

Outrunning the Devil: Considering the Implications of Relaxing the NLRA's Preemption Regime for Working Texas Families

*And when the last law was down, and the Devil turned round on you - where would you hide,
Roper, the laws all being flat?*

Yes, I'd give the Devil the benefit of the law, for my own safety's sake.

Robert Bolt
A Man for All Seasons

I. Introduction

Working families in Texas have hit rock bottom. Although the state's economy largely weathered the Great Recession and job growth in the state has been remarkably consistent, too many Texas families live in poverty, cannot afford housing, and lack access to basic needs like healthcare. While working families in Texas struggle to make ends meet, the state's elected leadership has vigorously resisted efforts to raise wages or provide benefits to Texans who work. Worse still, Texas' elected officials consistently seek to undermine the ability of working people in the state to come together to seek better pay and safer working conditions.

All across the state, working Texans have had enough. Changing demographics in the state and a changing political environment have given working people an opening to move in a different direction. They have used that opening to forge creative solutions that make it easier for them to find good, safe jobs and to have a voice at work.

Nationally, decades of assaults on collective bargaining, workers' wages, and workers' protections have resulted in the feeling among working people that they are falling behind.¹ This crisis for people who work has led leading thinkers to explore the types of labor law experimentation possible and underway at the local level under the National Labor Relations Act (NLRA).² Further, it has sparked a discussion about whether it may be time to "relax the NLRA's preemption regime,"³ thereby fostering local experimentation in labor law that could help more working people get ahead.

This paper explores what that kind of "relaxing" could mean for working people in Texas. It argues that any legislative change that would eviscerate the NLRA as a floor, or baseline, for working people's right to come together to improve their working conditions free from retaliation would have devastating implications for average Texans. In order to understand the potential implications, it is useful to better understand Texas.

¹ See, e.g., Mary Babic, *America's Poor Working Hard but Still Falling Behind*, OXFAM (Aug. 27, 2013), <https://www.oxfamamerica.org/press/americas-poor-working-hard-but-still-falling-behind/>.

² See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities*, 124 HARV. L. REV. 1153 (2011).

³ *Id.* at 1217.

II. The Failed Promise of the Texas Miracle⁴

For years, elected officials touted the “Texas Miracle.” They bragged about the resilience of the state’s economy during the Great Recession and assured us it was the result of little-to-no regulation of private sector markets in the state. We know better.

The facts reveal a picture of working Texans falling behind and a state government hostile to policies that improve wages and working conditions for Texans who work.

a. Texas Families Falling Behind

Millions of Texans need and deserve good jobs: jobs that both pay a living wage and offer basic benefits to working families, such as health insurance coverage and paid sick days. Today, too many Texans live below the poverty line. In fact, over 4.8 million people in Texas, a number greater than the entire population of more than half of the states in the United States, live in poverty.⁵ Poverty in Texas, including unemployment, poverty-level wages, and a lack of access to basic necessities such as food and medical care, disproportionately affects the state’s African American and Latino populations.^{6,7}

Texas’ growing economy almost exclusively benefits the wealthiest 1% of Texans, which includes households earning \$423,099 or more per year.⁸ During the post-recession period, Texas’ economy remained relatively strong with one of the lowest unemployment rates in the country.⁹ But even though Texas’ economy claims to be one of the strongest in the nation, the poverty rate is comparable to more economically stagnant states such as Arkansas and Alabama.^{10,11} Texas’ economic growth is clearly not benefiting all working Texas families. During

⁴ Some analysis contained in this section was originally published online in a substantially similar form by Workers Defense Project. WORKERS DEFENSE PROJECT, THE FAILED PROMISE OF THE TEXAS MIRACLE (2016), <http://www.workersdefense.org/wp-content/uploads/2016/02/The-Failed-Promise-of-the-Texas-Miracle-compressed-file.pdf>.

⁵ U.S. Census Bureau, United States Quick Facts: Population Census 2010, <http://www.census.gov/quickfacts/chart/POP010210/00>.

⁶ *Texas: Demographics of Poor Children*, NAT’L CTR CHILD. POVERTY (2015), http://www.nccp.org/profiles/TX_profile_7.html.

⁷ HELEN YOU & LLOYD POTTER, THE OFFICE OF THE STATE DEMOGRAPHER AND THE TEXAS STATE DATA CENTER AT THE UNIVERSITY OF TEXAS, SAN ANTONIO, EDUCATIONAL ATTAINMENT PROJECTIONS OF THE TEXAN CIVILIAN WORKFORCE, 2011-2030 (2014), http://osd.state.tx.us/publications/2014-04-08_EducationAttainment.pdf.

⁸ ESTELLE SOMMEILLER & MARK PRICE, ECONOMIC ANALYSIS AND RESEARCH NETWORK, THE INCREASINGLY UNEQUAL STATES OF AMERICA (2015), <http://s3.epi.org/files/2014/IncreasinglyUnequalStatesofAmerica1917to2012.pdf>.

⁹ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, UNEMPLOYMENT RATES BY STATE (2015), <http://www.bls.gov/lau/#tables>.

¹⁰ POVERTY USA, *Poverty Map* (2015), <http://www.povertyusa.org/the-state-of-poverty/poverty-mapstate/#>.

¹¹ BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, REGIONAL GDP (2015), https://www.bea.gov/iTable/index_regional.cfm (here is where you’ll need to guide the reader to pull up the custom data query for 2013-2014).

and after the Great Recession, many Texas politicians touted Texas' resilience against the economic recession and its relatively small loss of jobs compared to other states.¹² Yet not all Texans benefited from this resilience. From 2009 to 2012, the incomes of the wealthiest 1% of Texans grew by more than 50%. The other 99% of families saw an income increase of just 2%, which failed to even keep pace with inflation during the same time period.¹³

Texas' low unemployment levels and high poverty rates are resulting in dire consequences for working families, many of whom are struggling to make ends meet. The number of Texan households utilizing the food stamp program tripled from 2000 to 2010, and now more than 1.4 million households rely on food stamps to feed their families.¹⁴ Housing costs have also become unbearable for many Texas families, particularly in urban areas. In Austin, Texas, the median cost of a home skyrocketed by 48% from 2005 to 2014 while the median family income increased by just 12% during the same period. For the vast majority of Texas families, wages simply are not keeping up with the rising cost of basic necessities. In addition to food and housing, access to health care is also inaccessible for millions of Texas families. In fact, Texas has the highest uninsured rate in the United States.¹⁵ Low income Texans suffer the most: 40% of low-income adults lack health insurance compared to just 11% of high- and middle-income adults.¹⁶ The consequences of poor access to health care services for Texas families is real. Nationally, Texas has the 6th highest percentage of people with diabetes, the 3rd highest teen birth rate, and the 2nd highest percentage of households that experience hunger.^{17,18}

The combination of inequality, low wages, and unemployment has led to deep pockets of poverty throughout the state, primarily affecting families of color. One in three Latino and African American children live in poverty in Texas, compared to just one in ten non-Latino White children.¹⁹ Widespread poverty in Texas is not surprising when you consider that the state spends less than the national average on government programs for education, nutrition, and

¹² See, e.g., Max Ehrenfreund, *The Facts About Rick Perry and the 'Texas Miracle,'* WASH. POST (June 8, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/08/the-facts-about-rick-perry-and-the-texas-miracle/?utm_term=.f4f0e7ab0bda.

¹³ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, CONSUMER PRICE INDEX INFLATION CALCULATOR (2015), http://www.bls.gov/data/inflation_calculator.htm.

¹⁴ TRACY LOVELESS, U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) RECEIPT FOR HOUSEHOLDS: 2000-2013 (2015), http://www.census.gov/content/dam/Census/library/publications/2015/acs/acsbr13-08.pdf?eml=gd&utm_medium=email&utm_source=govdelivery.

¹⁵ Vivian Ho & Elena Marks, *Effects of the Affordable Care Act on Health Insurance Coverage in Texas as of March 2015*, JAMES A. BAKER INST. PUB. POL'Y, RICE UNIV. & EPISCOPAL HEALTH FOUND. (Apr. 30, 2015), http://www.episcopalhealth.org/files/7814/3040/3719/Issue_Brief_11_FINAL.pdf.

¹⁶ *Id.*

¹⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, *2014 Diabetes Atlas* (2015), <http://gis.cdc.gov/grasp/diabetes/DiabetesAtlas.html>.

¹⁸ CENTER FOR AMERICAN PROGRESS ACTION FUND, STATE OF THE STATES REPORT 2014: TEXAS (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/StateofStates-TX.pdf>.

¹⁹ *Texas: Demographics of Poor Children*, NAT'L CTR CHILD. POVERTY (2015), http://www.nccp.org/profiles/TX_profile_7.html.

health care.²⁰ Hypocritically, Texas relies heavily on the federal government for the existence of the few assistance programs available in the State. For example, Texas takes a greater proportion of federal money than California to keep Texas' minimal programs afloat.²¹

Texas has been one of the nation's strongest job-creating states, adding over 2 million new jobs between 2000 and 2013.²² Yet only thirty percent of these new jobs paid relatively high wages of at least \$26 an hour or more. The good jobs that do exist are often inaccessible to people of color in the state. Latinos, the second largest ethnic group in Texas, earn approximately half as much as the average non-Latino White worker. In 2013, the per capita income for each non-Latino White Texan was \$28,188, while the per capita income for an African American was \$19,624 and just \$15,177 for a Latino.²³ Unemployment also disproportionately impacts families of color, as Latinos are twice as likely to be unemployed compared to non-Latino Whites, and African Americans are nearly three times as likely to be unemployed.²⁴

Living wage jobs with benefits are needed for millions of Texans.

B. Texas Families Under Attack

The state's failure to invest in education, nutrition, and health care is not the only reason Texas' families are falling behind. The Texas legislature has consistently assailed policy tools that improve working conditions for Texas families and has also failed to enact commonsense policies that promote high wages and safe working conditions.

First, Texas is a "right-to-work" state. As such, the state prohibits union security clauses and allows employees to receive the benefit of collectively bargained wages and benefits without paying for the work that goes into winning them. Unsurprisingly, the first "right-to-work" campaign in the country was actually initiated in Texas in 1941 as a backlash to the wave of organizing campaigns sparked by the passage of the National Labor Relations Act six years earlier.²⁵ That campaign was led by Vance Muse, a former lobbyist for the oil industry described by his family as a "white supremacist, an anti-Semite, and a Communist-baiter who opposed women's suffrage and child labor laws."²⁶ With that culture of opposition to the rights of working

²⁰ *Total State Expenditures Per Capita*, KAISER FAM. FOUND. (2014), <http://kff.org/other/state-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-40-indicator/per-capita-state-spending/>.

²¹ *Federal Share of State Revenue*, PEW CHARITABLE TRUSTS (July 25, 2017), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/fiscal-50#ind1>.

²² MELISSA LOPALO & PIA M. ORRENIUS, FEDERAL RESERVE BANK OF DALLAS, TEXAS LEADS NATION IN CREATION OF JOBS AT ALL PAY LEVELS (2014), <https://www.dallasfed.org/assets/documents/research/swe/2014/swe1401d.pdf>.

²³ U.S. CENSUS BUREAU, PER CAPITA INCOME IN THE PAST 12 MONTHS: 2009-2013 AMERICAN COMMUNITY SURVEY 5 YEAR ESTIMATES (YEAR), <http://www.census.gov/easystats/>.

²⁴ Mary Gable & Douglas Hall, *Ongoing Joblessness in Texas*, ECON. POL'Y INST. (May 16, 2013) <http://www.epi.org/publication/ongoing-joblessness-texas-african-american/>.

²⁵ Cole Stangler, *Union Busting Republicans Lick their Lips at the Possibility of a Federal Right-to-Work Law*, THE VILLAGE VOICE (Feb. 21, 2017), <https://www.villagevoice.com/2017/02/21/union-busting-republicans-lick-their-lips-at-the-possibility-of-a-federal-right-to-work-law/>.

²⁶ *Id.*

people and collective bargaining so ingrained in Texas' past, it is understandable that in 2016 only 4% of people employed in Texas were members of labor unions.²⁷ The positive impact of unions on the wages of union members and non-union members is as well documented²⁸ as Texas' poor performance with respect to creating the conditions for wages to rise for most working Texans.²⁹

In addition to being hostile to working people's ability to raise their wages through collective bargaining, Texas also has a long history of hostility to wage increases enacted through policy. Texas did not adopt the federal minimum wage until 2001.³⁰ Before then, the Texas minimum wage was \$3.35 an hour.³¹ To make matters worse, two years later the Texas legislature explicitly prohibited local municipalities from adopting private-sector minimum wage laws.³² As a result, Texas cities are unable to raise the minimum wage over the federal minimum—this development has threatened to stymie worker movements, like the "Fight for \$15," that strive to help working people get ahead. It is no wonder, then, that Texas has become an engine for low-wage job growth.

Not only has Texas been historically hostile to the rights of working people, it is also *currently* hostile to the rights of working people. For example, during the 2017 legislative session, the Texas legislature advanced bills in the House and Senate that would have prohibited Project Labor Agreements (PLA) on public projects in the state.³³ PLAs establish base pay requirements, safety requirements, and work rules on construction job sites. The fact that these bills advanced, though ultimately failed (PLAs have never been used on a single public project in Texas), is evidence of the unbridled hostility the of state's leadership towards policy tools that improve working conditions for Texas families.

At the same time the state's leadership was moving to prohibit PLAs, they were also ignoring opportunities to enact common sense policies that promote high wages and safe working conditions. This past legislative session in Texas, the legislature failed to act on bills that would have meaningfully addressed wage theft,³⁴ improved safety conditions³⁵ for working people, and

²⁷ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, 2016 RELEASE ON UNION MEMBERS (Jan. 26, 2017), <https://www.bls.gov/news.release/pdf/union2.pdf>.

²⁸ See, e.g., Matthew Walters & Lawrence Mishel, *How Unions Help All Workers*, ECON. POL'Y INST. (Aug. 26, 2003), http://www.epi.org/publication/briefingpapers_bp143/.

²⁹ BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, CONSUMER PRICE INDEX INFLATION CALCULATOR (2015), http://www.bls.gov/data/inflation_calculator.htm.

³⁰ Don Baylor, *Getting the Facts Straight: Texas & the Minimum Wage*, CNTR PUB. POL'Y PRIORITIES (Feb. 24, 2005), http://library.cppp.org/files/2/pop_230.pdf.

³¹ *Id.*

³² *Id.*

³³ Scott Braddock, *Texas Republicans Take Aim at Union Agreements on Taxpayer-Funded Jobsites*, CONSTRUCTION CITIZEN (Apr. 12, 2017), <http://constructioncitizen.com/blog/texas-republicans-take-aim-union-agreements-taxpayer-funded-jobsites/1704121>.

³⁴ According to a study conducted in collaboration with the University of Texas, more than one in five Texas construction workers reported being denied payment for their work. WORKERS DEFENSE PROJECT, BUILD A BETTER TEXAS (Jan. 2013), http://www.workersdefense.org/Build%20a%20Better%20Texas_FINAL.pdf.

required workers' compensation coverage³⁶ for Texas construction workers. Together, these failures to act contribute to low wages and unsafe working conditions for too many working people in Texas.

III. Change Is Gonna Come

Texas is changing. Demographic changes and political changes have been bubbling in the state for decades. As those changes persist, they have led to promising creative solutions at the local level that make it easier for working families to find good safe jobs and to have a voice at work.

a. Increasing Diversity

The iconography of Texas that occupies most folks minds must be filled with vast rural expanses, cowboy hats, and small town football games. All of those images still have home in the state. But increasingly, they share that space with guayaberas, amazing Indian food, and light rail commuter trains. The face of the Texas' landscape is changing because its population is changing.

For the last several decades, a variety of forces have worked to dramatically change the demographics of Texas and the full extent of that change has not yet been realized. In the coming years, for example, Latinos are projected to emerge as the largest race or ethnic group in the state.³⁷ One reason this trend is playing out is because the largest age groups among Latinos in Texas are young--under the age of eighteen--while the largest groups of other race or ethnic groups are older.³⁸ In addition, Texas is, as a whole, becoming younger. For example, Texas is on pace to have a higher percentage of millennials than forty-six other states by the 2018 midterm elections.³⁹ That pace would also give Texas a higher percentage of millennials than any large- or medium-sized state by the same time.⁴⁰ For reference, "Texas has a higher percentage of both millennials and Latinos today than California."⁴¹

Where Texans live is also changing. Although the state is often depicted or imagined as a vast rural expanse most commonly traversed on horseback, more and more Texans actually reside

³⁵ More construction workers die in Texas than in any other state. *Id.* at ii.

³⁶ Texas is the only state in the country that neither requires workers compensation nor some form of private insurance. *Id.* at 15.

³⁷ Matt Stiles, *Texas' Looming Hispanic Shift Explained In 2 Charts*, NPR (July 8, 2013, 10:39 AM), <http://www.npr.org/sections/itsallpolitics/2013/07/03/198345561/texas-looming-hispanic-shift-explained-in-2-charts>.

³⁸ *Id.*

³⁹ Simon Rosenberg, *The GOP Should Be Worried About Texas*, U.S. NEWS & WORLD REP. (Oct. 27, 2016), <https://www.usnews.com/opinion/articles/2016-10-27/gop-should-worry-about-texas-turning-democratic>.

⁴⁰ *Id.*

⁴¹ *Id.*

in the state's cities. Texas is actually 84.7% urban, more urban than thirty-five other states.⁴² In addition, four of the country's eleven largest cities—Houston, San Antonio, Dallas, and Austin—are in Texas and account for the majority of the state's growth.⁴³

b. Political Change and Policy Progress for Working People

As Texas becomes more diverse, the politics of the state are changing and that change is resulting in positive policy experiments and developments for working families in every corner of the state.

The rapidly shifting demographics of the state have had an unmistakable impact on the political realities of the state. Approximately 28% of eligible voters in Texas are Latino. That is the second highest share of such voters of any state in the country.⁴⁴ These changes are starting to become evident at the ballot box. Republican candidates in statewide races won, on average, about 60% of the vote in 2000. They won less than 53% of the vote on average by 2008. Down-ballot Republican winners in 2008 won 51% of the vote on average.

As Texas cities grow and become more diverse, they have become beachhead for the potential seismic political shift that looms over the state. All four of Texas' largest cities have, in their own way, begun to foreshadow what may be in store for the state. For example, Dallas was once reliably Republican and is now solidly Democratic. Barack Obama won 60.1% of the vote in 2012 in Travis County, where Austin is situated. About three-fourths of the inhabitants of the San Antonio metro area are people of color and, in 2017, San Antonio elected a new mayor and city council that may prove to be the most progressive in the state.⁴⁵ In 2012, Barack Obama won Harris County, where Houston is situated, by just under 1,000 votes. In 2016, Hillary Clinton carried the county by more than 160,000 votes.⁴⁶

So far, these changes have had real impact for working people in Texas—particularly for working families in Texas cities. Although municipalities in Texas are prohibited from enacting private sector minimum wage laws, Texas cities have pushed forward to raise wages for public sector employees as well as the employees of municipal contractors, and have attached wage requirements to incentive programs. For example, the cities of Austin,⁴⁷ Dallas,⁴⁸ Houston,⁴⁹ San Antonio,⁵⁰ and others,⁵¹ have all moved to increase wages for various employees in those cities.

⁴² George Will, *If Texas Goes Blue, Republicans Are Finished*, NAT'L REV. (July 20, 2016), <http://www.nationalreview.com/article/438120/texas-republicans-demographic-change-could-finish-gop>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; Josh Baugh, *S.A. Might Have Most Progressive City Council Yet*, SAN ANTONIO EXPRESS NEWS (June 12, 2017, 9:11 PM), <http://www.expressnews.com/news/local/article/S-A-might-have-most-progressive-City-Council-yet-11214820.php>.

⁴⁶ Andrew Cockburn, *Texas is the Future - Can Democrats Reconquer the Lone Star State?*, HARPER'S MAG. (Mar. 2017), <https://harpers.org/archive/2017/03/texas-is-the-future/>.

⁴⁷ AUSTIN, TEX., RES. NO. 20150521-023, adop. May 21, 2015, <http://www.austintexas.gov/edims/document.cfm?id=231927>; AUSTIN, TEX., RES. NO. 20150618-091, adop. June 18, 2015, <http://www.austintexas.gov/edims/document.cfm?id=233993>; see also Amy Kamp,

In addition to pushing local elected officials to increase wages, working people across the state have come together to pursue creative policy solutions that lay the groundwork for good, safe jobs. In 2015, men and women working in construction in Dallas banded together with other community allies to win mandatory rest breaks for all construction workers in the city.⁵² In Austin, working people demanded that employers in the city delay running criminal background checks until an applicant is about to be offered a job and the Austin City Council adopted that measure in 2016.⁵³ Additionally, real estate interests and working people came together to create a program that allows developers to obtain building permits more quickly when they commit to requiring basic wage and safety standards in their subcontracting chain.⁵⁴

Despite Texas' historic and current hostility to rights and standards for working people, demographic and political changes in the state have created an opening for people who work to find policy solutions that help them to get ahead.

IV. The Devil We Know

In many ways, Texas is a contradiction. It is a state that was historically, and is currently, hostile to the ability of working people to improve their wages and working conditions. At the same time, Texans are a people whom persistently and creatively find solutions that allow Texas families to get ahead. There is a devil in that paradox. It menaces working people across the state, keeping too many of them in the shackles of poverty and low wage, dangerous jobs. It is also a devil the people of Texas know. It is a devil Texas families find ways to outsmart and outmaneuver. But for every working Texan that outruns the devil, there are often two or three that find themselves caught in his grasp. For those working Texans, federal protections, particularly those enshrined in the NLRA, are important tools that shield Texas families from the worst of the devil's ill intent.

Austin Extends Living Wage, AUSTIN CHRON. (Mar. 25, 2016), <https://www.austinchronicle.com/daily/news/2016-03-25/austin-extends-living-wage/>.

⁴⁸ Elizabeth Findell, *Dallas Approves \$10.37 Minimum Wage for City Contract Workers*, DALLAS MORNING NEWS (Nov. 2015), <https://www.dallasnews.com/news/dallas-city-hall/2015/11/10/dallas-approves-minimum-wage-for-city-contract-workers>.

⁴⁹ Maria Luisa Cesar, *Texas Cities Leading the Way on Living Wages*, TEXAS OBSERVER (Aug. 24, 2015), <https://www.texasobserver.org/texas-cities-leading-the-way-on-living-wages/>.

⁵⁰ KENS Staff, *San Antonio City Council Approves \$2.5B Budget, \$13.75 Minimum Wage Hike*, KHOU.COM (Sept. 16, 2016, 5:25 AM), <http://www.khou.com/news/local/texas/san-antonio-city-council-approves-25b-budget-1375-minimum-wage-hike/319332522>.

⁵¹ Bridget Spencer, *San Marcos Offers Tax Breaks in Exchange for \$15 "Minimum" Wages for Workers*, FOX 7 AUSTIN (Feb. 23, 2016, 10:33 PM), <http://www.fox7austin.com/news/local-news/95995908-story>.

⁵² Elizabeth Findell, *Dallas Will Require Rest Breaks for Construction Workers*, DALLAS MORNING NEWS (Dec. 2015), <https://www.dallasnews.com/news/dallas-city-hall/2015/12/09/dallas-will-require-rest-breaks-for-construction-workers>.

⁵³ Kylie McGivern, *Council Passes Ordinance to Delay Criminal Background Checks*, KXAN (Mar. 24, 2016, 11:28 PM), <http://kxan.com/2016/03/24/council-passes-fair-chance-hiring-ordinance-to-delay-background-checks/>.

⁵⁴ Jo Clifton, *Council OKs Rules for Expedited Permitting*, AUSTIN MON. (Mar. 3, 2017), <https://www.austinmonitor.com/stories/2017/03/council-oks-rules-for-expedited-permitting/>.

a. Outwitting the Devil in the Private Sector

Texas's status as a "right-to-work" state⁵⁵ has undoubtedly impacted the ability of working people in the to come together to demand good, safe jobs. The percentage of wage and salary workers who were union members in Texas in 2016, 4%, was the lowest percentage on record since 1986.⁵⁶ Union membership was also down from 2015 in Texas and was less than half the percentage of wage and salary workers nationally that were members of a union in 2016.

Even with the devil lurking around every corner, working people turn in Texas, people who work in the private sector in the state continue to organize. They still find the courage to come together to demand better for their families and children. In November 2015, hotel workers celebrated the end of a seven year battle with a titan of the tourism industry in San Antonio.⁵⁷ The organizing campaign, involving Hyatt Hotels, was marked by National Labor Relations Board (NLRB) and Occupational Safety and Health Administration complaints but eventually resulted in a five-year contract that included "higher wages and less demanding working conditions for housekeepers, reduced health-care costs for all employees, gratuity sharing for banquet servers, and the phasing out of sub-contracted labor...."⁵⁸ The year before, in Corpus Christi, 450 men and women working to repair and maintain helicopters participated in an NLRB election and decided to join the International Association of Machinists and Aerospace Workers.⁵⁹ More recently, registered nurses (RN) in El Paso, Texas ratified a contract with two hospitals that covers 700 RNs and "extends safe patient care standards [and] improves pay equity to retain the most experienced nurses...."⁶⁰

The NLRA has also played an important role in Texas outside the traditional collective bargaining setting. For example, for low-wage construction workers, the NLRA has proved to be an incredibly important tool for recovering stolen wages. This is because, despite efforts, the legislature has refused to pass legislation that would protect workers from retaliation when they exercise their rights to receive their lawful wage. The NLRA remains the sole tool organizations like the Workers Defense Project have to back up workers when they are fired, threatened, or blacklisted for exercising their right to be paid.

⁵⁵ TEX. GOV'T CODE ANN. § 617.004 (1993).

⁵⁶ *Union Membership in Texas – 2016*, BUREAU OF LABOR STATISTICS (2016), https://www.bls.gov/regions/southwest/news-release/unionmembership_texas.htm.

⁵⁷ Gilbert Garcia, *Downtown Hyatt Finally Resolves Long Battle with Hotel Workers*, SAN ANTONIO EXPRESS NEWS (Nov. 21, 2015), http://www.expressnews.com/news/news_columnists/gilbert_garcia/article/Downtown-Hyatts-finally-resolve-long-battle-with-6649313.php.

⁵⁸ *Id.*

⁵⁹ Press Release, *IAM Wins Organizing Drive for 450 in South Texas* (Apr. 3, 2014), <https://www.goiam.org/news/iam-wins-organizing-drive-for-450-in-south-texas/>.

⁶⁰ Press Release, *Hospitals of Providence Sierra, Memorial Campus RNs Vote by Overwhelming Majority to Ratify Contract* (Apr. 11, 2017), <http://www.nationalnursesunited.org/press/entry/hospitals-of-providence-sierra-memorial-campus-rns-vote-to-ratify-contract/>.

Despite being bedeviled by a climate of hostility towards working people, Texas families all across the state find ways to come together to improve their conditions at work.

b. Outwitting the Devil in the Public Sector

For all of the ways the devil torments working people in the private sector in Texas, he seems to save a special cruelty for people who work in the public sector. State law explicitly prohibits public sector employees from collective bargaining⁶¹ and engaging in strikes⁶² with a few notable exceptions. First, certain municipalities are statutorily permitted to authorize collective bargaining for firefighters and police officers.⁶³ Additionally, state law allows municipalities of a certain size to enter into a “mutual agreement” with an employee association regarding wages and other conditions of employment.⁶⁴ In Texas, the right of public sector employees to collectively bargain is significantly curtailed and non-existent for most of these employees.

For all the roadblocks and obstacles that impede working Texans in the public sector from coming together to fight for good, safe jobs, they continue to find a way. In the 1980s, the (CWA) and the National Association for the Advancement of Colored People (NAACP) came together to organize food service workers for a public university in East Texas. In order to stop the organizing drive, the university contracted out those positions. That maneuver left those workers in legal limbo but the organizers persisted and eventually won a collective bargaining agreement with the university.⁶⁵ Although state law does not explicitly bestow upon the public school teachers the right to collectively bargain, many school districts throughout the state have adopted “exclusive consultation” policies that allow teachers to have a voice in discussions related to employment conditions.⁶⁶ Even in this challenging legal environment, over 64,000⁶⁷ people have decided to join Texas American Federation of Teachers (Texas AFT) and thousands more have joined Texas’ National Education Association (NEA) affiliate, the Texas State Teachers Association.

Texas law governing collective bargaining in the public sector is restrictive and non-existent for most public sector employees. But Texans working in that sector have found holes and openings through which to outwit the devil.

c. The Benefit of the Law

Many working Texans have learned to maneuver through the challenging legal environment to collectively have a voice on the job. But still, all too often, working people in Texas get caught in

⁶¹ TEX. GOV’T CODE ANN. § 617.002 (1993).

⁶² TEX. GOV’T CODE ANN. § 617.003 (1993).

⁶³ TEX. LOC. GOV’T CODE ANN. § 173.023 (1993).

⁶⁴ TEX. LOC. GOV’T CODE ANN. § 146.003 (1993).

⁶⁵ Chris Brooks, *After Nissan: Can We Organize the South?*, LABOR NOTES (Sept. 1, 2017), <http://www.labornotes.org/2017/09/after-nissan-can-we-organize-south>.

⁶⁶ See, e.g., Roseana Auten, *Teachers Eye Union Label*, AUSTIN CHRON. (Feb. 28, 1997).

⁶⁷ TEXAS AFT, <http://www.texasaft.org/about-us/faqs-texas-aft/>.

the clutches of the Texas devil that is hostility towards working families. For those working families, federal labor law, particularly the NLRA, provides a final veil of protection against the harsh winds that can level working people in the state.

It is not difficult to find examples. There are the seven union members in Grand Prairie who were unlawfully discharged in violation of the NLRA. Because of those protections, five of those union members will be reinstated and all seven will receive just over \$200,000 in back pay.⁶⁸ There are the over 600 working men and women in Austin who were unlawfully denied benefits to which they were entitled. Because of the NLRA, those workers will receive \$655,000 as compensation.⁶⁹ And there is the employer who adopted unlawful employment policies that infringed on the rights of their employees to engage in protected concerted activity. As a result of the NLRA, that employer is rescinding those policies. These examples only scratch the surface of the kinds of abuses workers face on a daily basis in the state and are only a handful that were remedied because of existing labor law protections.

In Texas, there is a devil lurking in too many workplaces. He shows his face when working people are shackled to low wage jobs, denied benefits, and forced to toil in unsafe working conditions. But Texans are a resilient bunch. They have come to know this devil and learned to outwork and outsmart him. That can only happen when there is a failsafe to remedy the worst of the devil's ill-gotten gains--things like unlawfully stolen employment, benefits, and wages.

V. The Devil We Do Not Know

In a state where working people have hit rock bottom, it is sometime hard to imagine it getting any worse. Unfortunately, there is actually substantial evidence that gives insight into what "worse" could look like in the state of Texas. If the NLRA's preemption regime is relaxed, the consequences for Texas workers could be severe. In the recent past, a lurch to the right on the federal level regarding immigration policy has negatively impacted the state's own approach to immigration policy making. Legislative proposals put forth in recent legislative sessions related to the rights of working people are also insightful when considering what an unrestrained Texas—that is, a Texas operating under a relaxed NLRA preemption regime—could look like. The potential reality for working families is scarier still when the proposals of the state's most extreme voices are considered. When considered cumulatively, there is much to fear for working Texas families about the devil they do not know.

Prior to the rise in political power of the Tea Party in Texas, policy makers in the state had taken relatively moderate stances on immigration issues. For example, in 2001, Texas enacted a law

⁶⁸ Press Release, *Triumph Aerostructures, LLC Agrees to Reinstate 5 Employees and Pay \$204,665 in Back Pay and Lost Benefits*, NATIONAL LABOR RELATIONS BOARD (Feb. 3, 2015), <https://www.nlr.gov/news-outreach/news-story/triumph-aerostructures-llc-agrees-reinstate-5-employees-and-pay-204665-back>.

⁶⁹ Press Release, *Travis Transit Agrees to Pay Employees \$655,000 in Lost Benefits*, NATIONAL LABOR RELATIONS BOARD (Nov. 17, 2004), <https://www.nlr.gov/news-outreach/news-story/travis-transit-agrees-pay-employees-655000-lost-benefit>.

that permitted undocumented students to pay in-state tuition if they met certain requirements.⁷⁰ Even after Tea Party forces became fully entrenched in the state, most of the worst policies never made it to the Governor's desk.⁷¹ During the presidential campaign in 2016,⁷² and after the election of President Trump, the national policy debate around immigration took a decidedly hostile turn.⁷³ The results in Texas for working families have been harrowing. Following the winds blowing at the national level, Texas legislators, encouraged by the Governor, enacted a draconian law that would have commandeered local law enforcement as immigration officials and led to rampant racial profiling for people of color.⁷⁴ The constitutionality of this law is currently being challenged in the courts,⁷⁵ but its passage should be instructive when thinking about the relationship between policy shifts at the federal level and policy outcomes at the state level in Texas.

There were a battery of policies proposed during the most recent legislative session that were harmful to working people. A review of those policies introduced by lawmakers in Texas may give us a peek into the future of a Texas unbound by basic legal protections for working people. For instance, the state legislature advanced a bill that would prohibit the automatic collection of dues for working people in the public sector who decided to join unions.⁷⁶ Although the bill ultimately failed, it passed the Texas Senate⁷⁷ and was reintroduced during a special session.⁷⁸ As discussed above, the Texas legislature also considered legislation that would have prohibited PLA agreements on public projects in the state although PLAs have never been used on public projects in Texas.⁷⁹ Additionally, the legislature and the Governor took aim at a local

⁷⁰ Alana Rocha, *Dreamers Grateful Efforts to Repeal In-state Tuition Benefit Never Materialized*, TEXAS TRIB. (July 12, 2017, 12:00 AM), <https://www.texastribune.org/2017/07/12/dreamers-grateful-efforts-repeal-state-tuition-benefit-never-material/>.

⁷¹ *Id.*

⁷² Tal Kopan, *What Donald Trump Has Said About Mexico and Vice Versa*, CNN (Aug. 31, 2016, 10:20 PM), <http://www.cnn.com/2016/08/31/politics/donald-trump-mexico-statements/index.html>.

⁷³ Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?mcubz=0>.

⁷⁴ Priscilla Alvarez, *Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?*, THE ATLANTIC (June 6, 2017), <https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/>.

⁷⁵ Julian Aguilar, *Federal Judge Temporarily Blocks Implementation of 'Sanctuary Cities' Law*, TEXAS TRIB. (Aug. 30, 2017, 8:04 PM), <http://www.star-telegram.com/news/politics-government/state-politics/article170363317.html>.

⁷⁶ Cassandra Pollock, *Texas Senate Backs Bill that Would End Most Union Payroll Deductions*, TEXAS TRIB. (Mar. 29, 2017, 5:00 PM), <https://www.texastribune.org/2017/03/29/texas-senate-approves-union-dues-deduction-bill-party-line-vote/>.

⁷⁷ *Id.*

⁷⁸ Cassandra Pollock, *Texas Senate Passes Bill Targeting Public Employee Union Dues*, TEXAS TRIB. (July 25, 2017), <https://www.texastribune.org/2017/07/25/texas-senate-passes-union-dues-bill/>.

⁷⁹ Scott Braddick, *Texas Republicans Take Aim at Union Agreements on Taxpayer-Funded Jobsites*, CONSTRUCTION CITIZEN (Apr. 12, 2017), <http://constructioncitizen.com/blog/texas-republicans-take-aim-union-agreements-taxpayer-funded-jobsites/1704121>.

Austin policy that allows construction projects that include higher wages and safety standards to access an expedited permitting process.⁸⁰

In addition to examining legislation introduced by lawmakers, it is also instructive to examine statements from the state's lawmakers and proposals from some of the most extreme voices in Texas. It is worth noting that Texas Governor Greg Abbott recently suggested that the state should prohibit Texas cities from regulating generally.⁸¹ Such a maneuver, though obviously unrelated to the NLRA, is indicative of the kind of actions Texas could prioritize to wipe out any positive gains working people could make in Texas cities under a relaxed preemption regime.

Other, more extreme actors in the state also give a glimpse into the Texas for which they would advocate if the pesky NLRA was out of their hair. The Texas Public Policy Foundation, an influential, conservative, non-profit organization funded by Koch Brothers and other corporate interests⁸² has barely attempted to conceal its contempt for the NLRA. In a 2015 policy paper, the organization boasts that "[s]tate elected officials have substantially more capacity to rein in union excesses in the public sector than they do in the private sector," and laments that "state elected officials' ability to protect business employees and owners from the type of top-down union organizing campaigns that have targeted Texas janitorial, health care, and other employees in recent years is somewhat limited" because of NLRA protections.⁸³

Collectively, this evidence paints a dark picture of the Texas working families would face if the state ever listened to the council of the devil sitting on its shoulder and whispering in its ear. If the preemption regime of the NLRA was relaxed, there would be nothing to prevent that reality.

VI. Conclusion - Foresters in the Thicket of the Law

Texas has failed working families in the state. Low wages, non-existent benefits, and severe inequality and poverty are now stable features of the state's economy. Working Texans are in this predicament because the state has failed to invest in education, nutrition, and health care *and* because of Texas' legal and cultural hostility to the rights of working people.

There is, though, a path forward. The changing demographics and politics of the state have created an opening for working Texas families to win by organizing, particularly in the state's cities. This approach has already paid dividends—working people across the state have

⁸⁰ Andy Duehren, *Lawmakers to Target Austin's Worker Protections on Construction Projects*, TEXAS TRIB. (July 19, 2017, 12:00 AM), <https://www.texastribune.org/2017/07/19/special-session-lawmakers-target-austin-workers-protectoins/>.

⁸¹ Patrick Svitek, *Abbott Wants "Broad-based Law" that Pre-empts Local Regulations*, TEXAS TRIB. (Mar. 21, 2007, 12:00 PM), <https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/>.

⁸² Forrest Wilder, *Revealed: The Corporations and Billionaires that Fund the Texas Public Policy Foundation*, TEXAS OBSERVER (Aug. 24, 2012), <https://www.texasobserver.org/revealed-the-corporations-and-billionaires-that-fund-the-texas-public-policy-foundation/>.

⁸³ Stanley Greer, *State Labor-Management Policy and the Texas Model*, TEXAS PUB. POL'Y FOUND. (Feb. 2015), <https://www.texaspolicy.com/library/doclib/2015-02-RR03-CEF-StateLaborMgmtPolicy-SGreer-jag02242015.pdf>.

become foresters in the thicket of Texas labor law and have forged creative solutions at the local level that foster more good, safe jobs. They have been able to do that, in part, because of the protections of the NLRA. Allowing Texas more latitude to legislate in the area of labor law would almost assuredly put more Texas families in peril. Any legislative change to the NLRA that would eviscerate the NLRA as a floor, or baseline, for working people's right to come together to improve their working conditions free from retaliation would have devastating implications for average Texans.