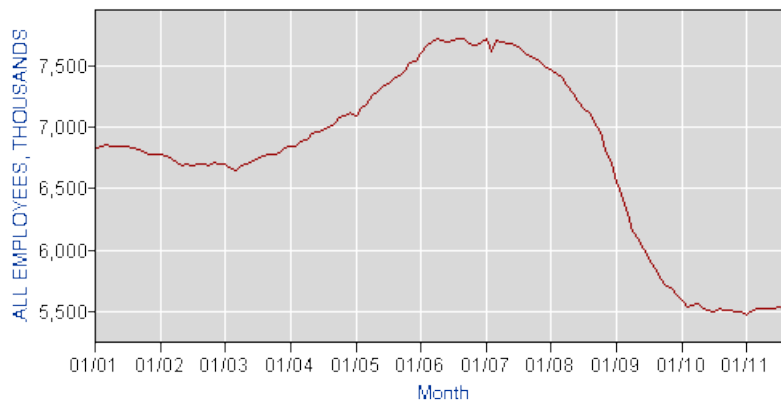
**Figure 6: Employment in nonfarm industry, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

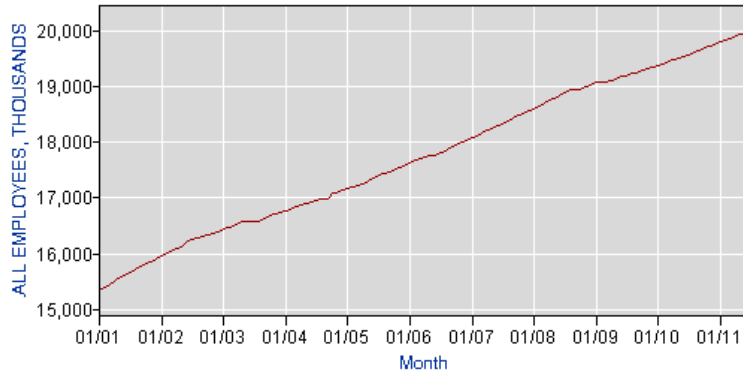
Breaking employment down to the more disaggregated industry level reveals starkly different trends. Figure 7 shows that construction appears to have been the hardest hit. After enjoying several years of expansion during the mid-2000s, construction employment dropped off a cliff during the recession, although it is stabilizing in 2010. In contrast, jobs in health services and education appear to have been virtually immune to any direct effects of the recession. Government jobs—federal, state, and local—have returned to pre-recession levels. They spiked up during the recession when decennial census workers were hired and dropped off when these positions ended.

**Figure 7: Employment in construction industry, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

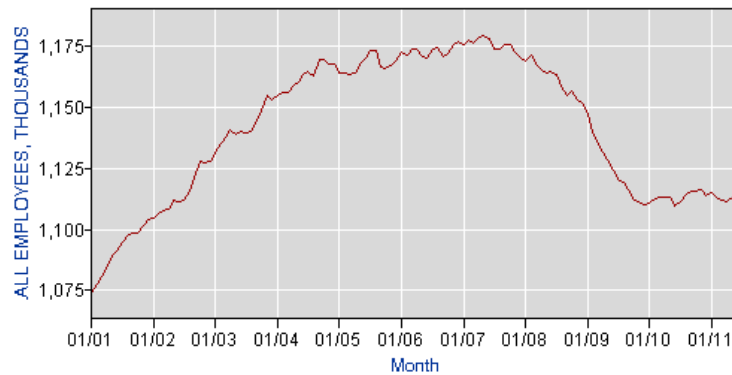
**Figure 8: Employment in education and health services industries, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

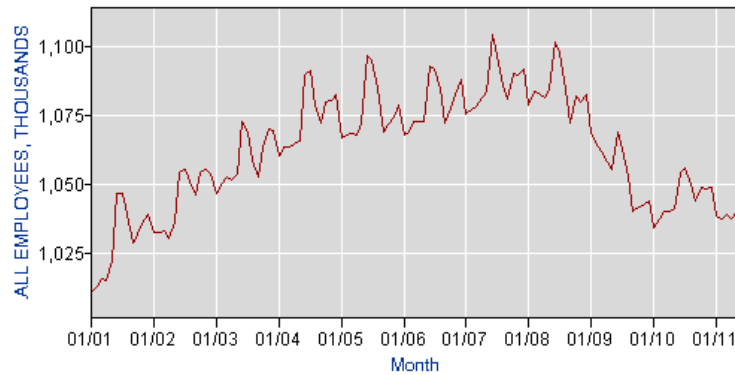
One industry of potentially keen interest is the legal services industry. Figure 9 illustrates the trend, which appears to pretty much mirror the national job trends. The drop in law office jobs was somewhat steeper than in other types of legal services jobs, but they have staged somewhat of a comeback in 2010. The former has returned to levels observed in 2002, during the recovery from the 2001 recession, but the latter remains mired at the recessionary levels. The former also appears to be far more seasonal in behavior than the latter.

**Figure 9: Employment in legal services industry, all employees, in thousands**



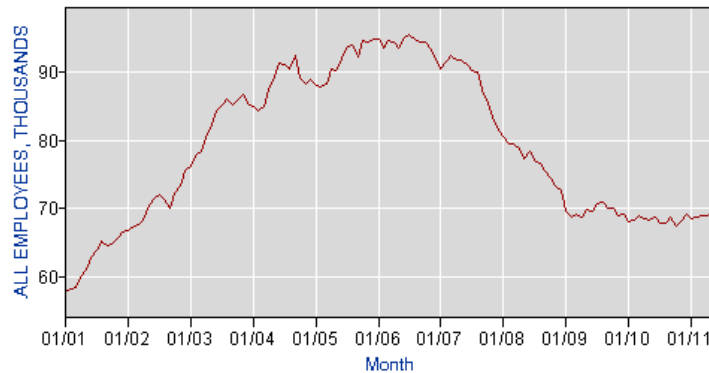
Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

**Figure 10: Employment in offices of lawyers industry, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

**Figure 11: Employment in other legal services industries, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

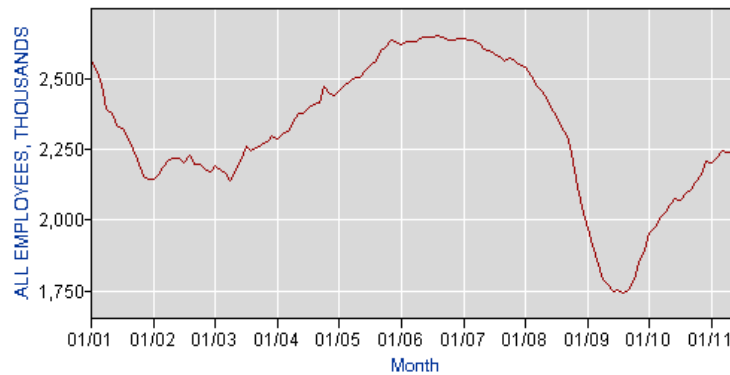
One cause for optimism on the job front and workers' confidence in the job market is the Rasmussen Reports Employment Index, from a private polling firm. Its index peaked in the high eighties range in the middle of 2008, reached a trough at under sixty in the middle of 2009, but had gradually climbed back to almost eighty by the fall of 2010.<sup>25</sup> Another hopeful indicator is the recent pattern in the temporary help services industry. Creation of such jobs tends to lead to an expansion of permanent jobs, to the extent employers are hiring only temporarily

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25. *Rasmussen Report Index Down Sharply: Just 18% Report Their Firms Are Hiring*, RASMUSSEN REPORTS (Aug. 2, 2011), [http://www.rasmussenreports.com/public\\_content/business/indexes/rasmussen\\_employment\\_index/rasmussen\\_employment\\_index](http://www.rasmussenreports.com/public_content/business/indexes/rasmussen_employment_index/rasmussen_employment_index).

until they are more convinced that a recovery in output demand has taken hold.<sup>26</sup> When the economy is in recovery mode, such jobs might actually tail off, although there is reason to believe that “temp” jobs have also experienced a structural (not just cyclical) increase, so they might increase during a general expansion. If this increase proves to be largely structural and permanent, worker well-being might fall.<sup>27</sup>

**Figure 12: Employment in temporary help services industry, all employees, in thousands**



Source: Bureau of Labor Statistics, *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*.

## II. LETTING THE SURGE (STIMULUS) WORK!?

While difficult to prove a counterfactual, White House economists estimate that up to 3 million more people would be unemployed without the ARRA stimulus passed in early 2009.<sup>28</sup> The non-partisan Congressional Budget Office (CBO)

26. See MARCELLO ESTEVÃO & SAUL LACH, *THE EVOLUTION OF THE DEMAND FOR TEMPORARY HELP SUPPLY EMPLOYMENT IN THE UNITED STATES* (1999); NONSTANDARD WORK: THE NATURE AND CHALLENGE OF CHANGING EMPLOYMENT ARRANGEMENTS 123–25 (Francoise Carre, Marianne A. Ferber, Lonnie Golden & Stephen A. Herzenberg eds., 2000); Jamie Peck & Nik Theodore, *Flexible Recession: The Temporary Staffing Industry and Mediated Work in the United States*, 31 *CAMBRIDGE J. ECON.* 171 (2007); Jeffrey B. Wenger & Arne L. Kalleberg, *Employers' Flexibility and Employment Volatility: An Analysis of the U.S. Personnel Supply Industry, 1972–2000*, 65 *AM. J. ECON. & SOC.* 347, 352–53 (2006).

27. For the many potential downsides of temporary and other contingent employment on worker well-being, see Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 *BERKELEY J. EMP. & LAB. L.* 153, 158 (2003); Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 *WASH. & LEE L. REV.* 879, 880 (1995); Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 *EMPL. RTS. & EMP. POL'Y J.* 285 (2009); Gillian Lester, *Careers and Contingency*, 51 *STAN. L. REV.* 73, 75, 77, 105, 125, 129 (1999).

28. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *THE ECONOMIC*

estimated that between 1.4 and 3.3 million people were employed by the end of August 2010 who otherwise would not have been without the stimulus.<sup>29</sup> The CBO estimated that the stimulus boosted GDP by between 1.7% and 4.5%, lowered the unemployment rate by between 0.7 and 1.8% points, and increased the number of full-time equivalent jobs by 2 million to 4.8 million, compared with what would have occurred otherwise.<sup>30</sup> This success was achieved with a four-part program: one, providing funds to states and localities—for example, Medicaid, aid for education, and boosted financial support for some transportation projects; two, extending and expanding unemployment benefits and benefits under the Supplemental Nutrition Assistance Program; three, direct purchasing of new goods and services—for instance, by funding construction and other investment activities that could take several years to complete; and finally, four, providing temporary tax relief for individuals and businesses—such as raising exemption amounts for the alternative minimum tax, adding a new Making Work Pay tax credit, and creating enhanced deductions for depreciation of business equipment.<sup>31</sup> By the end of September 2010, the administration met its self-imposed deadline of spending 70% of the ARRA funds, \$551 billion.<sup>32</sup> Almost all of the unspent stimulus money is already committed to specific projects, except for a few longer-range initiatives like subsidizing high-speed rail projects in certain to states (willing to accept it) and electronic health records.<sup>33</sup> Did the administration do everything it could to foster faster job creation and re-employment? Could it have pushed harder for a larger spending “stimulus” that was tilted even more toward public investments and less toward middle class tax cuts? Perhaps, but only if it were more willing to err on the side of too much stimulus—and risk consequent interest payments on new public debt. Could it have spent the money faster on the ARRA projects and on one-time social security checks? Likely not. Analysts predicted the government would lose 5% to 7% of it to fraud.<sup>34</sup>

Another source of workers’ frustrations with the job market surely relates to the changing consequences of labor productivity gains. In prior decades, workers’ earnings closely tracked gains in output per hour (or per worker, an alternative measure that would include longer working hours as a contributing factor). In recent years, productivity experienced increases; however, workers have little to show for it in the way of higher pay.<sup>35</sup> While this certainly garners less attention

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IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (2011).

29. CONG. BUDGET OFFICE, ESTIMATED IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT ON EMPLOYMENT AND ECONOMIC OUTPUT FROM APRIL 2010 THROUGH JUNE 2010 (2010).

30. Increases in full-time equivalent jobs include shifts from part-time to full-time work or overtime. Thus, they are generally larger than increases in the number of employed workers. *Id.*

31. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *supra* note 28.

32. *Id.*

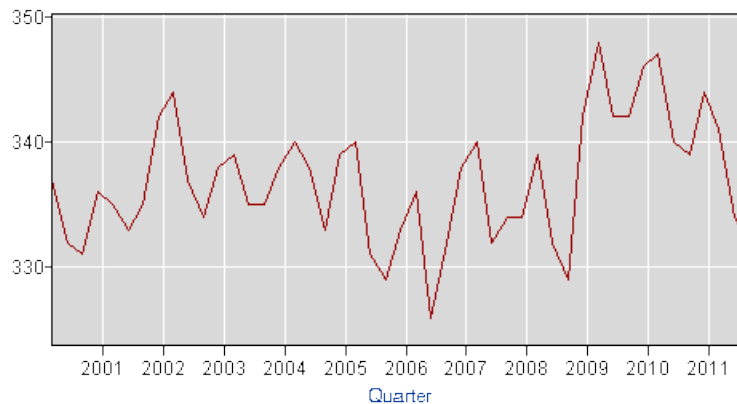
33. *See Track the Money*, <http://www.recovery.gov>, for the source of these data; *see also* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115

34. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *supra* note 28.

35. *See* Jonathan L. Willis & Julie Wroblewski, *What Happened to the Gains from Strong Productivity Growth?*, FED. RESERVE BANK OF KAN. CITY: ECON. REV., First Quarter 2007, at 5; *see also* Jared Bernstein & Lawrence Mishel, *Economy’s Gains Fail to Reach Most Workers’ Paychecks* 5 (Econ. Pol’y Inst., Briefing Paper No. 195, 2007), *available at*

than unemployment or underemployment, this more subtle development likely explains much of the feelings of diminished well-being. Increased effort unaccompanied by increased rewards, even in the longer run, not only becomes discouraging, but it undermines the ability of expansions to sustain themselves with increases in consumer spending.

**Figure 13: Median usual weekly earnings, wage and salary workers, excluding incorporated self-employed, employed full-time**



Source: Teresa L. Morisi, *The Early 2000s: A Period of Declining Teen Summer Employment Rates*, 133 MONTHLY LAB. REV., No. 5, May 2010, at 23, 31.

Despite gains from the previous quarter in nonfarm productivity per hour in all but three quarters in the last five years, only in mid-2008 was there a gain in employee real earnings per hour (and this largely due to a one-time deflation). A very similar pattern is evident when including just nonsupervisory workers, instead of all employees. Real earnings simply have grown at a slower rate than labor's productivity. Median earnings rose in the late 1990s, but settled back into a previous pattern or remained flat, despite continuous gains in labor productivity rates. Consequently, the share of national income accruing to labor has been on a clear downward trend since about 1980, although it gained in the late 1990s, with its tight labor market and high growth rate (see Figure 13). Despite the flattening trend of median hourly earnings, output per hour (productivity) change from the previous quarter for the nonfarm business sector changed for the positive in virtually every quarter between 1990–2010 (with the exception of the fourth quarter of 2008). Given the recent divergence of productivity and wage rates, it is not surprising that one of the remarkable constants of the post-World War II economy has been severed—once consistently two-thirds of all U.S. national income, labor compensation's share has sunk to closer to 60% (after a brief upsurge in the late 1990s).

## III. INCREASING INCOME INEQUALITY

Behind the growing disconnect between productivity growth and workers' real earnings lies the predominant pattern of the last several decades in the United States, especially the last decade—increasing inequality. This has led one leading analyst to dub the recent decade as “the Great Divergence.”<sup>36</sup> During the last period of economic expansion, 2002–2007, the top 1% of earners, whom we may label the “already wealthy,” enjoyed 10.1% annual income growth, adjusted for inflation.<sup>37</sup> For the other 99%, the growth rate was just 1.3%.<sup>38</sup> That meant the top 1% received sixty-five cents of every dollar in income growth. The wealth disparity narrowed in 2008 because rich households took a heavier hit from the financial crisis, but Census Bureau data shows it turned around immediately.<sup>39</sup> By 2009, inequality was at the highest level since the Census Bureau began tracking household income in 1967.<sup>40</sup> Since then, the share of national income going to the already wealthy more than doubled during the Great Divergence.<sup>41</sup> It rose from 9% to about 21%.<sup>42</sup> Moreover, the concentration of income is occurring within the very top. The share of national income going to the top 0.1% had increased nearly fourfold.<sup>43</sup> For reference, to be in the top 10% today means earning about \$100,000 or more, and to be in the top 1% means earning at least \$368,000.<sup>44</sup> How much of this reflects the skewed distribution of earnings from labor itself, and not just differential taxation treatment of earned versus non-earned income, is uncertain. Also uncertain is how much American citizens are willing to tolerate regarding such disparities. One recent opportunity to do something to redress this imbalance was on the 2010 election ballot in the state of Washington's proposed surtax on adjusted gross income above \$200,000 for individuals and \$400,000 for couples filing jointly.<sup>45</sup>

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36. PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 124–25 (2007) (describing the period beginning in 1980, following the epoch that had been termed the “Great Compression”); see also Claudia Goldin & Robert A. Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q. J. ECON., no 1, Feb. 1992, at 1; Timothy Noah, *The Great Income Divergence Is Changing America for the Worse*, NAT'L POST, Sept. 15, 2010, <http://fullcomment.nationalpost.com/2010/09/15/timothy-noah-the-great-income-divergence-is-changing-america-for-the-worse/>.

37. Emmanuel Saez and Thomas Piketty, 2009, August 2009 revision of data that includes up to 2007, see: <http://elsa.berkeley.edu/~saez/TabFig2007.xls>.

38. See Saez, *supra* note 12, at 4; Timothy Noah, *The Great Divergence Series: Part One: Introducing the Great Divergence*, SLATE, Sept. 3, 2010, [http://img.slate.com/media/3/100914\\_NoahT\\_GreatDivergence.pdf](http://img.slate.com/media/3/100914_NoahT_GreatDivergence.pdf).

39. Saez, *supra* note 12, at 5.

40. *Id.*

41. *Id.* at 3.

42. *Id.*

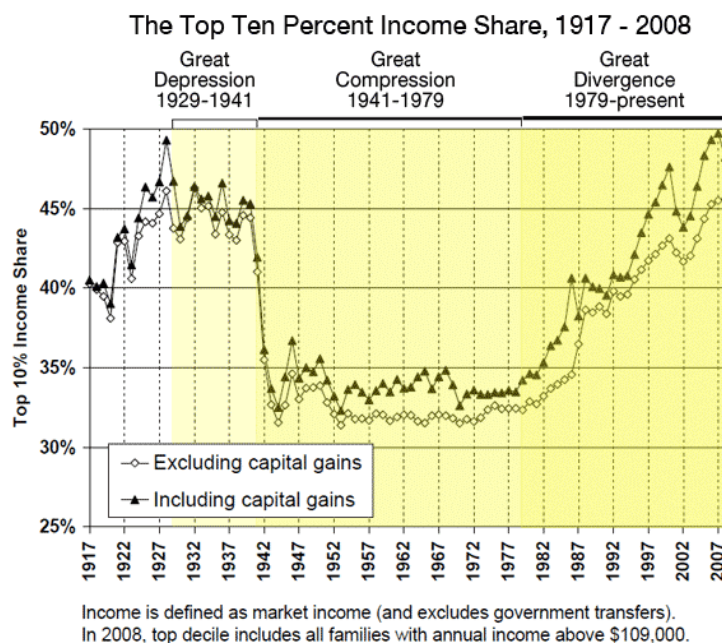
43. *Id.*

44. Noah, *supra* note 36.

45. Proposition I-1098 was defeated. The new tax was publicly advocated for by Bill Gates, Sr. and David Stockman, Ronald Reagan's budget director who once preached the gospel of tax cuts, but vigorously campaigned against companies and recently wealthy business donors. The expected two billion dollars in revenue generated from the income tax was to go to a dedicated trust fund for education and health services, which were facing a

This would have been the state's first income tax, at a tax rate of 5% on income above the \$200,000 threshold and then up to 9% on any income above \$500,000 for individuals (1 million dollars for couples).<sup>46</sup> It is hard to tell precisely why about 65% of voters cast their vote against it, except that many voters may be either expecting to be in that income class, have little unease with disparities if they feel the wealth is acquired in deserved fashion, were uninformed (or misinformed), or are simply sensitized to any taxes on income when their incomes have been so stagnant for so long. Indeed, the adjective "increasing" is becoming more of a verb, as inequality has been exacerbated by tax policy changes in the early 2000s. The question for policy makers is whether they choose to enact new tax rates and (eliminate) exemptions, which ultimately make achieving distributive justice even more difficult than under current policy regimes.

**Figure 14: The great divergence in income distribution**



Source: Timothy Noah, *The Great Divergence Series: Part One: Introducing the Great Divergence*, SLATE, Sept. 3, 2010, [http://img.slate.com/media/3/100914\\_NoahT\\_GreatDivergence.pdf](http://img.slate.com/media/3/100914_NoahT_GreatDivergence.pdf)

#### IV. TOWARD HAPPINESS? BEHAVIORAL ECONOMICS, RISING INEQUALITY, LAWS, AND A NEW SOCIAL CONTRACT

The economics field is beginning to take more seriously, and incorporate into models, the implications of rising inequality, long recognized by other fields, such

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four billion dollar shortfall. Additionally, the measure would reduce the limit on statewide property taxes by 20% and increase the business and occupation (B&O) tax credit to \$4800.

46. Elizabeth C. McNichol, Andrew C. Nicholas & Jon Shure, *Raising State Income Taxes on High-Income Taxpayers* (Ctr. on Budget & Pol'y Priorities, Washington D.C.), Sept. 30, 2009, at 1.



as the relationships between subjective well-being, perceived distributive justice, relative status concerns, autonomy, and happiness.<sup>47</sup> Happiness in countries tends to be inversely related to not only the level (and risk) of unemployment and job insecurity, but relative income disparities.<sup>48</sup> Perhaps the time is becoming ripe to begin to frame law and regulatory policy discussion around what would produce greater happiness for a greater number of citizens, and not just the traditional, perhaps overly narrow focus on unemployment rates and GDP growth rates.<sup>49</sup> Adopting a “happiness index” perspective suggests a more complex subjective well-being determination than just employment at a given wage.<sup>50</sup> Rather, it would include the potentially detrimental effects of feelings of job insecurity among those who remain employed, the importance of relative income (not just absolute income), and the timing (not just amount) of work. This perspective would provide a powerful underlying theme that would potentially connect the heretofore unconnected dots of wage laws, hours laws, labor laws, regulations regarding working conditions, and pro-job creation policies to promote a more robust economic recovery that could be felt by not only the unemployed, but by the employed. After all, we should not neglect the goal of improving the quality of jobs just because the quantity of jobs is currently insufficient. Most people seek to draw more from their employment than just income—they also pursue security, mastery, a sense of contribution, (individual and common) purpose, and a balanced or integrated work-life, no matter how small one’s effective domain. It is in this light that large monetary bonuses for traders or executives might diminish the well-being of others as much, if not more, than they improve the well-being of the recipients. Or, we improve the well-being of others when an uninsured individual gains the security of health insurance coverage even though it costs him or her more in a premium, or saving another’s job in the auto sector even if he or she prefers more public and less private transportation modes. Some might prefer a fully individualized system of transportation, but still feel enhanced by investments in public infrastructure and public spaces, although certainly some may feel

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47. See Andrew E. Clark, Paul Frijters & Michael A. Shields, *Relative Income, Happiness, and Utility: An Explanation for the Easterlin Paradox and Other Puzzles*, 46 J. ECON. LIT. 95 (2008); Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 3 (2006).

48. Richard Layard, *Happiness and Public Policy: A Challenge to the Profession*, 116 ECON. J. C24, C24 (2006); cf. Andreas Knabe & Stephen Rätzel, *Income, Happiness, and the Disutility of Labour*, 107 ECON. LETTERS 77 (2010).

49. See generally ERIC A. POSNER & CASS R. SUNSTEIN, *LAW AND HAPPINESS* (2010); Peter H. Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405 (2010); Peter H. Huang, *Happiness in Business or Law*, 12 TRANSACTIONS TENN. J. BUS. L. 153 (2011); Lonnie Golden, Susan Lambert, Julia Henly & Barbara Wiens-Tuers, *Working Time in the Employment Relationship: Working Time, Perceived Control and Work-Life Balance*, in THE EDWARD ELGAR HANDBOOK ON WORK AND EMPLOYMENT RELATIONS 188, 188–211 (Keith Townsend & Adrian Wilkinson eds., 2011).

50. See generally Ruut Veenhoven, *World Database of Happiness* (German Data Forum (RatSWD), Working Paper No. 169, 2011), available at [http://www.ratswd.de/download/RatSWD\\_WP\\_2011/RatSWD\\_WP\\_169.pdf](http://www.ratswd.de/download/RatSWD_WP_2011/RatSWD_WP_169.pdf); see also Ed Diener, *Subjective Well-Being: The Science of Happiness and a Proposal for a National Index*, 55 AM. PSYCHOLOGIST, No. 1, Jan. 2000 at 34–43.

diminished with any public transportation or social insurance system if it conflicts with their belief system, such as rugged individualism. Finally, some wish to promote more employee voice or a more democratic workplace even if they themselves have or could exert more power than their fellow employees. The most consistent finding of research since the discovery of the Easterlin paradox<sup>51</sup> is that more economic output (national income) does not necessarily create more happiness among the population as a whole.<sup>52</sup> However, there may be conditions under which it can, depending on how it is distributed. That includes how such income or activities are taxed.

The remedy to what ails the current economy and labor market at the start of 2011, for the purpose of improving well-being generally, will necessarily involve a framework with a three-pronged approach. First, and perhaps foremost, a macroeconomic policy that is not timid about boosting the aggregate demand for labor (cyclical unemployment is a far more important reason than any presumed, sudden rise in structural unemployment, even though it is tempting to argue this position as unemployment remains stuck at such a high level during a recovery). Nevertheless, job vacancies remain very low, and addressing structural mismatches of labor supply to labor demanded, via educational investments, is a laudable second prong, that will in the long run reduce the rate of unemployment and perhaps earnings if the link between productivity and earnings is restored, but likely not in the immediate horizon. Third and finally, institutional innovation could make serious inroads to raising workers' well-being. This includes any legal reforms that boost labor's bargaining power, particularly outside of those sectors where there are bound to be chronic skill shortages. It might start at the margins, such as in cases now before the NLRB—permitting unions for “employed” graduate students, nurse floor supervisors, etc.—which constitute patching the leaks in labor law standards in the United States. Unionization is one important means to these ends, and thus it is crucial to reduce the representation gap. Effective remedies may have been started with the ARRA, such as public infrastructure spending to help the construction sector. Tax policies that directly rewarded job creation, not just profit accumulation of companies, were also wise. Shifting the burden of taxation in ways that reduce wealth inequalities without distorting resources or stifling innovation and risk might be effective as well, such as replacing some of the income tax and estate tax with inheritance taxes. More specifically, the remedy increasingly involves providing greater workplace flexibility. Autonomy is a key working condition sought by workers and is a contributor to happiness and sometimes even worker productivity. Mismatches

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51. Richard A. Easterlin, *Does Economic Growth Improve the Human Lot?*, in *NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ* (Moses Abramovitz, Paul A. David & Melvin Warren Reder, eds., 1974); Richard A. Easterlin, Laura Angelescu McVey, Malgorzata Switek, Onnicha Sawangfa & Jacqueline Smith Zweig, *The Happiness-Income Paradox Revisited*, (Proceedings of the Nat'l Academy of Sci., Dep't Econ., UCLA, Oct. 26, 2010), available at [www.pnas.org/cgi/doi/10.1073/pnas.1015962107](http://www.pnas.org/cgi/doi/10.1073/pnas.1015962107).

52. For the most recent data and disputes, see Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox*, *BROOKINGS PAPERS ON ECON. ACTIVITY*, Spring 2008, at 1. Easterlin, et al., *supra* note 51.

between workers' desired and actual hours of work can be redressed by new workplace practices that encourage individualized rights to request and refuse, if hours of the overemployed can be shifted to the underemployed.<sup>53</sup> Finally, it is not too late to benefit from adopting short-time compensation (STC) programs, now present in twenty-three states' unemployment insurance systems, at the national level.<sup>54</sup> Such a bill, the Layoff Prevention Act of 2011, was introduced into the U.S. House with the intention of providing for the treatment and temporary national financing of states' STC programs.<sup>55</sup> So, what further to do? The answer is to frame this discussion back to the core issues of labor movement—better wages, hours, and working conditions. The White House Task Force on Middle Class Working Families, chaired by Vice President Joe Biden, set the following goals: expanding education and lifelong training opportunities, restoring labor standards (including workplace safety), helping to protect middle-class and working-family incomes, and improving work and family balance.<sup>56</sup> Each of the above are now explored, particularly the last two goals.

#### V. WHAT TO DO: EDUCATION AND THE QUALITY OF LABOR SUPPLY

If the United States decides as a society to counter wage stagnation rather than facilitate (increase) income and wealth inequality, it can decide on a mix of institutional and legal reforms. For perhaps too long, we relied on technological advances and financial innovation only. The biggest driver of the observed wage increases in the mid to late 1990s was the explosion of personal computing and the Internet, but any positive effect on wages seems to have stagnated in the 2000s, in

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53. A corollary, particularly for lower wage, hourly paid workers, would be reducing wage-hour violations and increasing compliance with FLSA and OSHA standards. See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59 (2006).

54. Expanding STC is part of President Obama's American Jobs Act of 2011. See Maurice Emsellem & George Wentworth, *The President's American Jobs Act of 2011: Responding to the National Crisis of Long-Term Unemployment* (Nat'l Employ. Law Project, Sept. 30, 2011), available at <http://www.nelp.org/page/-/UI/2011/NELP.AmericanJobsAct.Analysis.pdf?nocdn=1>; Wayne Vroman & Vera Brusentsev, *Short-Time Compensation as a Policy to Stabilize Employment* (Urban Inst., Nov. 2009), available at [http://www.urban.org/uploadedpdf/411983\\_stabilize\\_employment.pdf](http://www.urban.org/uploadedpdf/411983_stabilize_employment.pdf); *Saving Jobs Through Work Sharing* (AARP Pub. Pol'y Inst., Dec. 2009), available at [http://assets.aarp.org/rgcenter/ppi/econ-sec/insight45\\_worksharing.pdf](http://assets.aarp.org/rgcenter/ppi/econ-sec/insight45_worksharing.pdf).

55. H.R. 2421, 112th Cong. (2011). The bill was introduced on July 6, 2011 and referred to the Committee on Ways and Means. *Id.* In the proposed program, the participation of an employer is voluntary: an employer reduces the number of hours worked by employees in lieu of layoffs; employees whose workweeks have been reduced by at least 10%, and by not more than the percentage, if any, that is determined by the State to be appropriate (but in no case more than 60%), are eligible for unemployment compensation; and the amount of unemployment compensation payable to any such employee is a pro rata portion of the unemployment compensation which would otherwise be payable to the employee if such employee were totally unemployed.

56. MIDDLE CLASS TASK FORCE, ABOUT THE MIDDLE CLASS TASK FORCE, <http://www.whitehouse.gov/strongmiddleclass/about>.

particular when the labor shortage economy turned into a labor surplus economy in the late 2000s.<sup>57</sup> Demand for unskilled and semiskilled labor continues to lag far behind the demand for more highly skilled labor. Unless a growing segment of the population gains greater access to higher education and obtains the qualifications to compete for skilled jobs, median wages will surely remain flat, the wealth gap will grow further, and our international trade position will deteriorate. Unemployment data bears this prediction out. President Obama, on March 30, 2010, signed into law the Student Aid and Fiscal Responsibility Act (House Bill 3221), with virtually no cost to taxpayers.<sup>58</sup> The legislation reforms the system of federal student loans to save taxpayers \$87 billion, and then invests \$77 billion of those savings gradually back into education, particularly by making college more affordable, and directs \$10 billion back to the Treasury to reduce entitlement spending.<sup>59</sup> Among the law's many provisions, it increases the maximum Pell Grant from \$5350 in 2009 to \$5550 in 2010 and \$6900 in 2019, and keeps interest rates low on subsidized federal student loans.<sup>60</sup> Nevertheless, while more education will undoubtedly match at least some workers for the skilled positions that remain vacant even during the current slump (for example, nursing, in some regions), most of the occupations expected to exhibit the largest employment growth in the next decade in the United States tend to be rather lower skill, lower wage jobs with the exception of several professional and managerial jobs (for example, nursing).<sup>61</sup>

#### VI. WHAT TO DO: TAX POLICIES—CAN WE GET MORE TAXES OFF THE BACK OF MORE WORKERS?

Certain tax rate cutting, if temporary, indeed might be helpful to workers' well-being. In the context of flat-lined wage rates and a post-recessionary economy where consumer spending is longer driven by revolving or short-term consumer debt, payroll tax reductions ought to be continued. There is a common misguided impression that taxes are rising (not to mention a widespread myth that expiring temporary tax cuts somehow constitute a "tax increase"). The United States has a largely incoherent system of varying tax rates, exemptions, write-offs, credits, rebates, etc., that apply inconsistently across otherwise similar individuals and industries. Most importantly, tax rates have less and less favored the activity of labor; indeed they have increasingly favored acquisition and returns to financial capital over labor income. An exception might be the earned-income tax credit, designed to benefit single parents who work in paid employment.<sup>62</sup> Also, the Make

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57. See DAVID AUTOR, *THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS* 11–12 (2010), available at [http://www.americanprogress.org/issues/2010/04/pdf/job\\_polarization.pdf](http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf).

58. CONG. BUDGET OFFICE, H.R. 3221: STUDENT AID AND FISCAL RESPONSIBILITY ACT OF 2009 (2009).

59. *Id.*

60. *Id.* at 8.

61. T. Alan Lacey & Benjamin Wright, *Occupational Employment Projections to 2018*, 132 MONTHLY LAB. REV., no. 11, Nov. 2009, at 82, 86.

62. The earned-income tax credit is a tax credit for certain people with dependents who work and have earned income under \$48,362 in 2010. DEP'T OF THE TREASURY, INTERNAL

Work Pay tax credit is a law included in the ARRA that provided workers a refundable tax credit in 2009 and 2010, after which it is set to expire.<sup>63</sup> (Workers got a tax credit of 6.2% of their earned income, up to \$400 for individuals and \$800 for couples, phasing out at 2% of income over \$150,000 for couples and \$75,000 for single filers, with the credit completely eliminated for couples earning more than \$190,000 and singles earning more than \$95,000. The credit was reduced by any other payments associated with the stimulus package, such as the Social Security benefit of \$250.) The addition of work-study money for community college students was an indirect way of promoting both work and human capital investment, instead of having students choose discretely one or the other.<sup>64</sup> Perhaps it is time for a national discussion, raised by President Obama in his January 2011 State of the Union address, to revisit the inconsistencies in tax rates.<sup>65</sup> Can we not eventually harmonize all tax rates on all types of income, and build in different levels of exemptions? Why should a young individual's inheritance income be entirely exempted from federal taxation while income earned by another youth from working a summer job is taxed more?

#### VII. WHAT TO DO: REGULATORY POLICIES AND FLSA

Some labor and employment law “reform” advocates suggest that if a law is old that means it is “outdated.”<sup>66</sup> The Fair Labor Standards Act (FLSA) created exemptions from the hours and pay laws if the job predominantly was associated with certain duties.<sup>67</sup> In the twenty-first-century workplace, there is probably more of a continuum of job types, and duties associated with them, than the stark difference in the law in the treatment of “exempt” and “non-exempt” employee—dichotomous classifications. There is no longer anything magical about a forty-hour workweek, with the diminished presence of breadwinner-homemaker households and factories with standardized eight-hour work shifts, not to mention that “work” has become more fungible and walls between work and non-work time and activity have been all but eliminated in more and more jobs. The Bush administration instituted more employer-friendly regulations. By using a more generic “primary duty” as the determining factor of a job's exempt status, the regulations made it possible for some jobs to be legally reclassified as exempt from FLSA standards,

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REVENUE SERVICE, PUBLICATION 596, EARNED INCOME TAX CREDIT (EIC) 1 (2010).

63. *The Making Work Pay Tax Credit*, *supra* note 14.

64. THE WHITE HOUSE SUMMIT ON COMMUNITY COLLEGES, SUMMIT REPORT (2011).

65. President Barack Obama, State of the Union Address (Jan. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office-2011/01/25/remarks-president-state-union-address> (explaining that “a parade of lobbyists has rigged the Tax Code to benefit particular companies and industries. Those with accountants or lawyers to work the system can end up paying no taxes at all . . . . The best thing we could do on taxes for all Americans is to simplify the individual Tax Code.”).

66. *The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?: Hearing Before the H. Subcomm. on Workforce Protections*, 112th Cong. 9, 32, 49 (2011).

67. For a historical narrative of the adoption of the FLSA and critique, see Marc Linder, *The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States*, 59 INDUS. & LAB. REL. REV. 507 (2006).

including the exemption from FLSA for being an administrator/manager, and for highly but hourly paid technical employees.<sup>68</sup> Moreover, the NLRB made it easier to classify positions with some supervisory duties as exempt and outside the bargaining unit.<sup>69</sup> This has opened the door to future discussion regarding the scope of the FLSA exemptions and provides an opportunity to reconsider reforming the traditional dichotomy.<sup>70</sup>

#### VIII. WHAT TO DO: LABOR LAW

The union density rate, the proportion of the entire labor force represented by unions (or alternatively, union membership), has been declining over time, but has recently stabilized in the late 2000s (see Figure 15). Union density was 9.5% of employment in the private sector in 1998 and 10 years later had slid to 7.6%.<sup>71</sup> However, it reached its lowest point in 2006.<sup>72</sup> Private sector unionization remains relatively lower than public sector, although the former has experienced a slight revival after 2005, both in membership numbers and as a proportion of the work force. Private sector unionization, however, was hard hit by the steep decline in employment in late 2008 and early 2009. In the legal services industry, unionized employees actually climbed slightly in number, bucking the trend (see Figure 16). Fostering quicker elections and more deterrents against managerial tactics designed to undermine union organizing efforts would certainly enhance union membership. Internal reallocations of resources within the labor movement, toward organizing and away from servicing functions, may lead to a turnaround in this trend as well.<sup>73</sup> The “representation gap” remains high, despite workers’ and the public’s skepticism regarding the efficacy of labor unions.<sup>74</sup> During the Great Depression, it was certainly not only the ripe conditions of worker discontent from job insecurity

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68. See, e.g., Ross Eisenbrey, *A Closer Examination of the Department of Labor’s Final Overtime Regulations* (Econ. Pol’y Inst. May 20, 2004) (critiquing the 2004 Department of Labor Regulations reform).

69. E.g., *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001).

70. For more worker-friendly approaches to FLSA reform, see MARC LINDER, “TIME AND A HALF’S THE AMERICAN WAY”: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868–2004 (2004); Scott D. Miller, *Atrophied Rights: Maximum Hours Labor Standards Under the FLSA and Illinois Law*, 28 N. ILL. U. L. REV. 261 (2008); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74 (1999). For proposed FLSA overtime reforms that also address some employer concerns, see Lonnie Golden, *Overtime Reform: Widening the Lens*, PERSPECTIVES ON WORK, Winter 2005, at 23, 23–25.

71. Gary Chaison, *Research Summary: Union Membership Attrition*, 133 MONTHLY LAB. REV., no. 1, Jan. 2010, at 74, 76.

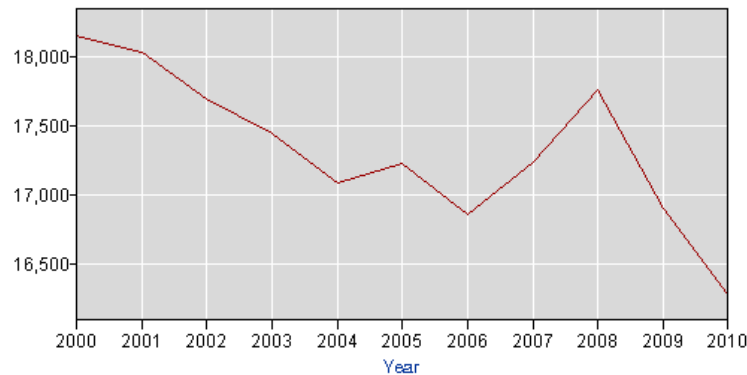
72. *Id.*; Bureau of Labor Statistics, News Release, *Union Members Summary*, *USDL-11-0063*, Jan. 21, 2011.

73. For further, detailed, and enlightened recommendations regarding labor and employment law reform, see STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS* 136–207 (2009).

74. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 11–14 (1999).

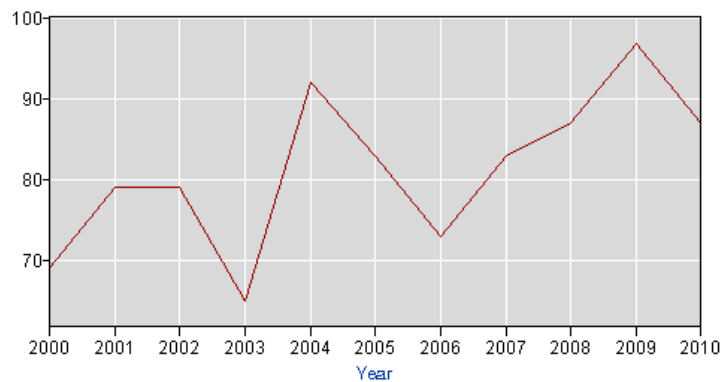
and falling wages, but the institutional and legal foundation, that made possible the dramatic growth of union membership during the 1930s and 40s.

**Figure 15: Employed wage and salary workers represented by unions, all industries, in thousands**



Source: Bureau of Labor Statistics, Union Affiliation Data from the Current Population Survey.

**Figure 16: Employed wage and salary workers represented by unions, legal occupations, in thousands**



Source: Bureau of Labor Statistics, Union Affiliation Data from the Current Population Survey.

## IX. WHAT TO DO: FURTHER HEALTH INSURANCE REFORM

One behind-the-scenes inhibitor of employment growth is the persistently rising cost to employers of employee insurance plans, including health care plans.<sup>75</sup> Now that employers and insurers are due to begin coverage increases, it is imperative that such plans consider a further reform in the structure of contributions. Change is needed because the charge to add an employee to the pool tends to be per head

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75. See Brigitte C. Madrian, *The U.S. Health Care System and Labor Markets* (Nat'l Bureau of Econ. Research, Paper No. 11980, 2006).

rather than per hour, and it therefore creates an inherent incentive for employers to lengthen work hours instead of adding new hires. Moreover, during downturns, it creates an incentive to lay off employees rather than reduce their hours. This disincentive for expanding or preserving employment could be countered only by making contributions to such plans more prorated, on the basis of hours worked. The chart below shows that as a proportion of labor costs, insurance benefit costs escalated even through the recession.<sup>76</sup> Employer costs for employee compensation for insurance plans in private goods-producing industries rose steadily from 8.3% of total compensation up to 9.5%—marking a gain from \$2.26 to \$3.13 cost per hour worked between the start of 2004 and end of the first quarter in 2011.<sup>77</sup> If this rate of increase is not curbed, future employment gains will be further dampened.

## X. WHAT TO DO: EMPLOYMENT LAW AND POLICIES

### A. Workplace Flexibility and Work-Family Pending Legislation

New momentum for gender equity legislation came to Congress with the passage of the Lily Ledbetter Fair Pay Act.<sup>78</sup> It amended the Civil Rights Act to protect plaintiffs filing an equal pay lawsuit from dismissal due to a statute of limitations and was signed into law by President Obama in 2009.<sup>79</sup> The Paycheck Fairness Act,<sup>80</sup> S. 797, has been introduced into the 112th Congress after House Bill 12 passed in the House, but Senate Bill 182 stalled in the Senate because it fell two votes short of the supermajority needed to bring it to a vote, at the end of 2010.<sup>81</sup> Perhaps overlooked during the 111th Congress and Obama White House have been efforts to move forward the discussion, and popular policies, that support the real, daily needs of twenty-first century American families. Once the unemployed regain employment, most households will face the realities of everyday working life faced by the employed. Higher income workers face the prospects of long working hours in often demanding jobs. While many have at least some access through the workplace to the type of supports necessary to cope with

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76. In service-producing industries, the corresponding percentages over the same time period rose from 6.7 to 7.6%, and in government from 10.1 to 11.8%.

77. U.S. Bureau of Labor Statistics, News Release, *Employer Costs for Employee Compensation USDL-11-0849*, Mar. 2011. Compare U.S. Bureau of Labor Statistics, News Release, *Employer Cost for Employee Compensation, USDL-11-1305*, June 2011, with U.S. Bureau of Labor Statistics, News Release, *Employer Cost for Employee Compensation, USDL-04-1805*, June 2004.

78. H.R. 2831, 110th Cong. (2007). It removed the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination. H.R. 2831. It was a response to the U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

79. The original bills were H.R. 2831, 110th Cong. (2007), and S. 1843, 110th Cong. (2007).

80. The bill sought to amend the FLSA to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, for example.

81. Susan Gardner, *Obama Recommits to Paycheck Fairness Act in Weekly Address*, DAILY KOS (Mar. 12, 2011, 7:30 AM), <http://www.dailykos.com/story/2011/03/12/955445/-Obama-recommits-to-Paycheck-Fairness-Act-in-weekly-address>.



daily pressures to balance or sequence work-non-work time conflicts, still many do not, and those in lower income jobs have considerably less access to the type of workplace supports that might help them achieve better work-life flexibility.<sup>82</sup> The United States notoriously lacks any systematic provision for subsidized child care, paid leave, mandatory sick leave or vacations, limits on mandatory overtime, and the right to request flexibility on the job that have been implemented across all other major post-industrial countries of the world.<sup>83</sup> This reflects the generally lower scope and degree of labor regulation in the United States relative to all other countries.<sup>84</sup> The White House Task Force on Middle Class Working Families, with the White House Council on Women and Girls, has advocated the development of what amounts to a federal infrastructure for making flexible work arrangements (FWAs) more the norm than the exception.<sup>85</sup> Among other things, they advocate establishment of a Commission on Workplace Flexibility, with an ideologically diverse membership (similar to those who serve on the National Council on Disability), and with a national advisory group composed of public and private stakeholders and representatives from various federal agencies.<sup>86</sup> A new division within an existing agency such as the Department of Labor or the Department of Commerce could be created. The division could have an advisory board composed of members from federal agencies with workplace flexibility programs and members from the private sector. A Presidential Committee on Workplace Flexibility could be created by executive order; A Citizens' Advisory Council could be created by executive order as well, composed of employee and employer interests, and other stakeholders to advise the presidential committee. On March 31, 2010, the White House hosted a one-day conference to discuss the potential benefits of workplace flexibility not only to employees, but employers and the economy, and addressed topics such as reduced absenteeism, lower turnover, improved health of workers, and increased productivity.<sup>87</sup> The Policy Platform by Workplace Flexibility 2010, a project funded by the Alfred P. Sloan Foundation and housed at Georgetown University Law School, has brought together the interests of workers, employers and government to consider expanding the availability of FWAs, workplace changes such as part-time and part-year work, phased retirement, compressed workweeks, telecommuting, and flexible daily work scheduling.<sup>88</sup> A second of three sets of policies advocated in the Platform consists

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82. Cf. Lonnie Golden, *A Purpose for Every Time?: The Timing and Length of the Workweek and Implications for Workers' Well Being and Law*, 42 CONN. L. REV. 1181 (2010).

83. See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1-2 (2010).

84. See Richard N. Block, Peter Berg & Karen Roberts, *Comparing and Quantifying Labour Standards in the United States and the European Union*, INT'L J. OF COMP. LAB. L. & INDUS. REL., Winter 2003, at 441.

85. See ANNUAL REPORT OF THE WHITE HOUSE TASK FORCE ON THE MIDDLE CLASS (Feb. 2010).

86. *Id.*

87. See COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *WORK-LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY* (2010).

88. WORKPLACE FLEXIBILITY 2010, <http://workplaceflexibility2010.org/index.php/>

of Time Off comprised of different lengths of time (e.g., sick days, time off to attend a parent-teacher conference, family leave, short-term disability, and military service), paid and unpaid. Finally, the Platform's third plank takes a longer-run scope of improving career maintenance and labor force entry (for example, training for workers reentering the workforce and mechanisms that keep individuals connected to the workplace during long periods of absence).<sup>89</sup>

An important and unfortunate caveat is the potential for a mandated provision of employee benefits to create perverse incentives that could raise the cost for employers to hire the very employees who would use such benefits.<sup>90</sup> Notwithstanding this, nowadays, with the diminished presence and power of U.S. labor unions, providing work-life flexibility extends beyond the negotiated collective agreements in unionized settings.<sup>91</sup> Unions have traditionally negotiated with great success some basic leave benefits for their members. However, flexible scheduling policies have not been as widespread in collective agreements.<sup>92</sup> Nevertheless, in a survey of workers across eight public and private unionized organizations, workers report that supervisors are providing them access to flexible work arrangements that are not specifically in the collective agreement.<sup>93</sup> Provision of flexible work arrangements on a case-by-case, individual basis, however, also risks inequity among employees as supervisors are making scheduling decisions that are not subject to the grievance procedure. This suggests that there are two critical roles for unions in the work-life flexibility arena: one, negotiating basic leave policies and flexible schedules; and two, facilitating worker access to flexible schedules and leaves through supportive behaviors. However, it turns out that even effective unions that negotiate good wages and benefits help employees gain access to flexible shifts but not greater flextime and working at home. Thus, it suggests that a potentially more potent way to deliver such benefits might be legislation at the federal level. Unions tend to improve the life satisfaction of individuals vis-à-vis non-union members.<sup>94</sup> Therefore, extending such benefits to all workers might raise satisfaction with life and work generally. The Gender Equality Act of 2010<sup>95</sup>

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89. *Id.*

90. See Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 112 Q. J. OF ECON. 285 (1998).

91. For an economist's statement of labor's bargaining power, specifically labor's inherently weaker position when it comes to the employment relationship, see Bruce E. Kaufman, *Labor's Inequality of Bargaining Power: Myth or Reality?*, 12 J. LAB. RES. 151 (1991).

92. See PETER BERG & ELLEN ERNST KOSSEK, MICH. STATE UNIV. SCH. OF HUMAN RES. AND LABOR RELATIONS, *FOSTERING FLEXIBILITY BEYOND THE COLLECTIVE BARGAINING AGREEMENT* 2–3 (2010).

93. *Id.*

94. Patrick Flavin, Alexander C. Pacek & Benjamin Radcliff, *Labor Unions and Life Satisfaction: Evidence from New Data*, SPRINGER SCI. & BUS. MEDIA, Dec. 12, 2009, at 436.

95. The bill proposed to establish a Congressional task force to assess and recommend changes to mandatory overtime rules under the Fair Labor Standards Act, including assessing the need, benefit, and costs of expanding FLSA work hour limits to include reasonable limits on mandatory overtime. It also contained a tax credit to employers for hiring or allowing an employee to voluntarily enter into a "flextime agreement." An employer would be eligible for a one-time \$400 credit for each employee who enters into a

was introduced to incentivize businesses to offer flexible work options with a limited tax credit for employers, with a scope and coherence beyond previous attempts.<sup>96</sup> By 2011, sixteen U.S. states had passed laws that place restrictions on the use of mandatory overtime beyond the usual work week, with a protected right to refuse such additional hours. The latest were Alaska, Texas, Pennsylvania, and New York. Virtually all such laws, however, are limited to nurses and other healthcare workers. Moreover, federal laws have been proposed, such as the Safe Nursing and Patient Care Act of 2007, which languished in the House Subcommittee on Health.

Bills introduced in the 112th Congress are not likely to gain much traction in the U.S. House. These include bills to amend the Fair Labor Standards Act such as the Healthy Families Act of 2011 (House Bill 1876 and Senate Bill 984). This bill would require businesses with fifteen or more employees to provide workers with up to seven days (fifty-six hours) of paid sick leave each year for their own symptoms, preventive care, and to care for a sick child. Paid leave could be taken to attend to an employee's own or a family member's illness, or used for preventative care such as doctor's appointments. Sick time requests may be oral or in writing at least seven days prior to foreseeable absence or otherwise as soon as practicable. The employee must provide notice of the expected duration of the absence. Employees would earn one hour of paid sick time for every thirty hours worked up to a maximum of fifty-six hours (seven days) annually. Leave begins accruing from the first day of employment, but may not be taken until an employee works for sixty days. Up to fifty-six hours of paid sick leave would carry over from year to year, but an employer may permit additional accrual beyond the fifty-six-hour minimum. In addition, paying for four weeks of the minimum guaranteed twelve weeks of parental leave time has been proposed for federal employees, under the Federal Employees Paid Parental Leave Act of 2011, H.R. 616 (which had been S. 1152 in the Senate). Moreover, a related aspect of the bill would expand the eligible use of funds for the "child care tax credit" to include care for elderly relatives. The credit for elderly care would be set at the current \$3000 level instead of the increased \$6000 level proposed in this legislation for child care.<sup>97</sup>

Arguably the most promising approach from a more individualistic (than collectivist) standpoint would be adopting proposed legislation that would ensure

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scheduling agreement that allows the employee to begin work anytime between 6 a.m. and 9 a.m. or allows the employee to work four 10-hour days per week for demonstrated family need, that is, child care or for an ill family member. It also would have provided incentives for firms to adopt fair paid leave practices, including a minimum number of paid family and medical leave days and expanded child care tax aid.

96. *Id.*

97. H.R. 2564. The "Paid Vacation Act of 2009" was a bill that had been introduced into the 111th Congress that would have required employers to provide a minimum of one week of paid annual leave to employees; an employee could be eligible if their employer employs 100 or more employees at any time during a calendar year. They would be entitled to a total of one workweek of paid vacation during each twelve-month period. Notably, the law would require the Secretary of Labor to conduct a study on workplace productivity and the effect on productivity of the leave requirement in this Act. The study would also address any benefits to public health and psychological well-being as a result of such leave, not later than three years after the date of enactment.

employers consider individual employee requests for flexible work and conditions within two weeks of such a request. This legislation would specifically authorize an employee to request from an employer a change in the terms or conditions of the employee's employment if the request relates to: (1) the number of hours the employee is required to work; (2) the times when the employee is required to work, including compressed work weeks; or (3) where the employee is required to work. It would be unlawful for an employer to interfere with any rights provided to an employee under this type of legislation. Employers can deny such requests only if the identifiable costs of the change in terms requested in the application—such as loss of productivity, costs of retraining or hiring employees, or costs of transferring employees from one facility to another facility—exceed the overall financial resources involved. Specifically, the Working Families Flexibility Act, S. 3840 (known as H.R. 1274 in the House) would permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions and for other purposes. The employer and the employee shall hold a meeting to discuss the request for reconsideration within fourteen days after the date on which the employee gives notice of the request for reconsideration to the employer; the employer shall give the employee a written decision regarding the request for reconsideration within fourteen days after the date of the meeting; if denied the employer shall state the grounds for the decision.<sup>98</sup> Just as wide in scope is another bill, H.R. 710, the Telework Tax Incentive Act, which attempts to facilitate more widespread use of teleworking by employers by amending the Internal Revenue Code of 1986 to allow a credit against income tax for expenses incurred by teleworking. It follows on the heels of the passage of the Telework Enhancement Act of 2010, enacted as P.L. 111-292 (December 9, 2010), which requires the head of each executive agency to establish and implement a policy under which employees shall be authorized to telework.

Republicans in the 111th Congress reintroduced the Family-Friendly Workplace Act (H.R. 933).<sup>99</sup> In the 112th Congress, given the hearings just held in July 2011,

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98. The proposed law is quite similar to one adopted already in the United Kingdom and Australia, as a "right to request" under the Flexible Working regulations, which enables mothers and fathers, and other caregivers, to request shorter hours (for an indefinite time period). Reforms now under consideration there would extend the scope of flexible working laws to parents with children up to the age of eighteen, rather than the current age of sixteen (raised from age six in 2007), and would make such rights to request available to all workers, regardless of parental status. Future discussion might include making one's arrangement portable to their next full-time job. Likewise, the recently adopted Australian "National Employment Standards" include a similar legal right to request a flexible schedule, reduced hours, an extension of unpaid time off, and part-time work when returning from parental leave. It sets thirty-eight hours per week as the new work week norm for purposes of overtime consideration and makes a distinction between "reasonable" and "unreasonable" hours. See ARIANE HEGEWISCH & JANET C. GORNICK, INST. FOR WOMEN'S POLICY RESEARCH AND CTR. FOR WORKLIFE LAW, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE (2008); Sue Himmelweit, *The Right to Request Flexible Working: A 'Very British' Approach to Gender (in) Equality?*, 33 AUST. BULL. LAB. 2 (2007).

99. Very similar bills have been introduced in Republican-controlled Congresses since 1996. They would allow private sector employers to compensate employees for overtime with promised future time off, and redefine the pay period as two weeks in length, with

we should soon expect to see in the House a revival of legislative attempts to alter the FLSA rules regarding the payment of overtime wages at a premium, which would allow employers to pay future compensatory time off (“comp time”) in lieu of pay, at the same rate of time and a half, if employees signed such an agreement.<sup>100</sup> While compelling in that it provided workers much needed time off, such a law is bound to be counterproductive as an attempt to reduce working hours or improve worker well-being.<sup>101</sup> From the perspective of labor demand, there is good reason to believe that employers would demand more overtime hours, ironically, from those employees who signed a preference for shorter work time. The legislation would make scheduling longer work weeks relatively cheaper because it allows employers to store comp time credits for up to a year and have the final say when overtime work gets scheduled and when comp time use could be denied. Comp time could potentially be forcibly scheduled by employers according to their own preference rather than that of employees. If the law were to foster true worker “choice” by allowing for refusal of the originally scheduled overtime hours and allowing workers to decide the use of their comp time unless it would clearly “cause substantial and grievous injury to the employer’s operations” (rather than the proposed lower standard of “avoidance of ‘undue disruption’ of business or operations”), it might actually help reduce the workweeks of workers who would prefer shorter hours even if it reduced their incomes (the “overemployed”). The latest version contains some slight modifications from previous versions in that the proposed law would attempt to bar both the potential denied use and forced use of comp time credits, which tilts the law a bit more in favor of employees than its past incarnation. Nevertheless, this would still likely encourage more rather than less scheduling of overtime work hours and thus wind up with longer rather than shorter working hours, thus inhibiting rather than enhancing job creation or preservation. This cost incentive could be offset only with a shorter standard workweek, for example, thirty-six hours, after which comp time hours would accumulate. In the meantime, the proposal remains mis-targeted since the preference for future time off over pay for overtime is far greater among “exempt” workers, who are currently not legally entitled to any premium pay for their beyond “standard” hours of work, whereas the preference among “non-exempt” workers for comp time is quite small with the exception of women and relatively high paying hourly paid occupations.

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overtime pay or comp time which would be due only for hours of work that exceed eighty in the period (or fifty in a given week).

100. *Hearing Before the H. Subcomm. on Workforce Protections, supra* note 66, at 48.

101. For FLSA overtime work hours reforms, see Golden, *supra* note 70, at 1–4; Juliet B. Schor, *Worktime in a Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 165–72 (1994); Robert Drago, *Trends in Working Time in the U.S.: A Policy Perspective*, 51 LAB. L.J., no. 4, Winter 2000 at 212–18; Walsh, *supra* note 70. For FLSA reforms generally, see U.S. GEN. ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 32 (1999); TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE (2002); Miller, *supra* note 70, at 281. For the role of FLSA in the determination of work hours, see Morris Altman & Lonnie Golden, *Alternative Approaches to Analyzing Hours of Work Determination and Standards*, in LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES 286 (Margaret Oppenheimer & Nicholas Mercurio eds., 2005); Peter Berg, Eileen Applebaum, Tom Bailey & Arne L. Kalleberg, *Contesting Time: International Comparisons of Employee Control of Working Time*, 57 INDUS. & LAB. REL. REV. 331 (2004).

Thus, a system of comp time would be more likely to improve worker well-being if it were available to exempt employees, as opposed to the non-exempt employees currently governed by the FLSA overtime pay regulations.

Other regulations concerning work and working hours tend to be sectoral or industry based, usually in response to particular adverse consequences documented not only for the employees, but health risks for the consumers of the products or services. For example, egg producers that process eggs brought in from other farms may not enjoy provisions that exempt them from FLSA overtime pay rules, particularly after the eggs were found to be a public health risk in such operations. Also, the Obama administration will “review and consider” changes to the rules governing the work hours of resident doctors and medical interns, known to be placed on long shifts for months and years on end, with well documented risks not only to their own well-being but also to the patients they treat.<sup>102</sup> OSHA is considering adopting sensible regulations for resident physician work hours.<sup>103</sup> Public health advocates are pushing OSHA to do the following: one, limit medical residents’ hours to a strict eighty per week; two, limit single shifts to sixteen consecutive hours; and three, grant residents at least one full day off per week, “without averaging.”<sup>104</sup> Others have called for similar measures: a minimum twenty-four-hour period of time off per week, and a forty-eight hour time off period per month; in-hospital and on-call frequency of no more than once every three nights (no averaging); a minimum of at least ten hours off after a day shift and twelve hours off after a night shift; a maximum of four consecutive night shifts.<sup>105</sup> These tend to be stricter than those adopted by the existing Accreditation Board standards governing teaching hospitals.<sup>106</sup>

#### *B. Work Sharing and Short-Time Compensation in Unemployment Insurance Funds*

In the United States, legislation is pending, introduced in the U.S. House by Representative Rosa DeLauro (D-CT) as the Keep Americans Working Act and by Sen. Jack Reed (D-RI) as the Helping Unemployed Workers Act in the Senate, to turn policies present in a handful of states into a national policy.<sup>107</sup> The bills attempt to both expand the eighteen states that currently have STC in place as part

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102. See, e.g., A.E. Dembe, R. Delbos & J.B. Erickson, *Estimates of Injury Risks for Healthcare Personnel Working Night Shifts and Long Hours*, 18 *QUAL. SAFE HEALTH CARE* 336 (2009); Anthony Sverre Wagstaff & Jenny-Anne Sigstad Lie, *Shift and Night Work and Long Working Hours: A Systematic Review of Safety Implications*, 37 *SCAND. J. ENVIRON. HEALTH* 173 (2011).

103. Mike Lillis, *OSHA to Consider Stricter Work Hour Rules for Medical Residents*, *THE HILL* (Sept. 5, 2010), <http://thehill.com/blogs/healthwatch/worker-safety/117251-oshato-consider-stricter-rules-for-work-hours-of-medical-residents>.

104. *Id.*

105. *Id.*

106. ACGME, *COMMON PROGRAM REQUIREMENTS* (July 1, 2011) (implementing further restrictions on the duty hours of residents training in ACGME-accredited residency programs in the United States).

107. These bills are H.R. 4135, 111th Cong. (2009) and S. 2831, 111th Cong. (2009), respectively.

of their state's unemployment insurance program and financially incentivize other states to adopt STC. Work-sharing programs might be able to curb or reduce unemployment. More likely, they provide a useful defensive measure against unemployment by preventing or forestalling layoffs that inevitably would lead to higher unemployment, to the extent that laid off workers cannot be re-absorbed in short order to another, comparable job. Thus, their contribution would be felt most during the downturn stages of the business cycle. Not surprisingly, employers' applications to use STC rose in 2008–2009 and receded somewhat thereafter.<sup>108</sup> The U.S. Labor Department estimates that 146,000 jobs have been saved due to the work-sharing programs in these states, through the end of 2009, and an estimated 265,000 jobs through 2010.<sup>109</sup> The motivation behind the two bills would be that additional, federal funding would spread the use of STC and save even more jobs, and the bills would save the states' unemployment insurance trust funds from being drained or having to borrow. Senator Reed's proposal in Congress for a national work-sharing policy would subsidize employers up to \$3000 per employee for increasing paid time off.<sup>110</sup> In addition, a new tax credit had been proposed in the 111th Congress, by Representative John Conyers, which would have allowed employers to reduce work time while still maintaining their pay.<sup>111</sup> This policy has the potentially added benefit of encouraging a wide variety of innovative reorganizations by employers, including those who are not planning layoffs. If such tax credits are sufficiently substantial and supported by replacement income from their state, workers whose hours are cut by, say, 20% (i.e., the equivalent of one day per week) could experience as little as only a 4% drop in their weekly income.<sup>112</sup> For example, a worker earning \$600 a week would have their weekly wages fall to \$480 with the shorter workweek, but STC could make up \$60 of that (half of the lost wages) and another \$36 could come from the public subsidy to the employer. Indeed, some workers might effectively break even if by working one fewer day per week, they reduce costs of commuting, hired care, and some income taxes owed. One attractive feature of expanding STC programs is that it would dovetail with some of the pending policy proposals in the United States that also involve work hours reduction, such as paid leave. Policies that promote a more flexible workplace by better matching working hours with those preferred by employees can not only reduce overemployment but achieve job preservation in contracting employers and even job creation in expanding firms. Shorter average hours per worker are likely to promote longer term environmental and human sustainability, with respect to health and well-being, as well.<sup>113</sup>

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108. See Vroman & Brusentsev, *supra* note 54, at 16.

109. Press Release, Reed Calls for New National Plan to Help Save American Jobs (July 6, 2011), <http://reed.senate.gov/press/release/reed-calls-for-new-national-plan-to-help-save-american-jobs>.

110. Layoff Prevention Act of 2011, S. 1333, 112th Cong. (2011).

111. Shared Credit Bill of 2011, H.R. 4179, 111th Cong. (2011).

112. See DEAN BAKER, CENTER FOR ECON. & POLICY RES., JOB SHARING: TAX CREDITS TO PREVENT LAYOFFS AND STIMULATE EMPLOYMENT 1–2 (Oct. 2009); JON C. MESSENGER, INT'L LABOUR OFFICE, WORK SHARING: A STRATEGY TO PRESERVE JOBS DURING THE GLOBAL JOB CRISIS 2 (June 2009).

113. See ROBERT LAJEUNESSE, WORK TIME REGULATION AS SUSTAINABLE FULL

## CONCLUSION

In conclusion, there is cause for hope if change can be delivered. If the Obama administration is able to create and sustain a clearer, more coherent theme that unites the various pending legislative proposals as a bundle, it may be able to help counter, or even reverse, the tide of falling material living standards for the median household and concentration of income growth into the top income bracket—the “already wealthy.”<sup>114</sup> Institutional changes are a necessary but not necessarily sufficient condition, but they would lean against recent tides for the first time in a decade or more.

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EMPLOYMENT STRATEGY: THE SOCIAL EFFORT BARGAIN (2009); DAVID ROSNICK & MARK WEISBROT, CENTER FOR ECON. & POLICY RES., A COMPARISON OF U.S. AND EUROPEAN ENERGY CONSUMPTION (2006).

114. Other recent relevant bills addressing the tax code and living standards include: (1) H.R. 5622, which would amend the Internal Revenue Code of 1986 to provide for the identification of corporate tax haven countries and increase penalties for tax evasion practices in haven countries that ship U.S. jobs overseas (for other purposes, cited as the Stop Outsourcing and Create American Jobs Act of 2010); (2) S. 3254, the Employee Misclassification Prevention Act, which would amend the Fair Labor Standards Act of 1938 to require persons to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for persons who misclassify employees as non-employees, in addition to other purposes; (3) The Wage Theft Prevention Act, H.R. 3303, which would amend the Portal-to-Portal Act to toll the statute of limitations for bringing a cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Standards Act and certain other Acts, starting from the time the Secretary of Labor notifies an employer of the initiation of an investigation regarding the cause of action until such employer is notified of its conclusion.