# Expanding Employee Ownership in America: A Proposal for a National Equity Compensation Mandate

TYLER ROSS*

*Individual and household wealth is most often derived from three sources: real property, human capital, and productive capital. The modern economy has developed financial tools, such as mortgages and student loans, to help individuals accrue real property and human capital, but there is no meaningful way for the working class to accrue ownership of productive capital. And, so long as the growth rate of capital exceeds the growth rate of wages, wealth inequality in the United States and elsewhere will continue to grow. This Note explores existing methods to extend capital ownership to the working class, such as Employee Stock Ownership Plans, and proposes a federal, national, mandatory equity minimum wage as an effective solution to three problems in our modern economy. Specifically, (i) employees do not benefit when the companies for which they work are tremendously profitable and provide outsized returns to investors; (ii) wealth inequality is worsening and will continue to do so; and (iii) there is a savings deficit among nearly one-half of American households. This Note explains how a mandatory equity minimum wage will help ameliorate these three problems by meaningfully extending ownership of productive capital to the working class.*

* Editor-in-Chief, Colum. J.L. & Soc. Probs., 2021–2022. J.D. Candidate 2022, Columbia Law School. The author thanks his Note Advisor, Professor Jed Purdy, for his guidance and feedback; his mother, Christina, for always pushing him to write better; and Nia Yancopoulos for her perpetual encouragement throughout this process. The author is also incredibly appreciative of the Staff and Editorial Board of the *Columbia Journal of Law & Social Problems* for all of their hard work and helpful comments.

## INTRODUCTION

Wealth and income inequality in the United States are at all-time highs—and worse than the infamous Gilded Era of the 1920s.[1] The wealthiest one percent of Americans own nearly one-third of the wealth in the country.[2] The bottom 50 percent, by contrast, have just 1.8 percent of the wealth.[3] Three Americans alone—Jeff Bezos, Bill Gates, and Warren Buffet—have more wealth than the bottom 50 percent of Americans combined.[4] The top 10 percent of income earners make over nine times that of the bottom 90 percent.[5] Wealth and income inequality aren't just economic problems; they are legal and social problems. Economic inequality is, in part, a function of the tax code and the way it privileges investment income over labor income.[6] The existence of the working poor is also, in part, a function of having a federal minimum wage so low that full-time workers live essentially at the poverty line.[7]

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1. *See, e.g.*, Tom Wheeler, *Who Makes the Rules in the New Gilded Age?*, BROOKINGS (Dec. 12, 2018), https://www.brookings.edu/research/who-makes-the-rules-in-the-new-gilded-age/ [https://perma.cc/E6NJ-GF89] ("At the height of the first Gilded Age, the top decile commanded more than 45 percent of the gross income in the United States. Today, the top decile of earners commands more than 50 percent of income.").

2. *Distribution of Household Wealth in the U.S. Since 1989*, BD. GOVERNORS FED. RESERVE SYS. (Oct. 1, 2021), https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:119;series:Net%20worth;demographic:networth;population:1,3,5,7;units:shares;range:2005.2,2020.2 [perma.cc/3W77-89PC].

3. *Id.*

4. Tom Kertscher, *Bernie Sanders: Bill Gates, Jeff Bezos, Warren Buffett Have More Wealth Than Bottom Half of U.S.*, POLITIFACT (July 19, 2018), https://www.politifact.com/factchecks/2018/jul/19/bernie-s/bernie-sanders-bill-gates-jeff-bezos-warren-buffet/ [https://perma.cc/MYJ4-ZC7F] (rated 'true', by the PolitiFact Truth-o-Meter™).

5. *Income Inequality*, INEQUALITY.ORG, https://inequality.org/facts/income-inequality/#income-inequality [https://perma.cc/6PPH-ZHK7] (finding that the top 0.1 percent earn 196 times more than the average member of the bottom 90 percent).

6. *See* Chuck Marr, Samantha Jacoby, & Kathleen Bryant, *Substantial Income of Wealthy Households Escapes Annual Taxation or Enjoys Special Tax Breaks*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 13, 2019), https://www.cbpp.org/research/federal-tax/substantial-income-of-wealthy-households-escapes-annual-taxation-or-enjoys [https://perma.cc/MUD8-2TEJ] ("To understand how the tax code taxes income from wealth more lightly than income from work, one must first distinguish between *labor* income (such as wages, salaries, and employer-provided benefits), which flows from work, and *capital* income (such as dividends, interest, rental income, and capital gains), which flows from ownership of assets.") (emphasis in original).

7. *See* David Cooper, *The Minimum Wage Used To Be Enough To Keep Workers Out Of Poverty—It's Not Anymore*, ECON POL'Y INST. (Dec. 4, 2013), https://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/ [https://perma.cc/2JRT-W9AX] ("As President Obama and others have noted, a parent who works full-time, year round at the federal minimum wage does not earn an income above the federal poverty line.").

These legal and social problems demand legal and social solutions. This Note proposes a mandatory, federal *equity* minimum wage to complement the federal minimum wage. Under the proposal, essentially all workers would earn equity—a capital stake—in the companies they work for. This proposal is designed to address three systemic problems in our economy: (i) that employees do not benefit when the companies they work for are tremendously profitable and provide outsized returns to investors; (ii) that wealth inequality is worsening and will continue to do so; and, (iii) that there is a savings deficit among nearly one-half of American households. This Note demonstrates how a mandatory equity wage, on top of cash wages, would work to ameliorate these three problems.

## A. MOTIVATING PROBLEMS

This Note is motivated by three problems in our economy that either contribute to, or are the result of, economic precarity and insecurity for working-class and working-poor Americans. The first I refer to as the "Amazon Problem" because Amazon is the paradigmatic example of a company that has generated tremendous wealth for its shareholders while its employees struggle financially.[8] The second I refer to as the "*Capital in the Twenty-First Century* Problem" in recognition of Thomas Piketty's popularization of the simple inequality, r > g, as the root cause of worsening wealth inequality across most developed economies—where 'r' stands for the growth rate of capital (i.e., money made from money) and 'g' stands for the growth rate of the economy.[9] The third I refer to as the "$400 Problem" after the Federal Reserve's annual survey on the "Economic Well-Being of U.S. Households," which has consistently found that around 40 to 50 percent of U.S. households report they would be unable to afford an unexpected $400 expense without going into debt, selling an asset, or simply not paying.[10]

8. For example, Amazon CEO and founder, Jeff Bezos, is often the richest person in the world. *See, e.g.*, Kerry A. Dolan, Jennifer Wang, & Chase Peterson-Withorn, *Forbes World Billionaire's List: The Richest in 2021* (2021), https://www.forbes.com/billionaires/ [https://perma.cc/FP9B-UREB].

9. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 25–27 (Arthur Goldhammer trans., Belknap Press Harvard Univ., 2014).

10. *Report on the Economic Well-Being of U.S. Households in 2018: Dealing with Unexpected Expenses*, BD. GOVERNORS FED. RSRV. SYS. (May 28, 2019),

### 1. *The Amazon Problem*

The Amazon Problem extends beyond Amazon employees; it affects employees of the many companies that have generated enormous wealth for corporate executives and shareholders, but who have shared in little—if any—of that gain or benefit themselves.[11] Amazon is used here as an illustrative example due to its atmospheric share price and the wealth it has generated for its shareholders while its employees toil in sweltering warehouses at risk of catching the coronavirus.[12]

For example, consider an Amazon warehouse worker responsible for packing boxes (a "packer") at one of Amazon's facilities five years ago, in October 2015, when Amazon was already the largest online retailer in the United States.[13] At the time, the average warehouse worker earned around $12 per hour.[14] Today, the typical packer salary is $16 per hour.[15] This change amounts to a 33 percent increase, or approximately 6.7 percent annual growth. By most standards, this is impressive wage

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https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm [https://perma.cc/FNU8-2AYH].

11. Much of this wealth generation has been in the form of dividends and share-price inflation through stock buybacks. *See, e.g.*, William Lazonick, *Profits Without Prosperity*, HARV. BUS. REV. (Sept. 2014), https://hbr.org/2014/09/profits-without-prosperity [https://perma.cc/5JH2-NSVU].

12. Shirin Ghaffary & Jason Del Ray, *The Real Cost of Amazon*, VOX (Jun. 29, 2020), https://www.vox.com/recode/2020/6/29/21303643/amazon-coronavirus-warehouse-workers-protest-jeff-bezos-chris-smalls-boycott-pandemic [https://perma.cc/R2LN-DRM4]. Amazon, moreover, is one of the largest employers in the United States and, due to its monopsony power in some local labor markets, can effectively unilaterally dictate wages and working conditions. *See, e.g.*, Julian Robinson, *Amazon: Monopoly or Monopsony?*, BULL & BEAR (Jan. 31, 2021), https://bullandbearmcgill.com/amazon-monopoly-or-monopsony/ [https://perma.cc/XN5M-5PJJ]; *see also Amazon's $15 minimum wage is welcome*, ECONOMIST (Oct. 4, 2018) (observing "[o]verall . . . monopsony exercises a downward pressure on wages that exacerbates income inequality"), https://www.economist.com/united-states/2018/10/04/amazons-15-minimum-wage-is-welcome [https://perma.cc/67ZZ-LP4T].

13. Benjamin E. Sawe, *The Largest Online Retailers of the United States*, WORLDATLAS (Sept. 21, 2017), https://www.worldatlas.com/articles/the-largest-online-retailers-of-the-united-states.html [https://perma.cc/3K8Y3FF4].

14. Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes*, THE VERGE (Mar. 26, 2015, 11:44 AM), https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts [https://perma.cc/N95P-RQ3F].

15. *Amazon Packer Salaries*, GLASSDOOR, https://www.glassdoor.com/Hourly-Pay/Amazon-Packer-Hourly-Pay-E6036_D_KO7,13.htm [https://perma.cc/8JPX-CDAM]; *c.f., Average Packer Hourly Pay at Amazon.com Inc*, PAYSCALE, https://www.payscale.com/research/US/Job=Packer/Hourly_Rate/05a97ffc/Amazon.com-Inc [https://perma.cc/K69D-U62Y] (reporting an average wage of $14.90 per hour).

growth.[16] When compared to Amazon's share price growth over the same period, however, it's dismal.

Amazon's shareholders have seen their wealth increase nearly fourfold over five years, while the average employee has seen her wages increase by about one-third.[17] Five years ago, on November 11, 2016, Amazon closed at a share price of $739.01.[18] As of November 11, 2021, a single share of Amazon was worth $3,472.50.[19] In other words, the share price was up 370 percent, growing about 74 percent annually on average. In neoclassical economic theory—the dominant strain of economic theory—wages ('w') are expected to grow at the same rate as labor productivity, which defines the growth rate of the economy ('g').[20] Although wages and productivity have been disconnected for approximately four decades,[21] taking the growth rate of wages (approximately 0.067 in the case of Amazon workers) as a substitute for 'g' yields the following the inequality:

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16. *Nominal Wage Tracker*, ECON. POL'Y INST. (Jan. 8, 2021), https://www.epi.org/nominal-wage-tracker/ [https://perma.cc/F2LC-JHCG] (showing average nominal wage growth was around two percent for most of the period between 2010 and 2020).

17. Approximately 64 percent of Amazon's warehouse staff are line-level "laborers and helpers" according to a report Amazon filed with Equal Employment Opportunity Commission in 2018. *See* Jodi Kantor, Karen Weise, & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html [https://perma.cc/F3VQ-TRBS] (citing Amazon's 2018 report to the U.S. Equal Employment Opportunity Commission).

18. *Amazon.com, Inc. (AMZN)*, YAHOO! FIN., https://finance.yahoo.com/quote/AMZN/history?period1=1478822400&period2=1478908800&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true [https://perma.cc/9Q5Q-MV8X] (data for November 11, 2016).

19. *Amazon.com, Inc. (AMZN)*, YAHOO! FIN., https://finance.yahoo.com/quote/AMZN/history?period1=1636588800&period2=1636675200&interval=1d&filter=history&frequency=1d&includeAdjustedClose=true [https://perma.cc/5H23-KTH2] (data for November 11, 2021).

20. *See* Greg Mankiw, *How are wages and productivity related?*, GREG MANKIW'S BLOG: RANDOM OBSERVATIONS FOR STUDENTS OF ECON. (Aug. 29, 2006), http://gregmankiw.blogspot.com/2006/08/how-are-wages-and-productivity-related.html [https://perma.cc/Z9G7-AG2D] ("Economic theory says that the wage a worker earns, measured in units of output, equals the amount of output the worker can produce."); Steven A. Greenlaw & Timothy Taylor, *Principles of Economics: Labor Productivity and Economic Growth*, OPENSTAX (Mar. 19, 2017), https://openstax.org/books/principles-economics/pages/20-2-labor-productivity-and-economic-growth [https://perma.cc/S9B7-BVVG] ("An economy's rate of productivity growth is closely linked to the growth rate of its GDP per capita.").

21. *The Productivity–Pay Gap*, ECON. POL'Y INST. (Aug. 2021), https://www.epi.org/productivity-pay-gap/ [https://perma.cc/DCG2-3YX4].

$$(r = .74) > (g = 0.067).$$

That is, for Amazon, the growth rate of capital has exceeded the growth rate of wages elevenfold.

2. *The* Capital in the Twenty-First Century *Problem*

Although one could cherry-pick additional examples of companies like Amazon, whose share prices have outperformed the market, the Amazon Problem is nevertheless reflected in the economy as a whole. That is, the overall returns to capital exceed the growth rate of wages across the American workforce. This is the *Capital in the Twenty-First Century* Problem.

According to the Bureau of Labor Statistics, the average hourly wage of production and nonsupervisory employees was $21.71 in October 2016 and rose to $26.31 in October 2021.[22] In other words, for the typical worker, wages grew 21 percent over five years, or about 4.2 percent annually.

The Vanguard Total Stock Market Index (VTI) is an exchanged-traded, indexed mutual fund that reflects the share prices of 3,566 publicly-traded companies and tracks the Center for Research in

22. *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)*, U.S. BUREAU OF LAB. STAT., https://data.bls.gov/timeseries/CES0500000008 [https://perma.cc/3VVQ-GYPK]. Nonsupervisory and production employees constitute approximately 70 percent of the total non-farm workforce. *See Production and Nonsupervisory Employees, Total Private & All Employees, Total Nonfarm*, FRED ECON. RSCH. (Jan. 27, 2022), https://fred.stlouisfed.org/graph/?g=LiEE [https://perma.cc/LR32-SUCG] ("Production and related employees include working supervisors and all nonsupervisory employees (including group leaders and trainees) engaged in fabricating, processing, assembling, inspecting, receiving, storing, handling, packing, warehousing, shipping, trucking, hauling, maintenance, repair, janitorial, guard services, product development, auxiliary production for plant's own use (for example, power plant), recordkeeping, and other services closely associated with the above production operations. . . . Nonsupervisory employees include those individuals in private, service-providing industries who are not above the working-supervisor level. This group includes individuals such as office and clerical workers, repairers, salespersons, operators, drivers, physicians, lawyers, accountants, nurses, social workers, research aides, teachers, drafters, photographers, beauticians, musicians, restaurant workers, custodial workers, attendants, line installers and repairers, laborers, janitors, guards, and other employees at similar occupational levels whose services are closely associated with those of the employees listed. . . . All Employees: Total Nonfarm, commonly known as Total Nonfarm Payroll, is a measure of the number of U.S. workers in the economy that excludes proprietors, private household employees, unpaid volunteers, farm employees, and the unincorporated self-employed. This measure accounts for approximately 80 percent of the workers who contribute to Gross Domestic Product (GDP).").

Security Prices' U.S. Total Stock Market Index.[23] On November 10, 2016, VTI closed at a share price of $111.41.[24] On November 9, 2021, VTI closed at a share price of $242.00.[25] In other words, one can fairly say that the overall stock market grew about 117.2 percent over five years, or about 23.4 percent annually.

Again, using the nominal growth rate of wages as a substitute for 'g' and taking the nominal growth rate of the stock market as 'r' (quite literally the growth rate of capital) and plugging these numbers into Piketty's inequality yields:

$$(r = 0.234) > (g = 0.042)$$

That is, the returns to capital were 5.5 times greater than the growth of nonsupervisory production wages. It is, of course, no surprise then that those who make their money from money have continued to put distance (economically and politically) between themselves and the working class. Their interests are not even remotely aligned.

More generally, Piketty found that 'r' exceeds 'g' across most developed economies.[26] The 'r > g' inequality means wealth grows faster than incomes, leading to widening and ever-worsening wealth inequality.[27] Or, "Since r is usually larger than g, the wealthy get wealthier. The poor don't necessarily get poorer, but the gap between the earnings power of people who own lots of buildings and shares and the earnings power of people working for a living will grow and grow."[28] More importantly for this Note, the inequality means that capital income grows faster than labor income. And it suggests a solution: expanding capital ownership in America will distribute capital incomes across a wider (ideally, universal) swath of the population. In particular, share price growth, on average, exceeds the average returns to capital, which

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23. *Vanguard Total Stock Market ETF (VTI)*, VANGUARD, https://investor.vanguard.com/etf/profile/VTI [https://perma.cc/YXP9-U4UG]; *see also CRSP U.S. Total Market Index*, CTR. FOR RSCH. IN SEC. PRICES, http://www.crsp.org /products/investment-products/crsp-us-total-market-index [https://perma.cc/5K7A-6S7A].

24. *Vanguard Total Stock Market Index Fund ETF*, GOOGLE FIN., https:// www.google.com/finance/quote/VTI:NYSEARCA [https://perma.cc/X3NQ-SHMG].

25. *Id.*

26. PIKETTY, *supra* note 9, at 571–73.

27. *Id.* at 571.

28. Matthew Yglesias, *The Short Guide to Capital in the 21st Century*, VOX (Apr. 8, 2014), https://www.vox.com/2014/4/8/5592198/the-short-guide-to-capital-in-the-21st-century [https://perma.cc/QXP8VN7B].

Piketty found to be around five percent annually.[29] Thus, expanding employee stock ownership looks to be a particularly effective way to address wealth inequality.[30]

### 3. *The $400 Problem*

Finally, a most pressing indicator of widespread economic precarity is that roughly four out of every ten American households report they would be unable to afford a surprise $400 expense without taking on debt, borrowing from a friend or relative, selling something, or simply not paying for the expense at all.[31] This statistic alone is concerning, and it's also reflective of broader problems within the American economy. Over 45 percent of households have credit card debt, with an average balance of $5,315.[32] The bottom half of Americans by assets have, collectively, a negative net worth, and one-fifth of Americans have no savings whatsoever.[33]

Moreover, the above-cited statistics all pre-date the damage the coronavirus pandemic wreaked on the American economy. At the height of the pandemic, a majority of households with incomes below $100,000 reported facing "serious financial problems" during the ongoing coronavirus pandemic—with issues ranging from depleting their savings to serious problems paying rent.[34] The economic impact of the coronavirus pandemic underscores, now more than ever, the importance of wealth generation and building long-term savings.

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29. PIKETTY, *supra* note 9, at 572.

30. Piketty, for his part proposes a progressive tax on wealth as the solution to the r > g inequality. *See id.* at 572–73. The merits (or demerits) of a tax on wealth are beyond the scope of this Note.

31. *See* BD. GOVERNORS FED. RSRV. SYS, *supra* note 10.

32. Joe Resendiz, *Average Credit Card Debt in America: 2021*, VALUEPENGUIN (Feb. 11, 2021), https://www.valuepenguin.com/average-credit-card-debt [https://perma.cc/P7LY-HV6H].

33. Ben Steverman, *The Wealth Detective Who Finds the Hidden Money of the Super Rich*, BLOOMBERG BUSINESSWEEK (May 23, 2019), https://www.bloomberg.com/news/features/2019-05-23/the-wealth-detective-who-finds-the-hidden-money-of-the-super-rich [https://perma.cc/CTK3-W8P7] (noting that the bottom half of Americans by assets have, collectively, a negative net worth); Gina Heeb, *A Fifth of Americans Say They Have Zero Savings*, BUS. INSIDER (Mar. 14, 2019), https://markets.businessinsider.com/news/stocks/americans-with-zero-savings-at-20-2019-3-1028029171 [https://perma.cc/3ST2-XA74].

34. THE IMPACT OF THE CORONAVIRUS ON HOUSEHOLDS IN MAJOR U.S. CITIES, NPR (Sept. 2020), https://media.npr.org/assets/img/2020/09/08/cities-report-090920-final.pdf [https://perma.cc/36U7-9PRA].

Although the real economy is still recovering from the pandemic, the Wall Street economy is thriving. Corporate titans such as Amazon, Google, and Netflix have seen their share prices hit record highs in the months since March 2020.[35] Even the stock market as a whole has effectively returned to its pre-pandemic record high.[36]

### B. CAPITAL OWNERSHIP IN THE UNITED STATES

The idea of expanding capital ownership to the laboring class is far from novel in the United States. Its origins extend back to the writings and policies of the Founding Fathers.[37] Observers, scholars, and policymakers have proposed democratizing capital ownership as the solution to income inequality, wealth inequality, and "wage slavery" throughout the 1800s and 1900s.[38] Employee ownership of productive capital grew dramatically in the last several decades with the invention—and legislative incentivization—of Employee Stock Ownership Plans (ESOPs).[39] Today, it is estimated that over 10,000 corporations, including around 1,000 of the nearly 5,000 publicly-traded companies on U.S. exchanges, have some form of ESOP, profit-sharing, or employee stock purchase program.[40] Perhaps surprisingly, surveys reveal that approximately 47 percent of private-sector, full-time wage and salary workers have some form of capital stake in the firms for

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35. Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html [perma.cc/7AY3-DD6N].

36. Gunjan Banerji, *Why Did Stock Markets Rebound From Covid in Record Time? Here Are Five Reasons*, WALL ST. J. (Sep. 15, 2020), https://www.wsj.com/articles/why-did-stock-markets-rebound-from-covid-in-record-time-here-are-five-reasons-11600182704 [https://perma.cc/N73C-H8JV]. In the scheme of this Note's proposal, if an employee had company equity going into the coronavirus pandemic, she may have had to sell some of it during the March-April slump (maybe even at a loss relative to the value at which she earned it in exchange for her labor), but the remainder would have recovered fully.

37. *See* JOSEPH R. BLASI, RICHARD B. FREEMAN & DOUGLAS KRUSE, THE CITIZEN'S SHARE: PUTTING OWNERSHIP BACK INTO DEMOCRACY 2–7 (2013) (describing an Act of the First Congress predicating federal support for northeastern fisheries on workers' entitlement to profit sharing).

38. *See id.* at ch. 4.

39. *See* JOHN LOGUE & JACQUELYN YATES, THE REAL WORLD OF EMPLOYEE OWNERSHIP 1 (2001); *The Origin and History of the ESOP and Its Future Role as a Business Succession Tool*, THE MENKE GROUP , https://www.menke.com/esop-archives/the-origin-and-history-of-the-esop-and-its-future-role-as-a-business-succession-tool/ [https://perma.cc/NN5P-HFK8].

40. *Employee Ownership by the Numbers*, NAT'L CTR. FOR EMP. OWNERSHIP (Mar. 2021), https://www.nceo.org/articles/employee-ownership-by-the-numbers#1 [https://perma.cc/3AX9-BY3N]; BLASI ET AL., *supra* note 37, at 93.

which they work.[41] The evidence that broad-based equity compensation and profit-sharing programs reduce employee turnover, improve productivity, and contribute to greater take-home pay and long-term wealth is overwhelming and largely undisputed.[42]

Although some firms have voluntarily taken it upon themselves to provide broad-based equity compensation to their employees, there have always been firms that have compensated employees with fair and above-market wages, even in the absence of a federal mandate to provide a minimum wage.[43] Today, more is needed. *All* employers must compensate *all* of their employees with equity to combat wealth and income inequality.

## I. WHY COMPENSATE WITH EQUITY?

Before describing the proposal in Part II, this Part explains why equity compensation is appealing. First, equity itself has several attractive characteristics: equity in publicly-traded companies is highly-liquid; it grows in value, on average, at rates in excess of the growth rate of cash savings (i.e., annual percentage yields on checking and savings accounts or certificates of deposit). And, from a behavioral economics perspective, equity is more likely to be regarded as an asset than cash, which increases the marginal propensity to save for those who can afford to do so.[44] Second, equity can align employee incentives with that of the firm.[45] Equity is already the primary form of compensation for most CEOs and many C-suite executives[46] because equity supposedly aligns

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41. BLASI ET AL., *supra* note 37, at 112.

42. *See* FIDAN ANA KURTULUS & DOUGLAS L. KRUSE, HOW DID EMPLOYEE OWNERSHIP FIRMS WEATHER THE LAST TWO RECESSIONS?: EMPLOYEE OWNERSHIP, EMPLOYMENT STABILITY, AND FIRM SURVIVAL: 1999-2011 7–23 (2017) (summarizing empirical literature on the performance of employee-owned firms and on employee outcomes); Corey Rosen, John Case & Martin Staubus, *Every Employee an Owner. Really.*, HARV. BUS. REV. (June 2005), https://hbr.org/2005/06/every-employee-an-owner-really [https://perma.cc/669B-FWAB].

43. Consider, for example, Ford Motor Co.'s groundbreaking introduction of a $5.00 daily wage in 1914 (about $130 per day, adjusted for inflation, or about $16.25 per hour). Matt Anderson, *Ford's Five-Dollar Day*, HENRY FORD (Jan. 3, 2014), https://www.thehenryford.org/explore/blog/fords-five-dollar-day/ [https://perma.cc/J3VX-ZKUG].

44. *See generally* Professor Thaler's scholarship cited *infra* note 58.

45. ADRIAN WILKINSON ET AL., THE OXFORD HANDBOOK OF PARTICIPATION IN ORGANIZATIONS 354-56 (2010).

46. Lawrence Mishel & Jori Kandra, *CEO Compensation Surged 14% in 2019 to $21.3 Million*, ECON. POL'Y INST. (Aug. 18, 2020), https://www.epi.org/publication/ceo-compensation-surged-14-in-2019-to-21-3-million-ceos-now-earn-320-times-as-much-as-a-typical-worker/ [https://perma.cc/B4A7-TQJT].

the executives' incentives with those of their firms. Evidence from employee-owned firms suggest there is reason to believe equity compensation would also align incentives even for lower-level employees.[47] Third, firms have a fiduciary responsibility to shareholders and, for many decades, the notion of "shareholder primacy" has put shareholders ahead of employees, communities, and the environment.[48] Although there are some signs this worldview is beginning to change,[49] it is still largely dominant.[50] Turning employees into shareholders would obligate firms to consider their interests as well.[51] At the very least, everything firms do to increase their share prices, such as stock buybacks, would have beneficial effects for employees, too.[52]

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47. *See, e.g.*, Publix example *infra* Part II.

48. *See* Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value [https://perma.cc/SCJ5-NBTP] ("There are many reasons why *the law requires* corporate directors and managers to pursue long-term, sustainable shareholder wealth maximization [over] the interests of other stakeholders or society at large . . .") (emphasis added).

49. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/2CX4-VXR6].

50. Lucian A. Bebchuk & Roberto Tallarita, *'Stakeholder' Talk Proves Empty Again*, WALL ST. J. (Aug. 18, 2021, 6:20 PM) https://www.wsj.com/articles/stakeholder-capitalism-esg-business-roundtable-diversity-and-inclusion-green-washing-11629313759 [https://perma.cc/X7PG-NSUA].

51. Chad Langager, *Who is Responsible for Shareholders Interests?*, INVESTOPEDIA (June 14, 2020), https://www.investopedia.com/ask/answers/05/shareholderinterest.asp [https://perma.cc/PJ4A-CP7A].

52. One reason many modern commentators, such as the economist Mariana Mazzucato, are critical of stock buybacks and dividends is that they divert resources away from employee compensation, research and development, and job training programs. If, however, employees had a meaningful stake in their employers through equity ownership, stock buybacks and dividends would look less problematic as the value of those financial maneuvers would reflect positively in the employees' brokerage accounts. *See* Katy Lederer, *Meet the Leftish Economist With a New Story About Capitalism*, N.Y. TIMES (Nov. 26, 2019), https://www.nytimes.com/2019/11/26/business/mariana-mazzucato.html [https://perma.cc/3YVA-UT8P]; Leslie P. Norton, *Economist Mariana Mazzucato on the Downside of Shareholder Value*, BARRON'S (Aug. 29, 2018), https://www.barrons.com/articles/the-downside-of-shareholder-value-1535571901 [https://perma.cc/9FKJ-RD32].

### A. EQUITY IS ATTRACTIVE

First, equity in publicly-traded companies is highly liquid.[53] Provided that the vesting period is sufficiently short (monthly or even bi-weekly), employees would have access to an asset that is readily convertible to cash if the need arises, such as an unexpected expense.[54]

Second, equity grows in value, on average, at rates in excess of the growth rate of cash savings (*e.g.*, yields on checking and savings accounts or certificates of deposit). Interest rates (annual percentage yields) on consumer checking and savings accounts have been near zero for about two decades. The yield on savings accounts has consistently hovered around 0.06 percent for most of the past decade.[55] For purposes of the figure below, I liberally assumed a one percent annual percentage yield on savings account. On September 1, 2000, the S&P 500 index was near a then-record high of 1,520.77 (during the height of the so-called "Dot Com Bubble").[56] Today, the S&P 500 is near a new high at 4,685.25.[57] The S&P 500 has thus yielded an average annual compound growth rate of approximately 5.5 percent. Whereas $1,000 saved in the year 2000 would be worth around $1,232 today, $1,000 invested in the market in 2000 would be worth around $3,081 today.

53. Miranda Marquit & Benjamin Curry, *Understanding Liquidity: Why You Need Liquid Assets*, FORBES ADVISOR (July 15, 2020), https://www.forbes.com/advisor/investing/liquidity-and-liquid-assets/ https://perma.cc/9FKJRD32].

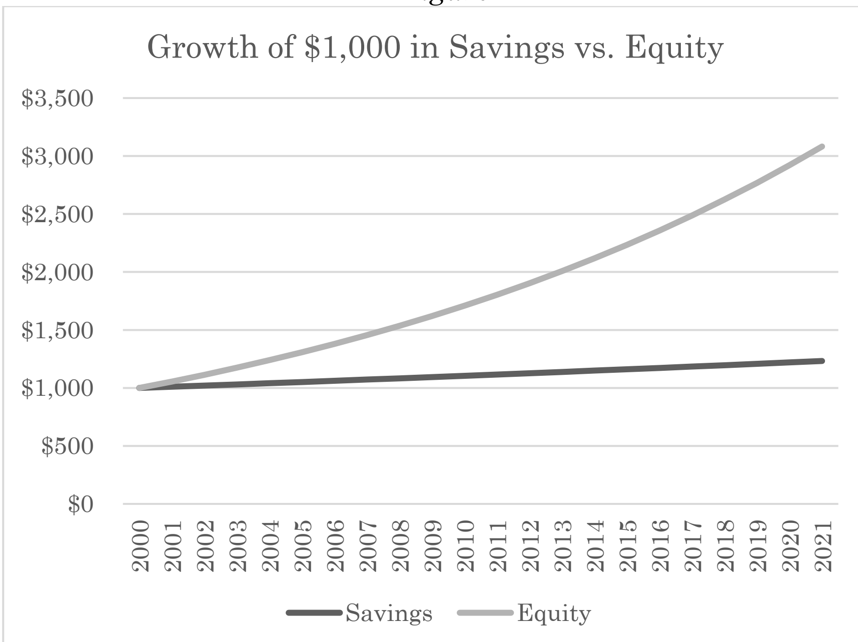
54. *See id.*

55. Ryan Brinks, *History of Savings Account Interest Rates*, FINDER (Feb. 19, 2021), https://www.finder.com/history-of-savings-account-interest-rates [https://perma.cc/8A4C-4SL5].

56. *S&P 500*, GOOGLE FIN., https://www.google.com/finance/quote/.INX:INDEXSP [https://perma.cc/74P3-CXGZ].

57. *Id.*

*Figure 1*




Finally, from a behavioral economics perspective, equity is more likely to be regarded as a savings asset than cash, thus likely increasing the marginal propensity to save for those who can afford to do so.[58] Some of the most powerful cognitive biases are "mental accounting" and the "pain of paying."[59] As Nobel Prize-winning economist Richard Thaler observed: "People tend to treat different sources of money, earmarked for different uses, in different

58. *See, e.g.*, Richard Thaler, *Mental Accounting Matters*, 12:3 J. BEHAV. DECISION MAKING 183, 196 (1999) ("The most tempting class of accounts is in the 'current assets' category, for example cash on hand and money market or checking accounts. Money in these accounts is routinely spent each period. Less tempting to spend is money in the 'current wealth' category, which includes a range of liquid asset accounts such as savings accounts, stocks and bonds, mutual funds, and so on. These funds are typically designated for saving."); Richard Thaler, *Anomalies: Savings, Fungibility, and Mental Accounts*, 4:1 J. ECON. PERSPECTIVES 193, 194 (1990) ("A simple way of thinking about how people actually behave with respect to various types of wealth is to assume households have a system of mental accounts. One formulation is to consider three broad accounts, a current income account C, an asset account A, and a future income account F. Roughly speaking, the MPC [marginal propensity to consume] from C is close to unity, the MPC from F is close to zero, and the MPC from A is somewhere in between.").

59. *See, e.g.*, George Loewenstein & Ted O'Donoghue, *"We Can Do This the Easy Way or the Hard Way": Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. 183, 194 (2006). The "pain of paying" can be remembered alliteratively as "paying with plastic is less painful than parting with paper."

ways."[60] Consider the rare, lucky person who finds a $100 bill on the street. Even otherwise frugal people are far more likely to put the $100 toward, say, a fancy meal than into savings because the $100 is "found money."[61] Similarly, Professor Lordan has noted: "Many studies have shown that people spend more when there are fewer blocks preventing us from doing so and that our sense of the reality of the money is cut loose."[62] The converse is equally true: the extra step of converting equity to cash, like having to take cash from an ATM, makes people less willing to spend.[63] This all suggests that equity compensation would, at least at the margins, help people build savings relative to an equivalent increase in cash compensation.

## B. EQUITY COMPENSATION AND INCENTIVES

Self-interest and rational choice theory suggest that equity compensation aligns the incentives of an employee with those of the employer.[64] At the very top of a firm, it is easy to see how this works: a CEO, whose every decision has implications for share price and company performance and whose compensation depends in large part on a high share price, will be incentivized to make decisions that increase the company's share price.[65] This is good for the firm and good for the executive, at least in theory.[66] For a

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60. Sharon Thiruchelvam, *Understanding the Psychology of Abstract Money*, RACONTEUR (Mar. 14, 2019), https://www.raconteur.net/finance/financial-services/behavioural-economics-abstract/ [https://perma.cc/2XYG-DJT2].

61. *Why Do We Think Less About Some Purchases Than Others?*, DECISION LAB, https://thedecisionlab.com/biases/mental-accounting/ [https://perma.cc/6Y3L-HMEL].

62. Thiruchelvam, *supra* note 60 (quoting Professor Lordan, a behavioral economist at the London School of Economics) .

63. *Id.*

64. *See, e.g.*, Nitzan Shilon, *Replacing Executive Equity Compensation: The Case for Cash for Long-Term Performance*, 43 DEL. J. CORP. L. 1, 10 (2018).

65. *See, e.g.*, Ulf Von Lilienfeld-Toal & Stefan Ruenzi, *CEO Ownership, Stock Market Performance, and Managerial Discretion*, 69 J. FIN. 1013 (2014) (reporting that CEOs with high stock ownership outperform those with low stock ownership by 4 to 10 percent per year). *See also* Randall Morck et al., *Management Ownership and Market Valuation*, 20 J. FIN. ECON. 293 (1988) (reporting that "Tobin's Q first increases, then declines [when ownership becomes concentrated], and finally rises slightly as ownership by the board of directors rises"); Robert Tumarkin, *How Much Do CEO Incentives Matter?*, (July 11, 2010) (unpublished manuscript) (*available at* http://people.stern.nyu.edu/rtumarki/research/HMDCIM.pdf [https://perma.cc/TE86-37D8]) ("For the mean incentive level, Tobin's q increases by 10.0% compared to that of counterfactual firms that lack CEO incentive compensation.").

66. *But see, generally*, Shilon, *supra* note 64 (criticizing executive stock compensation). Note, however, that Shilon's critiques of executive equity compensation do not extend to

lower-level employee at a large company, however, the theory may run into some difficulty. It is harder to see how any one of a company's tens of thousands of employees could individually affect the share price and therefore how any single employee would be incentivized to work harder, be more productive, or otherwise make the company more profitable. Practical experience, however, tends to overcome this theoretical challenge: empirical data from firms with equity compensation and tens of thousands of employees show that equity stakes improve morale, boost productivity, and lower turnover.[67]

Collective action on the part of employees can spur accountability and can help ensure that all employees work together to increase profitability, worker productivity, and, consequently, the firm's share price.[68] Peer pressure is powerful. Indeed, this hypothesis is borne out in the data from massive employee-owned firms like Publix, a supermarket chain with nearly 200,000 employees, over 1,250 locations, and ranked number one among supermarkets on the American Consumer Satisfaction Index for nineteen years in a row.[69] *Fortune* magazine named Publix one of the "100 Best Companies to Work For" for twenty-two straight years.[70] As of 2016, Publix had not laid off a single employee in its then-eighty-six-year history.[71]

What's the secret? *Fortune* magazine reporter Christopher Tkaczyk spent a week working as a Publix employee to better understand why the supermarket giant is regarded as having the "happiest, most motivated workforce in America."[72] The answer:

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broad-based employee equity compensation. Shilon argues that executive equity compensation incentivizes, among other issues: excessive risk-taking, *id.* at 17; stock price manipulation, *id.* at 18; and pursuing policies that harm non-shareholder stakeholders, *id.* at 22. Non-executive employees would have neither the authority nor the incentive to take such actions.

67. *See* KURTULUS & KRUSE *supra* note 42.

68. Anecdotally, this appears to be the norm at employee-owned firms. *See, e.g.*, Rosen et al., *supra* note 42 (describing the benefits of employee collaboration at United Airlines after employees were given 55 percent of the airline); *Ownership Culture*, NAT'L CTR. FOR EMP. OWNERSHIP , https://www.nceo.org/ownership-culture [https://perma.cc/ZZ3C-ZNHN].

69. *Benchmarks By Company: Publix*, AM. CUSTOMER SATISFACTION INDEX, https://www.theacsi.org/index.php?option=com_content&view=article&id=149&catid=&Itemid=214&i=Supermarkets&c=Publix&sort=Y2020 [https://perma.cc/CBY4-DUJM].

70. *Awards & Achievements*, PUBLIX, http://corporate.publix.com/about-publix/company-overview/awards-achievements [https://perma.cc/T84T-SR3N].

71. Christopher Tkaczyk, *My Five Days of 'Bleeding Green'*, FORTUNE (Mar. 3, 2016), https://fortune.com/longform/publix-best-companies/ [https://perma.cc/JY5J-TH3K].

72. *Id.*

equity compensation has a lot to do with it.[73] From the inception of Publix's Employee Stock Ownership Plan in 1974 through 2015, shares of Publix delivered an average annual return, including dividends, of 16.9 percent.[74] At the current stock price, "a veteran store manager who has accrued 20,000 shares (not unusual) would have holdings worth [$1,328,000]."[75] An employee with just 1,000 shares would have equity worth $66,400 and would have received $1,160 in dividends in 2019.[76] Tkaczyk adds:

> The extreme loyalty of Publix's workers is a phenomenon the company calls "bleeding green," after its trademark color. . . . [Employees] stay at the company—and stay and stay. The average store manager has been with the company for 25.1 years. And 2,428 associates have been with the company for more than 30 years, 205 have worked there more than 40 years, and 13 have been at Publix for more than 45 years. Here's perhaps the most astounding stat of all: Publix's annual voluntary turnover rate is a minuscule 5%—which makes a mockery of the retail industry average of 65%.[77]

Publix offers promising, real-world support for the premise advanced in this Note that equity ownership improves employee productivity, reduces turnover, and increases employee satisfaction.

### C. SHAREHOLDER PRIMACY

The concept of shareholder primacy, first articulated by Milton Friedman in a 1970 essay, rapidly distilled into a simple doctrine:

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73. *See generally id.* ("It's quarterly dividend day, when all associates who have stock in the company receive their dividend checks. As Veith told me earlier, 'You're going to see a lot of very happy faces today.' . . . The stock plan has served as a powerful wealth creator for loyal employees, boosted by Publix's steady growth. . . . 'Today, we're going to celebrate Mr. George,' Veith states. 'He gave us the gift that keeps on giving.'").

74. *Id.*

75. *Id.* (updated to reflect the current stock price of $66.40 as of Nov. 1, 2021); *Stockholders*, PUBLIX (Nov. 1, 2021), http://www.publixstockholder.com/ [https://perma.cc/3XUT-FKXH].

76. *Id.*; PUBLIX SUPER MARKETS, INC., ANNUAL REPORT (FORM 10-K), (Mar. 1, 2021), http://www.publixstockholder.com/financial-information-and-filings/sec-filings/sec-document/8718ac7b59a34fc0a8f7bb309b3e4d4e/html[https://perma.cc/VYA8-XBVM].

77. Tkaczyk, *supra* note 71.

"the job of a chief executive is to keep shareholders happy."[78] Keeping shareholders happy often means cutting costs wherever possible, including by keeping wages as low as possible.[79] The company's owners come before its workers.[80] One way that shareholder primacy affects workers is, for example, that since the 1970s, average real hourly wages have been virtually stagnant while productivity has increase severalfold.[81] This disconnect between wages and productivity marks a stark departure from the preceding decades, from 1950 to the early 1970s, during which productivity and real hourly wages rose in near-perfect unison.[82] Although globalization and increased foreign competition have contributed to the productivity-pay gap, shareholder primacy—the blindered focus on share prices and keeping shareholders happy—appears to be at least one of the driving forces.[83]

Although productivity increased almost 70 percent between 1979 and 2018, real wages increased only 11.6 percent.[84] On January 1, 1979, the S&P 500 index was 100.26; on January 1, 2019, it was 2,659.57 (a 2,552.67 percent increase).[85] That is, if workers had earned equity over this period, the growth in the value

78. *See* KURT ANDERSEN, EVIL GENIUSES: THE UNMAKING OF AMERICA: A RECENT HISTORY 53–57 (2020); Justin Fox, *How Shareholders Are Ruining American Business*, ATLANTIC (June 19, 2013), https://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/ [https://perma.cc/4PMH-TUE5]. *See also* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/UTZ7-DAYD].

79. *See, e.g.*, Jia Lynn Yang, *Maximizing Shareholder Value: The Goal That Changed Corporate America*, WASH. POST (Aug. 26, 2013), https://www.washingtonpost.com/business/economy/maximizing-shareholder-value-the-goal-that-changed-corporate-america/2013/08/26/26e9ca8e-ed74-11e2-9008-61e94a7ea20d_story.html [https://perma.cc/H46K-QB9J] ("[M]aximiz[ing] shareholder value . . . has paved the way for an economy in which companies are increasingly disconnected from the state of the nation, laying off workers in huge waves, keeping average wages low and threatening to move operations abroad in the face of regulations and taxes.").

80. In 1997, the Business Roundtable "stated that the principle objective of a business enterprise 'is to generate economic returns to its owners' [i.e., the shareholders]." *Id.*

81. ECON. POL'Y INST., *supra* note 21.

82. *Id.*

83. *See* Lenore Palladino, *Shareholder Primacy and Worker Prosperity: A Broken Link*, 66 U. KAN. L. REV. 1011 (2018); Lenore Palladino, *Financialization at Work: Shareholder Primacy and Stagnant Wages in the United States*, COMPETITION & CHANGE 392 (2020), https://doi.org/10.1177/1024529420934641 (on file with the *Columbia Journal of Law & Social Problems*); Lenore Palladino, *Ending Shareholder Primacy in Corporate Governance*, ROOSEVELT INST. (Feb. 8, 2019) (working paper), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_EndingShareholderPrimacy_workingpaper_201902.pdf [https://perma.cc/Q8EA-96JS].

84. ECON. POL'Y INST., *supra* note 21.

85. GOOGLE FIN., *supra* note 56.

of the equity would more than have made up for any wage depression induced by shareholder primacy. Put another way, even if wages had grown in tandem with productivity over the last several decades, owners of capital (equity) would still be far better off.

Admittedly, there are some signs that shareholder primacy is on the way out. In 2009, former General Electric CEO Jack Welch famously declared that shareholder primacy is "the dumbest idea in the world."[86] BlackRock CEO Larry Fink has advocated for a broader view of "corporate purpose" for several years now.[87] And, most recently, Business Roundtable, an influential industry group that once offered a full-throated endorsement of shareholder primacy, pledged in 2019 to redefine the purpose of a corporation to promote "an economy that serves all Americans."[88] As Jack Welch concluded: "Shareholder value is a result, not a strategy. . . . Your main constituencies are your employees, your customers and your products. Managers and investors should not set share price increases as their overarching goal."[89]

For the time being, however, these statements are just that—statements. There is little evidence that the Business Roundtable signatories have taken any steps toward making good on their pledge to put communities, employees, and other "stakeholders" before their shareholders.[90] As long as shareholder primacy continues to drive corporate decision-making, employees with equity stakes in their employers will benefit from shareholder primacy as shareholders themselves. But even assuming the signatories were to put their employees and stakeholders before their shareholders, the possibly diminished value of equity

86. Steve Denning, *Making Sense of Shareholder Value: "The World's Dumbest Idea"*, FORBES (July 17, 2017), https://www.forbes.com/sites/stevedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-idea/ [https://perma.cc/P5V4-6CMQ].

87. *Id.*

88. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/929MGFLV].

89. *Id.*

90. Lucian Bebchuk & Roberto Tallarita, Opinion, *'Stakeholder' Capitalism Seems Mostly for Show*, WALL ST. J. (Aug. 6, 2020), https://www.wsj.com/articles/stakeholder-capitalism-seems-mostly-for-show-11596755220 (on file with the *Columbia Journal of Law & Social Problems*); Kristin Toussaint, *One Year Ago, the Business Roundtable Pledged to Reshape the Culture of Business. Has Anything Changed?*, FAST CO. (Aug. 19, 2020), https://www.fastcompany.com/90540844/one-year-ago-the-business-roundtable-pledged-to-change-the-culture-of-business-how-did-they-do [https://perma.cc/YTQ6-UT5T].

compensation would likely be more than offset by the other advantages of putting employees first, such increased take-home pay, better working conditions, or less demanding hours.

## II. THE PROPOSAL: A NATIONAL EQUITY COMPENSATION MANDATE

This Part outlines one potential configuration of a national equity compensation mandate, styled as an "equity minimum wage" to complement the minimum wage for hourly workers.

An "equity minimum wage" in the equity-equivalent of $5.00 per hour would complement the applicable federal or state minimum wage and apply to all hourly waged and salaried workers, regardless of their status as full- or part-time employees. To lessen the burden on small businesses, a tax credit "rebate" would subsidize the cost of the equity minimum wage for small employers. Most workers would have the choice between receiving equity in the company for which they work or in a low-cost, broad-based exchange traded fund. The equity would "vest" monthly, giving workers the nearly unlimited ability to sell the equity for cash. The value of the equity at the time it vests would be treated like ordinary income; as would gains from the appreciation on the equities. Employers would be responsible for withholding for tax purposes.

### A. THE EQUITY MINIMUM WAGE FLOOR

An equity minimum wage of $5.00 per hour would enable a full-time worker to earn approximately $400 in equity over the course of a standard two-week, eighty-hour pay period.[91] While this amount is specifically aimed at addressing the $400 Problem, it would more broadly contribute to long-term savings to help more Americans reach financial stability and have more savings to tap into in the event of an emergency (such as the coronavirus pandemic). At $5.00 per hour, a full-time employee working fifty weeks out of the year would earn approximately $10,000 in equity in addition to her ordinary wages. These potential earnings stand in stark contrast to the median American's savings account

91. $400 is approximate because the equity could raise or fall in value over the course of the two-week period.

balance of $3,500.[92] In either relative or absolute terms, $10,000 is a considerable amount that could go toward emergency expenses, saving for retirement or a child's education, or making big-ticket purchases like a car, without having to take on additional debt. And, of course, the equity earned over the course of the year would, on average, grow in value, meaning that the year-end amount is likely to exceed $10,000. This amount could lift an estimated 3.5 million households out of poverty, according to the most recent data from the Census Bureau.[93]

### B. SCOPE OF COVERED WORKERS

In order for the introduction of the equity minimum wage not to create distortionary effects in the labor market, such as a shift toward part-time work or independent contracting, it must apply as broadly as possible. If the equity minimum wage were to apply only to full-time workers with stable employment, it would privilege a form of work that is increasingly rare in a time of widespread economic precarity.[94] The problem, for purposes of receiving equity compensation in one's employer, is that it is often unclear *who* a particular worker's employer is—a problem particularly acute for non-traditional workers.[95] Additionally, many workers are misclassified as independent contractors.[96] As such, this part focuses on independent contractors and franchisees.

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92. Maurie Backman, *Study: Average American's Savings Account Balance is $3,500*, THE ASCENT (Sept. 10, 2020), https://www.fool.com/the-ascent/research/average-savings-account-balance/ [https://perma.cc/J2RB-UJT9].

93. JESSICA SEMEGA ET AL., INCOME AND POVERTY IN THE UNITED STATES 60 tbl.B-4 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf [https://perma.cc/2P7C-SVEY].

94. *See, e.g.*, Allison J. Pugh, *What Happens at Home When People Can't Depend on Stable Work*, HARV. BUS. REV. (Apr. 4, 2017), https://hbr.org/2017/04/what-happens-at-home-when-people-cant-depend-on-stable-work [https://perma.cc/3AEK-5Z4X] ("The fact that people's health and emotional well-being are so closely tied to the absence of steady work is striking. Yet what matters here is not just job insecurity; it's also what we might call the *culture* of insecurity: the growing conventional wisdom that precarious employment is inevitable.").

95. *See, e.g.*, ASPEN INST., *Non-Traditional Work*, https://www.aspeninstitute.org/programs/future-of-work/nontraditional-work/ [https://perma.cc/G9HL-WHS3].

96. Independent contractor misclassification is one reason this Note focuses on independent contractors and other non-traditional workers. *See, e.g.*, Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL'Y INST. (June 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/ [https://perma.cc/EQ2K-5VH4].

According to the Bureau of Labor Statistics, over ten percent of the civilian workforce is underemployed, meaning that they are considered "marginally attached workers" or are involuntarily part-time.[97] An additional twenty-eight million workers are normally part-time; a number that has risen dramatically over the past several decades.[98] And then, of course, there are the millions of so-called independent contractors. Uber drivers are the paradigmatic example of independent contractors,[99] but it is estimated that 15 million workers in the United States—another ten percent of the labor force—are independent contractors.[100] Another class of non-traditional workers are temporary workers.[101] Microsoft, for example, is notorious for employing tens of thousands of "permatemps"—a moniker attached to the de facto employees who are categorized as temporary workers for accounting and benefits purposes—but many of these "temporary workers" have been at Microsoft for several years.[102] In 2000, Microsoft settled a lawsuit for $97 million for its practices surrounding permatemps, but that didn't stop Microsoft from continuing to take advantage of permatemps; in 2015, these workers created another stir when a group of them decided to unionize.[103]

FedEx, similarly, regarded its employees as independent contractors for many years despite dozens of lawsuits challenging

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97. *Alternative Measures of Labor Underutilization for States*, U.S. BUREAU OF LAB. STATS. (Jan. 19, 2021), https://www.bls.gov/lau/stalt.htm [https://perma.cc/9A99-GPXW].

98. *Employed, Usually Work Part Time*, FRED, FED. RSRV. BANK OF ST. LOUIS (Feb. 5, 2021), https://fred.stlouisfed.org/series/LNS12600000 [https://perma.cc/X4KZ-ZB5H].

99. Uber does not report the number of drivers on its app, but an August 2020 press release indicated that one million workers used its platform in 2019. *See* Uber, *Working Together: Priorities to Enhance the Quality and Security of Work in the United States* (Aug. 10, 2020), https://www.uber.com/newsroom/working-together-priorities/ [https://perma.cc/RWT3-GH9Q].

100. Yuki Noguchi, *1 in 10 Workers Is An Independent Contractor, Labor Department Says*, NPR (June 7, 2018), https://www.npr.org/2018/06/07/617863204/one-in-10-workers-are-independent-contractors-labor-department-says [https://perma.cc/Y5BY-A7B7]; Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH (July 31, 2019), http://www.equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/ [https://perma.cc/Q6BS-RSF6].

101. *See* ASPEN INST. *supra* note 95.

102. Brigid Schulte, *From the Ranks of Microsoft's Permatemps*, WASH. POST (Mar. 28, 2015), https://www.washingtonpost.com/local/from-the-ranks-of-microsofts-permatemps/2015/03/27/64f5c922-cb5d-11e4-8c54-ffb5ba6f2f69_story.html [https://perma.cc/DY58-4H2F].

103. *Id.*

the practice.[104] FedEx required "owner-operators" to purchase their own uniforms, maintain their own trucks, and they received no benefits, but each one purportedly ran her own business.[105] After the Ninth Circuit declared that FedEx drivers were not independent contractors, based on "FedEx's control over every exquisite detail of the drivers' performance,"[106] FedEx replaced the employees-as-independent-contractors model with what it now calls the "independent service provider" model.[107] FedEx Ground drivers still aren't FedEx employees; now, rather, they are employed by intermediary subcontractors.[108] This model, which covers over 100,000 workers,[109] continues to keep labor costs down—by depressing wages—and means that FedEx Ground drivers earn considerably less than their peers who work for FedEx Express, where the workers are employed by FedEx directly.[110]

Under the proposal, discussed below, any worker who could be readily identified as being de facto employed by a particular employer would be eligible for equity compensation by the putative employer. That is, Uber drivers would be eligible for equity in Uber, Microsoft permatemps would be eligible for Microsoft equity, and FedEx drivers would be eligible for FedEx stock.[111] Genuine

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104. Lydia DePillis, *How Fedex Is Trying to Save the Business Model That Saved It Millions*, WASH. POST (Oct. 23, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/10/23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions/ [https://perma.cc/F7TT-G8WM].

105. *Id.*

106. Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 991 (9th Cir. 2014) (quoting Estrada v. FedEx Ground Package Sys., 64 Cal. Rptr. 3d 327, 336 (Cal. Ct. App. 2007)) (applying the test of employment status under California law). *But see* SuperShuttle DFW, 367 N.L.R.B. 75 (2019) (reinstating traditional, common law independent contractor test and virtually guaranteeing that these FedEx Ground drivers would be considered "independent contractors" for purposes of federal law).

107. Robert W. Wood, *FedEx Settles Independent Contractor Mislabeling Case for $228 Million*, FORBES (June 16, 2015), https://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/ [https://perma.cc/LT5M-CLDQ].

108. DePillis, *supra* note 104.

109. Adiel Kaplan, Samantha Springer, & Cameron Oakes, *FedEx Drivers Say They're Not Getting Enough Coronavirus Protection*, NBC NEWS (Apr. 2, 2020), https://www.nbcnews.com/health/health-news/fedex-drivers-say-they-re-not-getting-coronavirus-protections-other-n1174031 [https://perma.cc/A6SP-E2RS].

110. DePillis, *supra* note 104. *See also* SuperShuttle DFW, 367 N.L.R.B. 75 (2019) (reinstating traditional, common law independent contractor test and virtually guaranteeing that these FedEx Ground drivers are "independent contractors").

111. The author is mindful that the proposals *infra* are in tension with existing labor and employment law standards (at both the state and federal levels), and would likely require a degree of reconciliation. The idea is to enable as broad a swath of the workforce as possible to earn equity. Exceptions to the rule (*e.g.*, for independent contractors) would

independent contractors, like many self-employed electricians and plumbers—those who genuinely control their work, hours, and schedules—however, would have little need for equity because they *are* their own businesses and therefore own the equity already.

Finally, not all workers could necessarily receive equity in their employers. Employees of privately-held firms may not be able to get employer equity because there's no market for the shares. Non-profits don't have shares to dole out. Nor do governments. As discussed below, these workers would still be eligible to earn the equity minimum wage.

1. *Independent Contractors*

Any legislation establishing the equity minimum wage might have to develop a novel framework for evaluating the employment relationship. The traditional, common law independent contractor test fails workers. Uber drivers, Microsoft permatemps, and FedEx drivers stand no chance of being regarded as employees under the current test.[112] One possibility might be to introduce a prima facie case with a rebuttable presumption along the following the lines:

> (i) Any worker who demonstrates that she receives a substantial portion (perhaps 25 percent or more) of her income from a particular employer establishes a prima facie case that she is an employee for purposes of the equity minimum wage.[113]
>
> (ii) It would then fall on the putative employer to prove that *no reasonable person* would regard the putative employee as actually being employed by the employer.

Crucially, the second prong of this framework imposes a high burden on the putative employer and—by invoking the "reasonable person" standard—turns the inquiry into a question of fact, rather

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simply encourage employers to shift more and more labor to these more precarious forms of employment.

112. *See* SuperShuttle DFW, 367 N.L.R.B. 75 (2019) (reinstating traditional, common law independent contractor test and virtually guaranteeing that these FedEx Ground drivers are "independent contractors").

113. Tax records would make the plaintiff's evidentiary burden relatively light.

than one that can be resolved as matter of law.[114] Although juries can be notoriously fickle, jurors would not be weighed down by the arcane complexities of "economic reality," as judges currently are.[115] Rather, to use an old adage, "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck."[116] That is, using common sense, juries will know an employer-employee relationship when they see one. And the Uber–Uber driver relationship fits the bill.[117]

### 2. *Franchise Employees*

The equity minimum wage proposal, moreover, should extend to employees covered by a franchisor-franchisee relationship, such as McDonald's workers. McDonald's, like FedEx, has a number of direct employees, and then many tens of thousands more who wear the uniform but are not considered employees (in McDonald's case, because they are employed by the franchises, just as most FedEx drivers are actually employees of the subcontractors). McDonald's, according to its most recent annual report, has only around

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114. *See, e.g.*, Swarthout v. Mut. Serv. Life Ins. Co., 632 N.W.2d 741, 745 (Minn. Ct. App. 2001) ("[Q]uestions about 'the reasonable person standard are ordinarily questions of fact, . . . but they become questions of law if reasonable persons can draw only one conclusion from the evidence.'" (quoting RESTATEMENT (SECOND) ON TORTS § 652(b) cmt. d (AM. L. INST. 1977))).

115. *See, e.g.*, Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 380 (5th Cir. 2019) ("Essentially, our task is to determine whether the individual is, as a matter of economic reality, in business for himself." (internal quotation marks and citation omitted)); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1443 (10th Cir. 1998) ("Our final step is to review the findings on each of the . . . factors and determine whether plaintiffs, as a matter of economic fact, depend upon [the employer's] business for the opportunity to render service, or are in business for themselves."); Sec'y of Labor, United States Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook J., concurring) ("[A]ny balancing test begs questions about which aspects of 'economic reality' matter, and why.").

116. The "duck test" is not unknown to the courts. *See, e.g.*, Greater Cincinnati/Northern Ky. Apartment Ass'n v. Campbell Cty. Fiscal Court, 479 S.W.3d 603, 610 (Ky. 2015) ("The 'service fee' involved here has none of the attributes of a legitimate regulatory fee or user fee. When something looks like a duck, walks like a duck, and quacks like a duck, we can be certain of one thing: it *is* a duck. The Campbell County 911 'service fee' looks like a tax, it is assessed like a tax, and it is collected like a tax. It is a tax."); Leicht Transfer & Storage Co. v. Pallet Cent. Enters., 2019 WI 61, ¶ 34, 387 Wis. 2d 95, 115 (Bradley, J., dissenting) ("Namely, 'if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.' This test suggests that something can be identified by its habitual characteristics, i.e.[,] how it routinely functions."); Culver v. Deaver (*In re* Estate of Boysen), 297 Or. App. 21, 25, 441 P.3d 633, 635 (2019) ("Essentially, [appellants] urge us to adopt the proverbial 'duck test': if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.").

117. No pun intended.

200,000 employees.[118] When one includes the employees of franchises, however, the number grows to approximately 1.7 million workers who wear the McDonald's uniform.[119]

Franchisees are notoriously squeezed. McDonald's, for example, expropriates up to 15 percent of a franchisee's revenue as rent and collects an additional four percent royalty on sales; franchisees are on the hook for equipment upgrades and must conform to an ever-increasingly complex menu.[120] Although McDonald's doesn't release statistics on its franchisees, according to *Bloomberg*, the average franchisee is a relatively small employer with relatively slim margins.[121] Economist Alan Krueger has found that employees of franchisee-operated fast food restaurants earn less than their company-owned counterparts.[122] Franchisee-operated restaurants also have significantly more wage-and-hour violations than company-owned peers.[123] Putting the burden of the equity minimum wage on the corporate giant, rather than on the franchisee (which would have a harder time paying and is more likely to be noncompliant), would, at the minimum, reduce the likelihood of illegally withheld equity wages. The below-described small business rebate, moreover, militates in favor of counting fast food workers as employees of the franchisor (rather than the franchisee), because otherwise the government would end up unnecessarily subsidizing the equity wages of the roughly 3.6 million fast-food franchise employees.[124]

There's precedent, too, for this kind of corporate veil piercing in the labor and employment law context. For example, in 2014, the National Labor Relations Board ruled that McDonald's could be held jointly liable for the labor and wage violations of its franchise

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118. McDonald's Corp., Annual Report (Form 10-K) (Jan. 23, 2021).

119. Kaityn Stimage, *The World's Largest Employers*, WORLDATLAS (Feb. 15, 2018), https://www.worldatlas.com/articles/the-world-s-largest-employers.html [https://perma.cc/3CMP-84XP].

120. Bryan Gruley & Leslie Patton, *The Frustrating Life of a McDonald's Franchisee*, BLOOMBERG (Sept. 16, 2015), http://www.bloomberg.com/features/2015-mcdonalds-franchises/ [https://perma.cc/8X3D-2HYM].

121. *Id.*

122. Alan B. Krueger, *Ownership, Agency and Wages: An Examination in the Fast Food Industry* (1990), https://www.nber.org/papers/w3334 [https://perma.cc/9NE5-WDEV].

123. MinWoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 ILR REV. 977 (2015).

124. Andrew Hait, *Franchising in America: Not Just Fast-Food Restaurants*, U.S. CENSUS BUREAU (Mar. 28, 2018), https://www.census.gov/library/stories/2018/03/franchises.html [https://perma.cc/N64J-HRBA].

operators.[125] And under the Fair Labor Standards Act, joint employment exists when:

> (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.[126]

Courts employ similar tests under the National Labor Relations Act and Title VII of the Civil Rights Act of 1964.[127] The joint employment test could therefore provide one avenue to finding that franchisee employees are eligible for equity in the franchisor, if the franchisor is deemed to be a joint employer.

Courts, however, have generally been reluctant to regard fast food franchisors as joint employers alongside franchisee employers.[128] To get around this problem, the equity minimum wage's implementing statute could expressly establish that franchisee employees are jointly employed by the franchisor, at least for purposes of the equity minimum wage.

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125. Steven Greenhouse, *McDonald's Ruling Could Open Door for Unions*, N.Y. TIMES (July 29, 2014), https://www.nytimes.com/2014/07/30/business/nlrb-holds-mcdonalds-not-just-franchisees-liable-for-worker-treatment.html [https://perma.cc/Y6XJ-WPHL]; *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NAT. LAB. RELATIONS BD. (July 29, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-of-the-general-counsel-authorizes-complaints-against-mcdonalds [https://perma.cc/P4G4-AAEY].

126. Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 129–30 (4th Cir. 2017).

127. NLRB v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1124 (3d Cir. 1982) ("[W]here two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA."); Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 408 (4th Cir. 2015) ("The basis for the finding that two companies are 'joint employers' is that 'one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.'") (quoting Torres-Negron v. Merck & Co., 488 F.3d 34, 40 n.6 (1st Cir. 2007)).

128. *See, e.g.*, Salazar v. McDonald's Corp., 944 F.3d 1024 (9th Cir. 2019) (holding McDonald's, as franchisor, was not a joint employer under California state law); Gessele v. Jack in the Box, Inc., No. 3:14-CV-1092-BR, 2016 U.S. Dist. LEXIS 172061, at *40 (D. Or. Dec. 13, 2016) (holding Jack in the Box, as franchisor, was not a joint employer under the FLSA); *In re* Jimmy John's Overtime Litig., No. 14 C 5509, 2018 U.S. Dist. LEXIS 107157, at *66–67 (N.D. Ill. June 14, 2018) (holding Jimmy John's, as franchisor, was not a joint employer under the FLSA).

### C. SUPPORT FOR SMALL BUSINESSES

To lessen the burden of an equity minimum wage on small businesses, a tax credit "rebate" would be offered to small employers and phase out on the basis of the number of employees. Illinois, for example, offers a partial tax rebate to the state's increased minimum wage for employers with 50 or fewer employees.[129] While another option would be to "phase in" the equity minimum wage, like several states' tiered minimum wages, such an option would unnecessarily disadvantage those who, by choice or otherwise, are employed by small businesses.[130]

In 2020, the Small Business Administration (SBA) reported that over 60 million people—about 40 percent of the workforce—are employed by small businesses, defined as those with fewer than 500 employees.[131] Approximately 20 million people are employed by businesses with fewer than 20 employees, another roughly 20 million are employed by businesses with 20 to 99 employees, and the remaining approximately 20 million are employed by firms with 100 to 499 employees.[132] There is no principled basis for disadvantaging the 20, 40, or 60 million employees of small businesses; accordingly, every employee should receive the full benefit of the equity minimum wage, with employers receiving a full or partial rebate on the basis of the number of employees.

The SBA, states, and municipalities differ as to the definition of a "small employer." Maryland considers "small employers" to be those with 14 or fewer employees.[133] New Jersey caps small employers at six employees or fewer.[134] In New York City, the limit is ten employees.[135] But these limits all impose steep discontinuities—that is, hiring the first employee over and above the limit increases the costs associated with not only the newly-hired employee but also every employee hired before. Steep

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129. 35 Ill. Comp. Stat. Ann. 5/704A(i) (Lexis 2021).

130. In California, for example, the current minimum wage is $13.00 per hour for employers with 25 or fewer employees, and $14.00 per hour for employers with 26 employees and above. Cal. Lab. Code § 1182.12(b) (West 2017).

131. U.S. SMALL BUS. ADMIN., 2020 SMALL BUSINESS PROFILE (2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf [https://perma.cc/R54S-BVLG].

132. *Id.*

133. Md. Code Ann., Lab. & Empl. § 3-413(a)(3) (Lexis 2021).

134. N.J. Stat. § 34:11-56a1(p) (Lexis 2021).

135. N.Y. Lab. Law § 652 (Lexis 2021).

discontinuities, therefore, disincentivize hiring. Consider if a firm received a 100 percent rebate of the equity minimum wage for each employee up to and including the tenth employee and then received only a 75 percent rebate for 11 to 25 employees. Hiring the eleventh employee would be very unattractive, because the eleventh employee would add roughly an additional $2,200 per month in labor costs on top of the employee's base wages.[136] Thus, like the EITC, the tax credit should phase out slowly, such that the marginal cost of each additional employee is very low.[137]

If sole proprietorships are excluded, firms with two to four employees would receive a 100 percent rebate, the rebate would drop to 95 percent at five employees (meaning that the firm pays $0.25 per hour per employee and the government would cover the rest), and each employee after the fifth would reduce the rebate by one percent.[138] At 50 employees, the firm would pay 50 percent of the equity minimum wage and the government would cover the other half. At 100 employees, the credit would entirely phase out and the employer would be responsible for the full amount of the equity minimum wage. But there would be no meaningful disincentive to hiring the hundredth employee because, by the 99th employee, the business would be covering $4.95 and the government only five cents.

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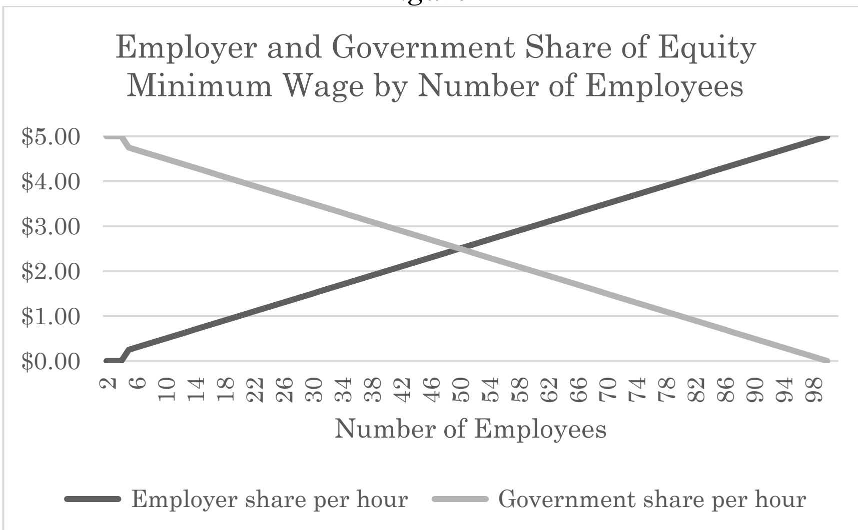
136. ($5.00 hourly equity wage) x (0.25 share paid by the employer) x (11 employees) x (40 hours per week) x (4 weeks per month) = $2,200.00.

137. *Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET AND POL'Y PRIORITIES (Dec. 10, 2019), https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit [https://perma.cc/93TN-7SH6].

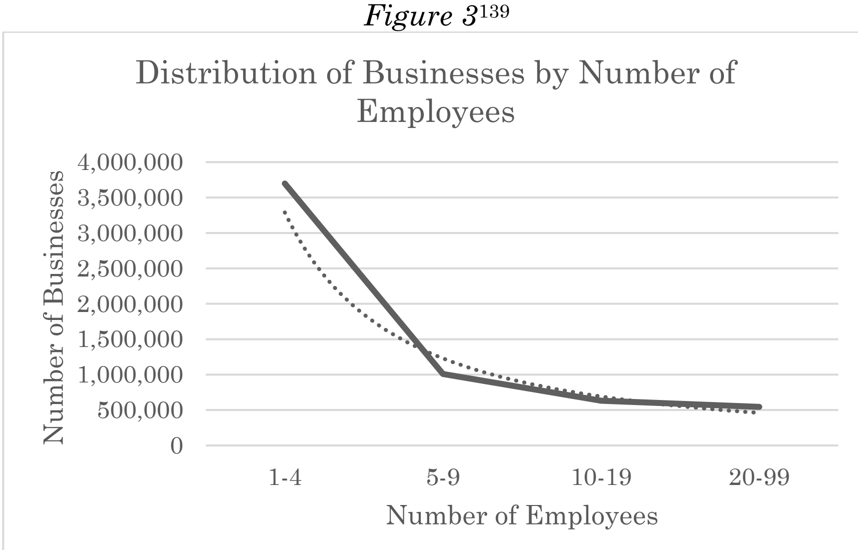
138. This small discontinuity would result in the fifth employee adding approximately $200 per month in equity wage costs. ($5.00 hour equity wage) x (0.05 share paid by the employer) x (5 employees) x (40 hours per week) x (4 weeks per month) = $200.00.

*Figure 2*




Estimating the cost of such a subsidy requires estimating how many people are employed by firms of a given size. The Census Bureau's quinquennial *Statistics of U.S. Businesses* from 2017 provides the following breakdown of the number of employees employed by small businesses:

*Figure 3*[139]




139. U.S. CENSUS BUREAU, NUMBER OF FIRMS, NUMBER OF ESTABLISHMENTS, EMPLOYMENT, AND ANNUAL PAYROLL BY ENTERPRISE EMPLOYMENT SIZE FOR THE UNITED

The Census Bureau's data only provides the distribution of firms in "buckets." That is, the data show that just over one million firms employ between five and nine employees; it does not, for example, say how many firms employ exactly seven employees. The proposed small business rebate, however, is dependent on the exact number of employees. That is, the rebate would be different for a firm with seven employees and another with eight employees. To calculate the estimated cost of the rebate, it is therefore necessary to estimate the number of firms that employ one person, two people, three people, and so on, up to one hundred employees. The author calculated that the line of best fit for this purpose is described by the equation:

$$y = 2.25 \times 10^{6} \times x^{-1.51}$$

Or, put another way:

$$\begin{aligned} &number\ of\ firms\ of\ a\ given\ size \\ &\qquad = 2{,}250{,}000 \times number\ of\ employees^{-1.51} \end{aligned}$$

The model is a good fit for the data because it estimates that 40 million people are employed by firms with 99 or fewer employees.[140] This matches the SBA's own data that 40 million people are employed by small businesses with 99 or fewer employees and is close to the data from the Census Bureau reflecting that approximately 42 million people are employed by firms with 99 or fewer employees.[141]

According to these estimates, the rebate would cost the government around $187 billion annually, but would provide benefits to an additional 40 million workers who might not be covered under a phase-in program. It would also result in an additional $350 billion dollars of equity transferred to working Americans every year. The average worker would earn $8,840 in equity. In 2019, for example, the average household in the second-lowest quintile by income had an average after-tax income of $32,945 and average expenses of $40,472, meaning that the

STATES AND STATES, TOTALS: 2017 (2017), https://www2.census.gov/programs-surveys/susb/tables/2017/us_state_totals_2017.xlsx [https://perma.cc/9X7J-XFUV].

140. Data on file with the *Columbia Journal of Law & Social Problems*.

141. *See* 2020 SMALL BUSINESS PROFILE, *supra* note 131; U.S. CENSUS BUREAU, *supra* note 139.

average household in this quintile is in the red by around $7,500.[142] $8,840 in extra take-home pay would mean the difference between taking on debt and being able to begin saving.

$187 billion dollars, for context, is approximately 4.3 percent of the federal government's 2019 spending.[143] $187 billion dollars is roughly half of the government's annual interest payments on the national debt ($394 billion), less than a third of spending on Medicare ($644 billion), half that of Medicaid ($409 billion), and around 52 percent of current combined spending on social safety net programs ($361 billion)—including the EITC, food assistance (SNAP), and low-income housing assistance.[144] The cost of the rebate, admittedly, dwarfs spending on the EITC ($63 billion in 2019), but the average earned-income credit was $2,476, and the amount the average worker would earn in equity would be over 320 percent larger.[145] The EITC, moreover, awards only one credit for households filing jointly, and a two-earner household could theoretically earn $20,000 in equity.

The cost of rebate, moreover, pales in comparison to the over $4 trillion spent by the federal government in response to the coronavirus pandemic.[146] About $2.3 trillion has gone directly to businesses, including $651 billion in tax breaks, $670 billion on the paycheck protection program, and $454 billion to enable businesses to keep borrowing at low interest rates.[147] Roughly one-fifth, or $884 billion, has gone to helping workers and families.[148] In contrast, a rebate to small employers—that is 100 percent passed-through to employees in the form of equity—seems eminently affordable.

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142. U.S. BUREAU OF LAB. STATS., CONSUMER EXPENDITURE SURVEY tbl.1101 (Sept. 2020), https://www.bls.gov/cex/tables/calendar-year/mean-item-share-average-standard-error/cu-income-quintiles-before-taxes-2019.pdf [https://perma.cc/PF8L-75V6].

143. *The Federal Budget in 2019: An Infographic*, CONG. BUDGET OFF. (Apr. 15, 2020), https://www.cbo.gov/publication/56324 [https://perma.cc/D8MQ-GRY8].

144. Drew DeSilver, *5 Facts About the National Debt*, PEW RSCH. CTR. (July 24, 2019), https://www.pewresearch.org/fact-tank/2019/07/24/facts-about-the-national-debt/ [https://perma.cc/X3DW-CS9B]; CONG. BUDGET OFF., *supra* note 143.

145. *Earned Income Tax Credit Overview*, NAT'L CONF. OF STATE LEGISLATURES (July 9, 2021), https://www.ncsl.org/research/labor-and-employment/earned-income-tax-credits-for-working-families.aspx [https://perma.cc/9R36-DP6B].

146. Peter Whoriskey, Douglas MacMillan, & Jonathan O'Connell, *'Doomed to Fail': Why a $4 Trillion Bailout Couldn't Revive the American Economy*, WASH. POST (Oct. 5, 2020), https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending/ [https://perma.cc/3PL7-G2XL].

147. *Id.*

148. *Id.*

Consider, moreover, that studies found that the $2,000 in stimulus payments provided to most Americans in December 2020 and March 2021 "substantially reduced hardship," including contributing to "sharp declines in food shortages, financial instability and anxiety."[149] By contrast, for the average full-time worker, the equity minimum wage would provide a five-fold safety net. Thus, there's even more reason to believe that the equity minimum wage would significantly reduce financial instability and the many manifestations of hardship (e.g., hunger, unpaid utility bills, and mounting credit card debt.).

The rebate also has the advantage of shifting administrative costs to the employer, rather than the government: the employer would be responsible for conveying the equity. It also limits non-compliance: the IRS would require proof of the number of employees and the amount of equity paid in order for the company to receive the rebate amount for which it is eligible.[150]

### D. THE CHOICE BETWEEN EMPLOYER EQUITY AND BROAD-BASED EQUITY

For a variety of reasons, employers may prefer to grant (and employees may prefer to receive) company equity. For one, employers may believe it will incentivize employee performance; for employees, it may give a sense of ownership over one's work, in addition to literal ownership of the company. For another, it may be cheaper for companies to give company equity if they can essentially mint or print new shares rather than buying them in the open market; for employees, company equity may be particularly attractive if the company's shares are outperforming the market overall.

On the flipside, employers may prefer to give (and employees may prefer to receive) a broad basket of stocks such as an exchange-traded, indexed mutual fund. For firms with few outstanding shares, printing new shares may excessively dilute

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149. Jason DeParle, *Stimulus Checks Substantially Reduced Hardship, Study Shows*, N.Y. TIMES (July 18, 2021), https://www.nytimes.com/2021/06/02/us/politics/stimulus-checks-economic-hardship.html [https://perma.cc/U7EY-8UJD].

150. The author notes there could be considerable enforcement concerns, particularly around ensuring workers are paid all equity wages due to them, but these concerns are beyond the scope of this Note.

existing shareholders' share value.[151] For firms with small market capitalizations or limited trading volumes, purchasing shares on the open market may lead to artificially inflated share prices if the demand (necessary to supply their employees with equity) far exceeds the supply of shares available to be purchased.[152] And for privately-held firms, it may be prohibitively costly to engage third-party accounting firms to valuate the firms' share prices.[153] Employees may prefer a broad basket of equities if the company is underperforming the market overall. Employees may also prefer, as is generally recommended, to have a diversified portfolio of equities.[154]

Although this proposal amounts to a government-mandated solution to a market-created problem, the solution is a market-inspired one. At present, the market generates tremendous wealth for the few and not the many. If equity were distributed more broadly, the market *would* generate wealth for the many.

One of the most cherished principles of the free market is consumer choice: specifically, that more choices are always better than fewer.[155] Accordingly, workers should have the choice between receiving equity in their employer (where feasible) or in a broad basket of equities.[156] Ideally, an employee could even choose to receive some of their equity compensation in the form of company equity and the remainder in a broad basket of equities.

If the equity vests rapidly and is liquid, moreover, it should not matter if the employee chooses company equity or a stake in a

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151. *But see* Mira Ganor, *The Power to Issue Stock*, 46 WAKE FOREST L. REV. 701, 708 (2011). Professor Ganor notes that if new shares are issued at "fair market value," then existing shareholders' votes are diluted but the "value of the shares of the old shareholders remains the same[.]" *Id.* at 708–709.

152. It's not clear that this would hurt the employees (whose equity would increase in value), but as a general rule it seems that avoiding share price bubbles, or share prices that far exceed the value of the company's expected future earnings, is prudent policy.

153. As discussed *supra* Part I.B, Publix is an example of a privately-held firm that engages a third-party accounting firm to appraise its share price on at least an annual basis. Private firms would have to do so on at least as regular of a basis for the employee to make a valid comparison between receiving company equity or a broad basket of equities.

154. *See, e.g.*, *Why Portfolio Diversification Matters*, SOFI (Mar. 3, 2021), https://www.sofi.com/learn/content/why-portfolio-diversification-matters/ [https://perma.cc/R7NE-PYLG].

155. *See, e.g.*, Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust,* 62 U. PITT. L. REV. 503 (2001); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 716, 754 (1997).

156. The default election should probably be for the broad basket of equities, with the employee having the option to change their election at will, to be reflected in the following pay period.

broad basket of equities. Both options are fungible because the employee could choose to sell the company equity and buy into a basket of equities, or vice-versa. For instance, an Amazon employee could receive Amazon stock, promptly sell it, and use the proceeds to purchase Tesla equity. And, most importantly, if the employee prefers cash, the equity could be readily converted to cash.

We do not, however, live in a world without transaction costs.[157] There are transaction costs associated with everything—the time it takes to sell the equity, at the very least. Defaults, moreover, are "sticky."[158] An employee who opts at the outset to receive company equity is unlikely to elect to change her preference if it requires filing paperwork with her employer.[159] For these reasons, it is incredibly important to pay attention to defaults and to ensure that workers make informed decisions at the outset. Financial advising and counseling services are likely to flourish—and are necessary.[160] Presumably, the government could take on some of the burden of educating employees, but the government is further removed from the employee than the firm.

Attention must be paid to ensuring that companies do not act in their self-interest by encouraging employees to make decisions that are against the employees' interests. Specifically, protections should be in place to ensure that workers are not encouraged to receive company equity when they would be better off with the broad basket of equities. Presumably, common law fraud and

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157. *See, e.g.*, Brett Frischmann & Evan Selinger, *Utopia?: A Technologically Determined World of Frictionless Transactions, Optimized Production, and Maximal Happiness*, 64 UCLA L. REV. DISCOURSE 372 (2016).

158. *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 659 (2006).

159. *See* Shlomo Benartzi & Richard H. Thaler, *Behavioral Economics and the Retirement Savings Crisis*, 339 SCIENCE 1152–53 (2013).

160. Expanding access to financial planning and financial counseling is an important goal, but is beyond the scope of this Note. It is important to note, however, that many employers already provide financial counseling services to their employees and that many states, cities, and non-profits provide free financial counseling to the public. *See, e.g.*, Kelly Burch, *Financial Planners Can Help with Everything from Investing to Retirement, and Your Employer May Offer Planning Services for Free*, BUS. INSIDER (Sept. 24, 2019), https://www.businessinsider.com/personal-finance/you-may-be-missing-out-on-a-big-work-perk-financial-planning [https://perma.cc/Z7A6-RLB9] ("Sixty-five percent of employers offer some sort of financial wellness program, according to a recent survey by Robert Half International."); *Get Free Financial Counseling*, N.Y.C. DEP'T OF CONSUMER AFFS. (June 19, 2020), https://www1.nyc.gov/site/dca/consumers/get-free-financial-counseling.page [https://perma.cc/CZ2L-TUJ5]; *Financial, Credit, and Medicare Counseling*, N.Y. PUB. LIBR., https://www.nypl.org/help/getting-oriented/financial-literacy/counseling [https://perma.cc/L3MZ-SWXN].

robust enforcement of securities laws' antifraud provisions by the SEC could provide relatively effective guardrails against abuse. Further research may be needed, however, to determine if additional statutory safeguards for employees are necessary.

Even with robust antifraud protections in place, mandating clear and easily-understandable disclosure is essential. At the time of election, employees must be presented with digestible information about the company's financials and its performance relative to the market overall. Charts showing the company's share price performance over varying periods (e.g., the prior three months, one year, five years, etc.) might be sufficiently clear to enable most employees to make an educated decision. More research is necessary, however, to determine precisely what information and mode of presentation would be necessary to help employees make well-informed choices.

As noted, not every employee will be eligible to receive equity in their employer. Employees at small, privately-held firms, for example, may receive the broad basket of equities by default. Another class of employees potentially ineligible are those employed by non-profits; there are no shares to dole out. And perhaps the largest class of employees ineligible to receive equity in their employer are those employed by the government, be it state, local, or federal.

Nearly twenty-four million people are public-sector employees.[161] These civil servants are already paid less than their private-sector counterparts.[162] There is no reason to further disincentivize talented individuals from working for the government simply because they would be denied a chance to earn meaningful equity. As such, public-sector workers should also be eligible to receive the broad basket of equities.

As a workaround to receiving equity in their employers, public-sector employees could have the option of choosing between

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161. Fiona Hill, *Public Service and the Federal Government*, BROOKINGS (May 27, 2020), https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/ [https://perma.cc/XN3A-4Z4L].

162. Jeffrey H. Keefe, *Public-Sector Workers Are Paid Less Than Their Private-Sector Counterparts—and the Penalty Is Larger in Right-to-Work States*, ECON. POL'Y INST. (Jan. 14, 2016), https://www.epi.org/publication/public-sector-workers-are-paid-less-than-their-private-sector-counterparts-and-its-much-worse-in-right-to-work-states/ [https://perma.cc/AN6D-T447]; Jessie Bur, *Feds Face a Smaller but Significant Pay Gap with Private Sector*, FED. TIMES (Nov. 6, 2019), https://www.federaltimes.com/management/pay-benefits/2019/11/06/feds-face-a-smaller-but-significant-pay-gap-with-private-sector/ [https://perma.cc/EF82-JV9U].

Treasury bonds (for federal government employees) or investment-grade-rated bonds issued by the state for which they work (for state employees).[163] The yields on bonds are likely to be lower than the returns on equity investments, but they are incredibly safe—in fact, it has been nearly a century since any state has defaulted on its bonds.[164] Detroit's 2013 bankruptcy, and concomitant default on its municipal bonds, is a rare exception, but it is worth noting that Detroit, rather than the state of Michigan, issued the defaulted bonds.[165]

### E. THE VESTING PERIOD

In order to effectively address the $400 Problem, employee equity must vest rapidly—meaning that the worker is allowed to sell it for cash. Currently, most firms that offer some form of equity compensation have a one- to four-year vesting window.[166] Generally, none of the equity vests until the employee's one-year mark, at which point one-quarter vests, and then the remainder tends to vest monthly or annually throughout years two through four.[167] This is too long. It ties up equity that could be sold for much-needed cash. Employers like this option because it incentivizes employee retention, but many employees are already stuck in jobs that are poor matches for their skills or potential because they depend on their employers for healthcare.[168] To decouple this employee-employer dependency, the equity should vest as soon as is feasible. The vesting period could be as brief as two weeks (a standard pay period) or as long as quarterly.

163. Given that bonds are not as liquid as public equities, employees would have to be given a guaranteed redemption option like for employees with equity in privately-held companies. *See supra* Part II.

164. Monica Davey, *The State That Went Bust*, N.Y. TIMES (Jan. 22, 2011), https://www.nytimes.com/2011/01/23/weekinreview/23davey.html [https://perma.cc/V9UR-5X98].

165. Danielle Kurtzleben, *Everything You Need to Know About the Detroit Bankruptcy*, VOX (Dec. 15, 2014), https://www.vox.com/2014/12/15/18073574/detroit-bankruptcy-pensions-municipal [https://perma.cc/F3UL-44MJ].

166. Jenna Lee, *What is Stock Vesting?*, CARTA (July 11, 2019), https://carta.com/blog/what-is-stock-vesting/ [https://perma.cc/D6FD-K6WU].

167. *Id.*

168. Josh Bivens, *Fundamental Health Reform Like "Medicare for All" Would Help the Labor Market*, ECON. POL'Y INST. (Mar. 5, 2020), https://www.epi.org/publication/medicare-for-all-would-help-the-labor-market/ [https://perma.cc/S8AH-8TCL] ("Making health insurance universal and delinked from employment widens the range of economic options for workers and leads to better matches between workers' skills and interests and their jobs.").

Quarterly vesting would reduce administrative costs for the employer, but may be longer than many employees can afford to wait. A one-month vesting period strikes a reasonable balance between reducing administrative costs and not being an unduly burdensome length of time for an employee to wait.[169] Finally, the equity would have to be held in a fee-free brokerage account managed by an independent third party.

Borrowing against unearned equity would be strictly prohibited. It would be unlawful for lenders to use unearned equity or future equity streams as collateral for loans. It would also be unlawful for someone to purchase a future equity stream upfront for a lump-sum payment. Equity compensation would also be unassignable. These prohibitions would forestall the kind of predatory lending that has plagued compensation programs like the James Zadroga 9/11 Health and Compensation Act (the Zadroga Act).[170] In 2017, the Consumer Financial Protection Bureau and the New York Attorney General sued RD Legal Funding (RD) for their deceptive and abusive practices, scamming September 11 first responders out of millions of dollars.[171] RD repeatedly offered upfront, lump-sum payments to first responders who were entitled to compensation from the Zadroga Fund, and once the funds were awarded, the first responders owed the awards to RD at what effectively amounted to unconscionable and usurious interest rates.[172]

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169. Additional research on the appropriate length of time for the vesting period may be necessary. Payday lending is a $90 billion industry that depends on the fact that many workers cannot afford to wait until their next paychecks. As such, a month may be too long. *See, e.g.*, Adam Tempkin & Christopher Maloney, *Expensive Loans to Desperate People Built This $90 Billion Industry*, BLOOMBERG (Feb. 14, 2019), https://www.bloomberg.com/news/articles/2019-02-14/expensive-loans-to-desperate-people-built-this-90-billion-industry [https://perma.cc/5SYD-TMEZ]. Some employers and start-ups, however, are developing ways to enable workers to access their earned wages before their next payday, helping workers escape the vicious payday loan debt trap. *See, e.g.*, Kristin Toussaint, *This Startup Wants Workers to Get Access to Their Wages Before Payday*, FAST CO. (Mar. 2, 2020), https://www.fastcompany.com/90468637/this-startup-wants-workers-to-get-access-to-their-wages-before-payday [https://perma.cc/7AEM-VP34]; Michael Corkery, *Walmart Will Let Its 1.4 Million Workers Take Their Pay Before Payday*, N.Y. TIMES. (Dec. 13, 2017), https://www.nytimes.com/2017/12/13/business/walmart-workers-pay-advances.html [https://perma.cc/45R9-D9L2]. These Earned Wage Access (EWA) services—PayActiv, Even, Daily Pay, and Immediate, to name just a few—could theoretically help employees convert earned equity to cash for a small fee before the shares fully vest.

170. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623.

171. Complaint, Consumer Fin. Prot. Bureau v. RD Legal Funding LLC, No. 1:17-cv-00890, (S.D.N.Y. Feb. 7, 2017), ECF No. 1.

172. *Id.* at 2.

### F. TAXING THE EQUITY MINIMUM WAGE

Finally, there is the issue of taxation. Like equity compensation generally (e.g., to CEOs), the equity minimum wage would be treated like ordinary income for tax purposes. The primary concern is ensuring that equity wages are sufficiently withheld, so that workers are not hit with unexpectedly large tax obligations. As is the case at most firms that offer some form of equity compensation or stock options, the firm would be responsible for ensuring that a sufficient amount of equity is withheld to satisfy the employee's year-end tax obligation. The employer could engage in "stock netting" or stock sales to satisfy the employee's anticipated tax obligation, whichever is more advantageous to the employee.[173]

Investment gains of equities held less than one year (short-term capital gains) are taxed as normal income, while gains from equities held longer than one year are taxed at the long-term capital gains rate.[174] While some employees may be able to hold onto their equities for more than a year, it is likely that many employees will have to sell equity to pay for certain expenses. The value of the shares at the time they vest is treated like ordinary income, while the profits from the sale of shares may be treated like capital gains.[175] Employers are responsible for tax withholding at the time of vesting, but employees are responsible for taxes on the sales.[176] It is possible that many workers would owe money to the IRS at the end of the year, and there is not a great way to mitigate against this risk. According to the IRS, however, "Some or all net capital gain may be taxed at 0% if your taxable income is less than $80,000."[177] This exemption may be

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173. *Tax Withholding in Company Stock Plans*, FIDELITY INVS., https://workplaceservices.fidelity.com/bin-public/070_NB_SPS_Pages/documents/dcl/shared/StockPlanServices/SPS_Tax_Withholding.pdf [https://perma.cc/7BE5-7D2Q]; Richard Friedman, *RSUs: The Basics*, CHARLES SCHWAB (2012), https://www.schwab.com/public/eac/resources/articles/rsu_basics.html [https://perma.cc/9K8J-3KRV].

174. 26 U.S.C. § 1222; *see also Topic No. 409 Capital Gains and Losses*, INTERNAL REVENUE SRVC. (Mar. 12, 2021), https://www.irs.gov/taxtopics/tc409 [https://perma.cc/WG4P-6UQP].

175. *How Equity Compensation and Stock Purchase Plans Are Taxed*, FIDELITY INVS. (2020), https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/fidelity/equity-compensation-tax-treatment-guidelines.pdf [https://perma.cc/AKM9-RBJG].

176. *Id.*

177. INTERNAL REVENUE SRVC., *supra* note 174.

sufficient to ensure that a large majority of workers are not under-withheld.

Another option is to create a tax exemption, like the standard deduction, for some level of investment income (as opposed to ordinary income).[178] But this policy could be costly to the government and could benefit some wealthy people who could sell a portion of their investments each year, but not too much as to put them above the deduction threshold. Alternatively, firms could be conservative in their withholding. Although, this option would mean less take-home pay for the worker, it would increase the likelihood that the employee is not under-withheld and receives a refund from the IRS at tax time.[179]

## III. POTENTIAL OBSTACLES AND CRITICISMS

In this Part, costs and alternatives are considered and discussed. This Part shows that the proposal is affordable and defensible against a host of potential criticisms.

### A. COST

This Note's proposal may elicit an obvious question: can businesses afford this? The short answer is yes. Analyzing over 7,000 firms across 94 industries, an NYU Stern dataset reveals that the average firm has a gross margin in excess of 36 percent and a net margin of around 7.7 percent.[180] Labor costs as a percent of all costs are typically between 20 to 35 percent of gross sales.[181] According to the Bureau of Labor Statistics, the average total cost of compensation (including all benefits) is $38.20 per worker per

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178. *See* INTERNAL REVENUE SRVC., *Topic No. 551 Standard Deduction*, https://www.irs.gov/taxtopics/tc551 [https://perma.cc/R9WF-8XMR] (explaining what the standard deduction is and how it operates).

179. *See* Julia Kagan, *Underwitholding*, INVESTOPEDIA (Nov. 16, 2020), https://www.investopedia.com/terms/u/underwithholding.asp [https://perma.cc/M2VJ-YLP9].

180. Aswath Damodaran, *Margins by Sector (US),* N.Y.U. STERN (Jan. 2021), http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html [https://perma.cc/Z46G-T7AG].

181. William Adkins, *How to Calculate the Employee Labor Percentage*, CHRON (Jan. 31, 2019), https://smallbusiness.chron.com/calculate-employee-labor-percentage-15980.html [https://perma.cc/UGT3-2UBQ].

hour.[182] If that were to increase to $43.20—assuming no above-minimum-wage wages are substituted for equity—it would amount to approximately a 13 percent increase in average total compensation.

Taken together, this means that labor costs as a percent of all costs would rise, on average, between 2.6 percent and 4.6 percent. Gross margins and net margins would fall accordingly. Firms with average or above-average margins would be able to absorb the cost into their profits. Firms with below-average margins would likely have to increase prices. The increased prices would likely be passed on to consumers, but every working American would see his or her income increase, so the increased prices would unlikely be unduly burdensome.

### B. WHY PREDICATE ON EMPLOYMENT?

Because the equity minimum wage strives to apply as broadly as possible, it begs the question: why not make it universal? That is, why not give everyone equity monthly, like an equity universal basic income (UBI), or at birth, like baby bond programs? There are two compelling reasons: (i) cost and (ii) politicians' and the public's aversion to perceived handouts.[183] First, most universal programs would be significantly more costly than the largely employer-funded equity minimum wage. Estimates of the cost of a universal basic income are in the ballpark of $3 trillion dollars annually.[184] Anne Alstott and Bruce Ackerman's baby-bond-like "citizen's stake," as outlined in *The Stakeholder Society*, was

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182. *Employer Costs for Employee Compensation*, U.S. BUREAU OF LAB. STATS. (Mar. 4, 2021), https://data.bls.gov/timeseries/CMU1010000000000D [https://perma.cc/3HYC-RQP6].

183. *See, e.g.*, Annie Lowrey, *The Problem with Government Handouts*, N.Y. MAG.: INTELLIGENCER (Sept. 25, 2015), https://nymag.com/intelligencer/2015/09/problem-with-government-handouts.html [https://perma.cc/AM8D-VZ2C].

184. Robert Greenstein, *Commentary: Universal Basic Income May Sound Attractive But, If It Occurred, Would Likelier Increase Poverty Than Reduce It*, CTR. ON BUDGET AND POL'Y PRIORITIES (June 13, 2019), https://www.cbpp.org/poverty-and-opportunity/commentary-universal-basic-income-may-sound-attractive-but-if-it-occurred [https://perma.cc/KP9P-RAKK]; Kyle Pomerleau, *Does Andrew Yang's "Freedom Dividend" Proposal Add Up?*, TAX FOUND. (July 24, 2019), https://taxfoundation.org/andrew-yang-value-added-tax-universal-basic-income/ [https://perma.cc/6JQA-UTB8]; Max Jaeger, *Universal Basic Income Would Cost Taxpayers $3.8 Trillion Per Year: Study*, N.Y. POST (July 12, 2018), https://nypost.com/2018/07/12/universal-basic-income-would-cost-taxpayers-3-8t-per-year-study/ [https://perma.cc/CS6E-LCQM].

estimated by the authors to cost around $385 billion annually.[185] Hillary Clinton's 2007 baby bond proposal ($5,000 for each newborn), and Senator Cory Booker's 2019 baby bond proposal ($1,000 at birth, with up to $2,000 added by the government each year) have more modest costs: $20 billion and $60 billion per year, respectively.[186]

Here, the $187 billion cost of the small employer rebate is a small fraction (6.2 percent) of the estimated cost of a universal basic income and around half the cost of *The Stakeholder Society*'s "citizen's stake," but significantly more costly than the leading baby bond proposals. One major difference bears mentioning: although these three proposals all take advantage of the fact that capital grows faster than wages (addressing the *Capital in the Twenty-First Century* Problem), the latter two do not address the $400 Problem. That is, the policies leave the money locked up and inaccessible until the recipient reaches maturity. The equity minimum wage, however, addresses the $400 Problem.

Second, most people are averse to what they perceive to be "handouts."[187] This is one of the reasons that fewer people than are eligible take advantage of social safety net programs, like SNAP.[188] A "handout," or anything perceived to be a handout, moreover, is essentially dead-on-arrival in Washington.[189] In order for the proposal to have at least some political viability, it must (for better or for worse) be linked to employment.[190] This is

185. BRUCE A. ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 219 (2000) (dollar amounts adjusted for inflation since publication).

186. Gerald Prante, *Hillary Clinton's Proposal for $5,000 "Baby Bond" Is Essentially Already Here*, TAX FOUND. (Oct. 3, 2007), https://taxfoundation.org/hillary-clintons-proposal-5000-baby-bond-essentially-already-here/ [https://perma.cc/UB6L-K4BL]; Elise Viebeck, *Booker Wants a 'Baby Bond' For Every U.S. Child. Would It Work?*, WASH. POST (Aug. 19, 2019), https://www.washingtonpost.com/politics/cory-booker-wants-a-baby-bond-for-every-us-child-would-it-work/2019/08/15/35003f16-b88b-11e9-bad6-609f75bfd97f_story.html [https://perma.cc/226D-QWFT].

187. *See, e.g.*, JoNel Aleccia, *Broke and Ashamed: Many Won't Take Handouts Despite Need*, NBC NEWS (Mar. 23, 2013), http://www.nbcnews.com/feature/in-plain-sight/broke-ashamed-many-wont-take-handouts-despite-need-v17327439 [https://perma.cc/4LPA-XJJZ] ("'Stigma seems to be a big barrier to participation,' said Colleen Flaherty Manchester, an assistant professor of management at the University of Minnesota who studies the issue. 'We find it to be quite substantial.'").

188. *Id.*

189. *See* Annie Lowrey, *supra* note 183; Vann R. Newkirk II, *The Real Lessons From Bill Clinton's Welfare Reform*, ATLANTIC (Feb. 5, 2018), https://www.theatlantic.com/politics/archive/2018/02/welfare-reform-tanf-medicaid-food-stamps/552299/ [https://perma.cc/GH6G-JEYL].

190. Vann R. Newkirk II, *supra* note 189.

consistent with the trend of reforming welfare programs to include a work or actively-seeking-work requirement for eligibility.[191]

### C. WHY NOT CASH?

Another likely response is, "Why not just increase the minimum wage by $5.00 per hour?" Between 50 and 78 percent of Americans are living paycheck to paycheck (according to various studies from Nielson, the American Payroll Association, Career Builder, and the National Endowment for Financial Education); it seems, then, that what most Americans need desperately is more cash.[192] There are two reasons, however, that militate against simply raising the minimum wage. First, increasing the minimum wage would do very little to move the needle on the 'r > g' inequality. In order for workers to benefit from the rising tide of equities, they need an endowment of capital to begin with. Now, of course, workers could take the increased wages and purchase equities on the market, but this prospect seems exceedingly unlikely.[193]

This first reason is related to the second reason why simply increasing the minimum wage is inadequate: behavioral economics.[194] Behavioral economics studies suggest that a top-up of cash wages would more likely go to discretionary spending, rather than savings for emergencies or other large purchases (that might otherwise be purchased with debt, such as a car).[195] The well-documented endowment effect also shows that people will tend to hold on to perceived assets and assign greater value to them than to a comparable amount of cash.[196] Finally, the equity

191. Alvin Chang & Tara Golshan, *The Republican Push for Welfare "Work Requirements," Cartoonsplained*, VOX (July 26, 2018), https://www.vox.com/2018/7/26/17465068/work-requirements-medicaid-snap-republican-cartoon [https://perma.cc/EE5V-FSSL].

192. Ilyce Glink & Samuel J. Tamkin, *A Breakdown of What Living Paycheck to Paycheck Looks Like*, WASH. POST (Aug. 17, 2020), https://www.washingtonpost.com/business/2020/08/17/breakdown-what-living-paycheck-to-paycheck-looks-like/ [https://perma.cc/NA9G-DMS8].

193. This is unlikely for the reasons that defaults are "sticky" and because people are unlikely to take the additional step of converting cash to equities. *See supra* notes 158 & 159 and accompanying text.

194. *See supra* Part II.

195. Nicholas Epley, *Bonus of Rebate?: The Impact of Income Framing on Spending and Saving*, 19 J. BEHAV. DECISION MAKING 213, 213–27 (2006).

196. Fiona So, *Of Holdouts, Mugs and Pens: How the Endowment Effect Inspires App Loyalty*, MEDIUM (Dec. 3, 2019), https://medium.com/cogniss-magazine/of-holdouts-mugs-and-pens-how-the-endowment-effect-inspires-app-loyalty-a35cccd4a9f2 [https://perma.cc/5PWF-FSQA].

minimum wage would introduce millions of Americans to the stock market and could very likely encourage further investing with regular cash earnings.[197]

Helping to build savings, which grow at the growth rate of capital (in excess of the growth rate of wages), seems preferable to merely increasing wages. The entire proposal, moreover, is predicated on liquidity; workers could quickly, and at virtually no cost, convert the equities to cash if so needed.

### D. WHAT ABOUT UNEMPLOYMENT?

Opponents and proponents alike are likely to ask, "Will the proposal contribute to unemployment?" (i.e., will employers hire fewer workers?) and, "Will it just accelerate the pace at which certain firms go out of business?" These are difficult questions to answer because they are highly speculative and forward-looking. At least in the short run, it seems probable that unemployment would increase slightly.[198] But the evidence from studies of increased state minimum wages suggest the adverse employment effects are likely to be modest.[199] Additionally, the equity minimum wage could be phased in over a number of years—like most increases to the minimum wage—to blunt the impact. There may be concerns that employers would seek to "offshore" jobs to

197. Millions of first-time investors joined Robinhood during pandemic-induced lockdowns, spurring financial columnist Matt Levine's "boredom markets hypothesis." *See, e.g.*, Matt Levine, *Goldman Was Just Trying to Help*, BLOOMBERG (May 26, 2020 12:13pm), https://www.bloomberg.com/opinion/articles/2020-05-26/goldman-was-just-trying-to-help [https://perma.cc/74J7-JNGN]. According to anecdotal accounts and statements from Robinhood, many of these first-time investors have outperformed the market and have profited handsomely. *See, e.g.*, Rachel Louise Ensign, *Robinhood, Three Friends, and the Fortune That Got Away*, WALL ST. J. (Apr. 22, 2021) https://www.wsj.com/articles/robinhood-three-friends-and-the-fortune-that-got-away-11619099755 [https://perma.cc/GYY6-SKQG]. Others, however, have suffered huge losses on risky bets. *Id.* It may be necessary to impose additional guardrails to prevent first-time equity earners from taking excessively risky bets—perhaps, something akin to the SEC's accredited investor rule for unlisted securities. *See Accredited Investor Rule*, 17 C.F.R. § 230.501 (2021).

198. *How Increasing the Federal Minimum Wage Could Affect Employment and Family Income*, CONG. BUDGET OFF. (Apr. 5, 2021), https://www.cbo.gov/publication/55681 [https://perma.cc/8EQ9-95PT].

199. James Kwak, *The Curse of Econ 101*, ATLANTIC (Jan. 14, 2017), https://www.theatlantic.com/business/archive/2017/01/economism-and-the-minimum-wage/513155/ [https://perma.cc/968F-7JAS]; Daniel S. Hamermesh, *Do Labor Costs Affect Companies' Demand for Labor?*, IZA WORLD OF LAB. (Feb. 2021), https://wol.iza.org/articles/do-labor-costs-affect-companies-demand-for-labor/long [https://perma.cc/5XKL-9C3G].

lower cost countries or that increased labor costs would accelerate the pace of automation. These are genuine issues.[200] As for concerns that jobs would be "offshored" to lower income countries, sixty-eight percent of the gross domestic product in the United States comes from the services sector; shipping, retail, food services, education, and healthcare are some of the largest contributors to the services sector—and they are jobs that are hard to offshore.[201] A lower paid worker in Indonesia, say, cannot replace an UberEats driver in Indiana.

Some doomsayers, such as Yuval Noah Harari, predict that automation will create a "global useless class."[202] Already, driverless or self-driving vehicles are putting two to three million trucking jobs in jeopardy of being automated out of existence.[203] The pandemic—thanks in part to social distancing—has further accelerated pre-existing trends toward automation in service industries ranging from fast-food restaurants to hotels.[204]

To some extent, increased labor costs will accelerate the automation trend. The author, however, agrees with Harari that technologically-driven automation is all but inevitable. The best thing now, therefore, is to give extant workers a share of the pie so they will, at a minimum, have some assets when their jobs are

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200. *See, e.g.*, *Since 2017, Hundreds of Thousands of American Jobs Were Offshored, Trade Deficit Is Up 22%*, PUB. CITIZEN (Sept. 28, 2020), https://www.citizen.org/news/since-2017-hundreds-of-thousands-of-american-jobs-were-offshored-trade-deficit-is-up-18/ [https://perma.cc/4AAM-UBA6]; Grace Lordan & David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, 52 LAB. ECON. 40 (2018) ("[W]e find that increasing the minimum wage decreases significantly the share of automatable employment held by low-skilled workers, and increases the likelihood that low-skilled workers in automatable jobs become nonemployed or employed in worse jobs.").

201. Rumki Majumdar & Daniel Bachman, *Changing the Lens: GDP from the Industry Viewpoint*, DELOITTE INSIGHTS (July 25, 2019), https://www2.deloitte.com/us/en/insights/economy/spotlight/economics-insights-analysis-07-2019.html [https://perma.cc/RU8R-4JRQ].

202. Kimiko de Freytas-Tamura, *What's Next for Humanity: Automation, New Morality and a 'Global Useless Class'*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/world/europe/yuval-noah-harari-future-tech.html [https://perma.cc/BFB8-CMTD].

203. Jennifer Smith, *Self-Driving Technology Threatens Nearly 300,000 Trucking Jobs, Report Says*, WALL ST. J. (Sept. 4, 2018), https://www.wsj.com/articles/self-driving-technology-threatens-nearly-300-000-trucking-jobs-report-says-1536053401 [https://perma.cc/S343-2JVP]. *But see* Maury Gittleman & Kristen Monaco, *Automation Isn't About to Make Truckers Obsolete*, HARV. BUS. REV. (Sept. 18, 2019), https://hbr.org/2019/09/automation-isnt-about-to-make-truckers-obsolete [https://perma.cc/TP6S-QXVU].

204. *See* Ben Casselman, *Pandemic Wave of Automation May Be Bad News for Workers*, N.Y. TIMES (Sept. 25, 2021), https://www.nytimes.com/2021/07/03/business/economy/automation-workers-robots-pandemic.html [https://perma.cc/7P7C-4Z67].

eliminated by automation. If automation is inevitable, speeding up its arrival is less than ideal, but the proposal would help those most at risk of being deleteriously affected by automation weather the storm a little bit better.

## CONCLUSION

An equity minimum wage could make a substantial impact in addressing three systemic problems in our economy. An equity minimum wage—when earned in the form of employer equity—would help address the Amazon Problem: workers whose labor is essential to their companies' tremendous share price growth deserve to share in the rewards. An equity minimum wage—when earned in any form—would give workers a capital stake in the economy and would help reduce the widening wealth inequality between those who earn money from money and those who earn money from labor (i.e., the *Capital in the Twenty-first Century* Problem). And, finally, an equity minimum wage would help workers earn long-term savings and have a readily-accessible reserve of funds to cover unexpected expenses, avoiding costly payday loans and other debt traps (the $400 Problem).

The proposal set forth in this Note is designed to apply as broadly as possible and to mitigate against the undesirable shift toward more unstable and inequitable forms of labor, such as part-time work and independent contracting. The proposal for introducing an equity minimum wage is also designed to provide substantial assistance to small businesses to ensure they are not disproportionately burdened by additional labor costs. This Note's proposal would not only reduce wealth and income inequality, but it would do so in a way that is economically feasible.