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Coercion and Consent in Employment: From Contract to Civic Republicanism

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ABSTRACT:

Although regulated by local, state, and national law, the employment relationship in the United States remains predominantly a negotiated model, with the bulk of terms and conditions of work determined by the employment contract, individual or collective. Rooted in philosophical liberalism, the essence of free labor is defined by the consent of the parties to employment. After a period of abstract ideological laissez-faire (the Lochner Era), New Deal legislation and jurisprudence brought an element of realism to labor law, seeking to remedy problems of power imbalance by encouraging collective bargaining with the National Labor Relations Act, placing a floor under working conditions with the Fair Labor Standards Act, and after WWII, countering discrimination with Title VII of the Civil Rights Act. With the "right turn" of the federal judiciary, however, accelerated by the consolidation of a conservative "supermajority" on the U.S. Supreme Court, protective regulation is being drastically undermined and worker frustrations are growing, as some commentators even warn of a return to a "new Lochner Era." Instead of seeking simply a more realistic refurbishing of "consent," some labor advocates are accompanying a revival of civic republicanism as a constitutional ideology in calling for a republican redefinition of freedom as non-domination at work and for empowered worker voice within firms as well as stronger democratic citizenship for workers in economic and political life.

KEYWORDS:

employment contract, consent, civic republicanism, worker voice, domination.

1. Introduction

Sir Henry Sumner Maine, nineteenth century British legal historian, famously described the evolution of legal regulation of social relations as moving from

status to contract in modernizing societies (Matsuura). This observation aligns with the philosophy of liberalism, an ideology of individualism that undergirds a predominantly negotiated model of employment based on a largely unregulated labor market and free employment contracts. The ideal of a laissez faire economy with strong economic rights such as liberty of contract was always a utopian ideal never realized in practice, but it was approximated in American jurisprudence at the turn of the nineteenth century, a period often referred to as the Lochner Era, named after an (im)famous Supreme Court case. This nineteenth century free market fundamentalism came under mounting criticism in the twentieth century, when reformers (confusingly called "liberals" in United States parlance, while advocates of a return to nineteenth century liberalism are designated as "conservatives") recognized that realism, actual social conditions and the welfare of workers and society, demanded regulations to protect the rights and interests of workers. Despite extensive regulations enacted under the pressure of the New Deal and the labor movements of the 1930s and 1940s through the various movements for civil rights, women's rights, workers' rights, etc., in the 1960s and 1970s, beginning with the Reagan presidency in the 1980s a right turn in American politics and law has sought to turn the hands of the clock back to a NeoLochnerian Era. Neoliberal politics, along with the dire threat to majoritarian democracy of which Donald Trump is a symptom (although not the cause), has in recent decades diluted or even repealed much of the protective infrastructure scaffolding the United States labor market, with the potential to return the American labor regime to one that venerates abstract consent while being blind to real coercion. Although there is no shortage of calls to shore up and restore the labor and employment regulations and protections erected by the New Deal and post-WWII legal liberalism, there has also emerged an undercurrent of thinking in the academic and legal communities that advocates

a new approach based on civic republicanism. This political philosophy has a traditional place in American culture and, some claim, overlaps substantially with American traditional liberalism, but has significant divergences that might provide a distinct stamp for labor and employment law. Especially with its emphasis on understanding freedom as non-domination rather than the more orthodox liberal freedom as non-interference, civic republicanism might point reformers toward new avenues for enhancing worker rights in areas such as freedom of association and organizing rights, employment conditions and welfare policies, worker participation and voice in firm management, new forms of enterprises such as cooperatives and stronger political influence over the economy, and even new fundamental economic rules and development models. If traditional law treated workers as bound by their status instead of exercising individual freedom, and if markets and contracts promised emancipation but failed to some degree to realize this ideal, both liberal and civic republican approaches to employment might be conceived as offering a new more favorable status to workers, as citizens in an industrial democracy. This article will briefly trace these historical transformations and offer snapshots or samples of the kinds of protections that might exemplify a republican employment regime.

2. Free Labor and Lochner

The United States is often characterized as philosophically liberal. This liberal philosophy supposedly not only shapes our culture (individualistic), economy (capitalist, tending toward market oriented), politics (emphasizing rights and minimizing government), but also our law. Our constitution is noticeably spare and brief (less than ten pages compared to book-length for Brasil) And our labor and employment law, compared to other wealthy, modern, capitalist economies, relies more on a negotiated rather than legislated model

(although to claim that the United States does not have labor and employment regulation is so inaccurate as to be mythical (Fernandes).In a famous argument published in the 1950s, Louis Hartz claimed that, since the U.S. had been spared a feudal past and the class conflicts that system spawned, liberalism had so dominated political thinking in the United States from its origins that consensus more than conflict had characterized American history and politics (Hartz). Hartz' thesis has been roundly criticized, and liberalism has been blended with and challenged by other ideologies, including illiberalism (Hahn), populism (Judis), democratic socialism (Nichols), and civic republicanism (Sandel). Liberal individualism, however, has undoubtably had a strong influence in shaping America's employment regime as a predominantly negotiated model. Historical experience has reinforced ideology; in particular, the origins of the country as a slave society and the struggle to abolish slavery led to an implacable identification of "free labor" with employment contracts (Forbath).

Although Northern workers, composed principally of small farmers and craftspeople, held an ideal of freedom at work as economic independence, and perceived employment skeptically as a form of subordination, more middle class abolitionists conceived of the distinction between slavery and free labor as the right to sell one's labor to an employer of one's own choosing and revered the employment contract as the mark of emancipation (Forbath; Gourevitch). Professor Amy Dru Stanley (1998) has traced how contract came to define the relationships of both employment and marriage; indeed, the nineteenth century in the United States has been called the era of "contract culture."

The idealized view of contract fit nicely with the liberal political philosophy that predominated in the young American Republic, especially as that ideal evolved in the nineteenth century but also as it derived from earlier thinkers. John Locke (1632 – 1704), the apologist for the English Glorious Revolution whose thought was revered by American revolutionists, had, following Hobbes but with important twists, conceived of society as founded on a social contract. According to Locke (Second Treatise), before the foundation of civil society, all people existed in a state of nature as free, equal, independent, and property-owning individuals endowed with rights to life, liberty, and estates. These individuals only entered society by consenting to the social contract, and the role of government was strictly limited to protecting the "natural rights" that these individuals enjoyed in the state of nature (though, in the type of inconsistency or ambiguity that characterizes so many aspects of Locke's thinking, government could legitimately regulate the lives, liberties, and property of citizens in the name of protecting them). Implicitly, all sorts of lesser contracts predated the social contract. In the state of nature, people bought and sold, traded, made various commercial and social agreements, and importantly, bought and sold labor (which Locke thought

was owned by each worker, because workers owned their own bodies and hence, their own labor) as well as other forms of property (land being especially important in an agricultural society like 17th century England). The role of the government was to respect and enforce these contracts and resultant distributions, not, emphatically, to redistribute property.

Nineteenth century liberal thinkers and political economists elaborated on the nature of market exchanges, including labor markets. In the ideal version, two individuals, a buyer and seller, meet in the market to effect an exchange. Various assumptions must be made for the market to function and for exchanges to be truly free. Buyers and sellers must be equal, meaning not equally resourced but with equal legal rights. They must be free, not coerced into a deal – that is, exchanges must be voluntary. Any deal must be mutually beneficial, an assumption that follows from the freedom of both parties; otherwise, presumably, a party who was not benefited would not consent to the deal. In a labor market, for example, buyers of labor (employers) offer prices (wages or salaries, terms and conditions of employment) to induce sellers of labor (workers or employees) to accept employment and perform the work with their labor bought by the buyer/employer (Dagan and Heller; Dukes and Streeck). In such an ideal market, the role of the state is minimal. Although even libertarians recognize (when pushed) that some government rules are necessary to create and sustain a market, to go beyond this bare framework to having laws that influence the content of contracts is to risk paternalism at best, coercion for sure, and suboptimal outcomes not only for individual buyers and sellers but economic inefficiency, political unfreedom (coercion), and social injustice (redistribution, that is, deviations from market outcomes) (Galbraith; Dagan and Heller).

Judges played an important role in injecting the ideal of markets and contract into American law as the primary instrument for ordering employment relations, enshrining the contractual ideal in both common law and constitutional interpretation. Although the traditional English common law of employment, dating from the Middle Ages and the Statute of Laborers of 1351, had been master/servant law, a common law imported to the American colonies when settled and modified in practice but not repudiated by the American Revolution (Kahana; Seinfeld 1991), in the 1880s American judges began to change the law. In his popular treatise on the law, Judge Horace Wood claimed that the American rule was that employment contracts that did not explicitly state the duration of their validity were to be interpreted as "at will," meaning that either party could terminate the contract at any moment for any reason. As the influence of Wood's treatise spread, American judges subtly transformed what was initially a canon of interpretation, a presumption that the contract was at will barring other evidence of a different will of the parties, to a substantive rule of employment law, meaning that employment contracts were necessarily at will unless they specified a period in the contract (Steinfeld 1991, Orren).

In the last decades of the nineteenth century and first third of the twentieth century, the U.S. Supreme Court in essence constitutionalized this at will rule, basing employment contracts in a so-called implicit "liberty of contract." This constitutional right was not explicit in the constitutional text, but was founded on a 1897 Court decision (Cochran 2021). Guided by this constitutional right to contract (along with other constitutional principles based on conservative interpretations of the constitutional by the Supreme Court of this era), majorities of Justices struck down a wide assortment of reforms passed by Congress and state legislatures to resolve problems of a society undergoing rapid and complex

changes of modernization, including industrialization, immigration, urbanization, and social change and dislocations. Several notorious cases epitomize the era's approach to reforms of employment. In the 1923 Atkins v. Children's Hospital, the Court invalidated a minimum wage law in the District of Columbia as amounting to redistribution of property, since the reform would override the wage level set "naturally" by the labor market. In Adair v. United States (1908), the Court undermined Congressional attempts to protect the right of workers to unionize in order to bargain collectively in the labor market for more favorable terms, striking a Congressional prohibition on "yellow dog" employment contracts requiring workers to promise not to join a union in order to be hired. The Court held that the ban on such contracts interfered with the property rights of employers as well as being a matter (employment as opposed to commerce) that Congress had no authority to regulate under the interstate commerce clause of Article I, Section 8.

The case that came to symbolize this conservative reaction against reform legislation was Lochner v. New York. In 1905 the U.S. Supreme Court struck down New York's Bake Shop Act, a labor reform limiting bakers' hours to a maximum of ten hours per day or sixty hours per week. The Act, said the majority, violated the liberty of contract. Affirming the myth of the idealized labor market, the Court affirmed that liberty of contract protected workers' right to sell their labor for eighteen hours a day if they wished as much as employers' rights to offer long working days. Although the Court recognized that contractual liberty was not absolute but could be regulated for the community welfare, the majority judged that the Act's limitation on working hours was not a reasonable regulation, concluding that it had little to do with the health of the community or the bakers themselves and was unnecessary as a labor protection, the bakers being adults who could make their own employment contracts to further their own best

interests. Instead, the limit on hours was paternalistic, and amounted to class legislation, redistributing income from bakery owners to bakers. The majority paid no heed to strong dissents, most notably by Justice Oliver Wendell Holmes, Jr., criticizing the decision for manufacturing constitutional rights that did not exist in the text and usurping the role of the legislature by dictating the Justices' view of the public interest, in essence reading their laissez faire economic ideology into the constitution, and the Lochner decision came to represent the Court's hostility to reform legislation that predominated American law from roughly 1895 to 1937 (designated the Lochner Era after this decision). The result of these late nineteenth century legal developments was that the common law doctrine of at will employment, which meant, in the words of a famous court decision, that "the employer can dismiss his employee for good reason, bad reason, or no reason whatsoever," became the default rule of employment contracts, and efforts to modify or reform at will employment tended (not in every case, but in the majority of instances) usually ran afoul of Supreme Court decisions striking them as inconsistent with various constitutional provisions, especially a liberty of contract, in essence, constitutionalizing this common law doctrine (Cochran 2021).

These doctrines in law were matched on the ground, as it were, with truly harsh conditions for American workers. Whatever they gained in liberty and mobility through doctrines such as at will employment, they suffered in loss of security in employment and in material conditions in the early twentieth century. This historical situation is well analyzed using the concepts of social theorist Karl Polanyi. Polanyi pointed out that while all societies have utilized markets to various degrees, the ideal of a purely "market society," a society governed by a laissez faire market, was a nineteenth century utopian ideal of the liberal movement, not realized in practice anywhere or at any time because of its

impracticalities and real-world consequences. In particular, Polanyi emphasized that the pillars of this market society ideal's economy rested on "fictitious commodities" – labor, land, and money. Labor, land, and money were bought and sold as commodities, but none were actually produced to be products on the market. To take labor as an example, labor as a commodity could not be disentangled or extracted from laborers, and laborers were not commodities but human beings with human needs and human rights. To treat them as mere things to be bought and sold would produce intolerable infringement on these human rights and needs. Hence, Polanyi predicted a "double movement," a second movement in reaction to the first nineteenth century liberal marketizing movement, that would pressure society to protect its laboring people, its land and natural resources, and its financial and monetary assets. And labor and employment law in the U.S. is the product of that second movement bearing fruit in the twentieth century.

3. New Deal and Legal Realism

It is important to recognize that even before landmark twentieth century legislation overcame the purely contractarian ideology of liberal mythology, status has never been entirely irrelevant to the law of employment in the United States. As mentioned above, the country inherited the law of master and servant from Great Britain, where it was deeply embedded in centuries of law. In English law, being an employee or employer was a status, somewhat akin to being a wife or husband, entailing certain benefits and duties imposed by law quite apart from what might be chosen by individual volition. The difference is that status is imposed from without by law or custom, based on who a person is, their social standing, while contract imposes on individuals only those obligations freely

assumed by parties entering into voluntary agreements (Tomasetti; Matsumura). The law of master and servant was modeled on the domestic household, and employers had duties to their employees not unlike those owed to spouses or children, for example, the duty to care for them when sick – so a servant would receive support even when unable to work because of illness. Likewise, servants owed reciprocal duties to their masters, most prominently obedience and respect – not unlike the duties of children to their parents. The period of employment was normally considered to be one year, which was reasonable in an agricultural society where production ebbed and flowed seasonally, evening out support and labor during periods of intense as well as slack work. Employees who left employment before the year's contract had expired could be harshly punished; they were subject to imprisonment for up to three months or until they agreed to return to fulfill the terms of their contract (Seinfeld 1991).

Arguably, American workers have been freer from the impositions of master/servant law since the country's independence. Two factors figure prominently in explaining these looser restrictions: first, binding labor by legal impositions based on status did not comport well with a revolutionary ideology declaring that "all men" were naturally endowed with rights to "life, liberty, and the pursuit of happiness"; and second, labor shortages in the new nation compelled employers to entice workers by offering more favorable contractual terms (Kahana). So even when master/servant law reigned before the adoption of at will employment, unlike England, where "the English rule" enforced a one-year employment norm with prison as punishment for breach, in the U.S. workers who left their employment before the year's termination suffered forfeiture of the year's entire wages, but not imprisonment (the so-called entirety doctrine) (Steinfeld 1991; Kahana).

Of course, master/servant law was not the only, or even primary, example of status trumping contract in work relations. Much of the "free" workforce during colonial times consisted of indentured servants, workers who entered into contracts for typically four to seven years and who were subject to extremely harsh terms, including very limited freedoms and drastic punishments during the course of indenture (one estimate is that one-fifth of indentured servants died before the end of their service). Although states abolished indentured servitude in the years after the revolution, apprenticeships continued to be common, and although entered into by agreement, they involved limits on individual freedoms based on the status of apprenticeship (Seinfeld 1991; Sitaraman).

Slavery constituted the most glaring contradiction to contract labor as well as political freedom for the first two hundred and fifty years of the country's history. Slavery was introduced to the American colonies almost from the beginning, and although it had been abolished or virtually died out in many, mostly northern, states by the revolution, it received new impetus in the South in the 19th century with the advent of the cotton economy, creating a massive second internal slave trade as enslaved people were brutally "sold down the river" to newly booming cotton regions (Baptist). A bloody civil war and post-war constitutional amendments were required to abolish slavery, but even so, in the decades after emancipation Southern states created various forms of unfree labor to force the formerly enslaved (as well as some poor whites) to continue working under coercive conditions. In agriculture, share cropping and tenant farming amounted to virtually forced labor for the majority of workers. More explicitly coercive, debt peonage bound many poor laborers, while the convict labor system used the coercive power of the state to essentially recreate slavery for the black workers swept into its clutches (Pope 2010).

Even for white Southern workers and Northern workers fortunate enough to avoid being ensnared in these unfree labor systems, the "free labor" celebrated by the middle-class abolitionists increasingly rang hollow as the economic developments over the course of the nineteenth century changed the nature of work for most workers. While small farms and craft shops had been much more prevalent in the United States than in Europe in the early years of the Republic (Sitaraman), economic, trends, including industrialization, urbanization, and the corporate "revolution" (Roy; Lamoreaux), conspired to deprive many independent small farmers and craft workers of ownership of their means of production, forcing them to enter employment, selling their labor to increasingly large enterprises (Gordon, Edwards, and Reich). Although "proletarianization" sounds too Marxist to be commonly used to describe this change, American workers indeed did sense this transition from self-employment to employment by others as a loss of freedom. Early labor organizations such as the National Labor Union and the Knights of Labor denounced the newly predominant employment as "wage slavery" (Gourevitch 2015) and advocated "a cooperative commonwealth" as an alternative to the emerging corporate, industrial capitalist order (Fink). Even into the twentieth century, the labor movement argued for worker protections not based on statutory or common law but on the constitutional prohibition against "involuntary servitude" found in the thirteenth amendment that abolished forced labor along with slavery (Pope 2010).

President Franklin Delano Roosevelt's New Deal, however, relied on statutory reforms to enhance the conditions of labor, immeasurably worsened by the Great Depression. The premiere labor legislation, the National Labor Relations Act (1935), remained true to the negotiated employment regulation model, creating a public law framework that encouraged employees and employers to collectively

negotiate mutually acceptable terms and conditions of employment, rather than directly legislating such. In prioritizing private contracts, however, the law recognized (in its purpose statement) that capital had itself collectivized in the form of giant corporations (Lamoreaux), and that bargaining power was now grossly unequal between individual employees and corporate employers, requiring legal protections for employees to organize and bargain collectively for there to be "actual liberty of contract" by "restoring equality of bargaining power between employers and employees" (NLRA). Then NLRA was supplemented shortly thereafter by the Fair Labor Standards Act (FLSA, 1938) which did statutorily impose a minimum wage and maximum hours (requiring overtime pay for more than 40 hours per week) as well as banning child labor.

In the 1960s, at the height of the civil rights movement, Congress enacted the Civil Rights Act of 1964 whose Title VII prohibited discrimination in employment "because of" race, color, sex, religion, or national origin. Several other federal statutes extend anti-discrimination regulations, notably based on age (the Age Discrimination in Employment Act, 1967) or disability (the Americans for Disability Act, 1990). State and local governments also have many laws to protect employment rights and worker interests, with some jurisdictions passing "little Title VIIs" and much older legislation regulating aspects of employment (including such nowadays mundane matters as when and how employees must be paid). In the last years of the twentieth century, a trend emerged in many states to modify the harshness of common law at will employment as judges began to recognize various categories of exceptions to employers' purely discretionary power of discharge. There were decisions finding contractual terms implied by law (so-called good faith and fair dealings clauses) whether or not expressed by the parties explicitly in employment contracts; other decisions found promises

implied by the facts of the employment (e.g., a promise to employ someone who moved to accept a job, or a company handbook whose rules promised to fire employees only for certain specified just causes). And some states limited at will firing in cases where the discharges violated "public policy" (e.g., employees fired for testifying before a grand jury or otherwise exercising civic duties). Not all states adopted all of these reforms to the common law, and some states adopted none. In any case, the trend seemed to have peaked out in the 1990s as neoliberalism increasingly displaced New Deal regulatory liberalism.

The resulting complex employment regulation can be conceived of as a framework composed of private contracts, individual and collective, and public laws (state and federal, enacted principally in three waves during the 1930s, 1960s, and 1980/90s) that limit the discretion of employers. But within this framework, employers retain a huge amount of residual authority to both dictate the terms and conditions of employment, the operations of work, and even the termination of employment. This framework is depicted in Figure 1 here.

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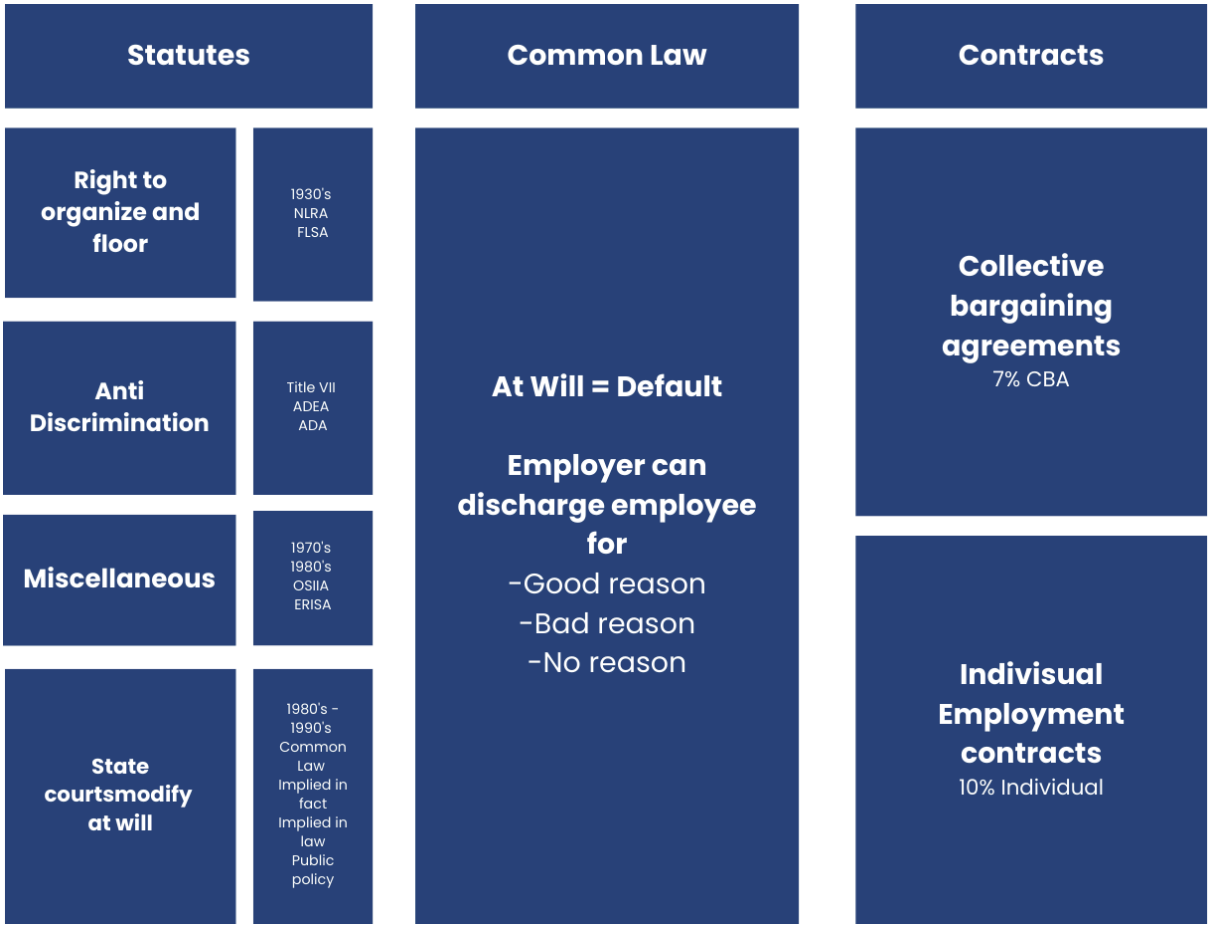

The intent of the labor and employment law of the New Deal and its progeny was not to have the state dictate terms and conditions of employment but to ensure that private negotiations, individual or collective, would be free and fair. In a sense, having evolved from labor that was unfree because of the status of many workers being slave, indentured, or servants, the law had replaced status with contract, but failed to attain the liberatory effects anticipated by Maine and many liberals because of evolving modern economic and social conditions. Hence the New Deal's determination to replace these imbalanced bargaining conditions with what could be conceived of as a new status: "citizenship" in a new "industrial democracy" wherein workers would enjoy certain rights to protect their interests analogously to the rights enjoyed by all citizens in a political democracy.

Even Figure 1's picture overstates the limitations placed on employer's extensive power. Almost from the beginning of the New Deal statutory regime, conservative forces launched intense campaigns to dilute regulation (Phillips-Fein). In 1947, when Republican majorities gained control of Congress, it passed the Taft-Hartley amendments to the NLRA over President Truman's veto. Arguably these changes converted the national government's stance from encouraging collective bargaining as the preferred mode of industrial relations to a position of neutrality, even though the statute's stated purpose was not revised (Hartley), but whether or not the shift was so substantial, the specific provisions weakened the protections for workers in the law. Two significant alterations were prohibiting secondary boycotts or strikes in support of workers in other firms and allowing employer "freedom of speech," including so-called captive audience meetings where employees are required to listen to employers' anti-union propaganda without questioning or rebuttal.

Beyond legislative amendment, the federal courts have historically played an important role in diluting the force of the NLRA and other pro-worker legislation. Professor Karl Klare has called the original Wagner Act "the most radical piece of legislation ever passed by Congress," but he has traced how Supreme Court interpretations have "deradicalized" the law through pro-employer, anti-employee rulings. An early egregious example is Makay Radio v. NLRB (1938), in which the Court endorsed the use of permanent substitutes to replace striking economic workers, despite the clear protections of the right to strike in the NLRA. Other examples would include allowing employer lockouts and ruling that shutting down a company to avoid unionization is not necessarily an unfair labor practice while deeming worker tactics like slowdowns to be unfair labor practices. Professor James Atleson has highlighted the way judges have also introduced

even subtler anti-worker bias into their interpretations of the NLRA by incorporating common law doctrines into their decisions limiting the reach of the law's protections, even though in the hierarchy of American law, statutory law in theory trumps common law. For example, the Supreme Court has severely limited employees' access to hear pro-union information and advocacy in the name of respecting employers' property rights (Republic Aviation; Lechmere; Cedar Point Nurseries). Workers' free speech and protest rights have been limited because of an implicit duty of loyalty, despite the traditional law of master/servant being long outdated (NLRB v. IBEW-Jefferson Standard). And union's right to bargain over various firm decisions has been severely limited by Supreme Court jurisprudence about permissive and mandatory subjects of bargaining that reflects old common law nature on the proper role (or lack thereof) of workers in "management decisions" (First National Maintenance). In interpreting anti-discrimination law, the court's record is more mixed. For example, even the extremely conservative Supreme Court recently interpreted Title VII to extend its protections against discrimination because of sex to include discrimination based on sexual orientation or gender presentation, with both the majority and dissent written by conservative Justices claiming to base their reasoning in textualist methods (Bostock). As the Supreme Court has moved increasingly to the right, however, affirmative action has come under intense attack, culminating in twin cases, both concerning college admissions but with obvious implications for employment decisions, ruling affirmative action to violate the constitutional mandate for "equal protection" as well as Title VII's prohibitions of discrimination because of race (Students for Fair Admissions). Perhaps the greatest impact of the Court's "colorblind" approach to discrimination will result if the majority perceives Title VII's application to disparate impact (practices that result in

disparate outcomes, regardless of whether they reflect an intent to discriminate) as a form of affirmative action, as the majority did in Ricci, or if the current six-three majority of conservatives on the Supreme Court overrule the precedent that declared rules with disparate impact to be unlawful business practices (Griggs v. Duke Power) and directly declare disparate impact beyond the scope of Title VII.

Conservative presidential administrations have also undermined the efficacy of labor and employment law by the downgrading of enforcement agencies, the National Labor Relations Board (NLRB) that administers the NLRA, the Equal Employment Opportunity Commission (EEOC), charged with enforcing Title VII, and the Department of Labor's Wage and Hours Division that enforces the FLSA. These agencies have all experienced severe cutbacks in their budgets and staffing for decades, since the presidency of Ronald Reagan, and even recent Democratic presidential administrations have failed to offset the reductions in the neoliberal era (Hartley).

4. Neoliberalism and NeoLochnerism

The New Deal and legal liberalism's recognition of the need to compensate somewhat for unequal bargaining power and adopt minimal rules of fairness, e.g., anti-discrimination laws, in the labor market, constitute modest attempts to counteract the privileged position of contract by law that could be conceived of as implementing a new status of equal democratic citizenship in an industrial democracy (Derber). Since the 1970s, however, the scales tipped once again in favor of a regime of accumulation that exalts individual choice and denounces most forms state intervention as coercion: neoliberalism. Neoliberalism can be understood and defined in diverse ways: as a philosophy, set of policies, a political

project, a hegemonic ideology, or a new form of governmentality (Cochran, 2017). Professor Wendy Brown, influenced by Foucault, conceives of neoliberalism as a political logic that extends economic concepts, values, and rules into all areas of life and that shapes individual subjects into entrepreneurs of themselves, viewing all personal and professional choices as investments in their own human capital.

This "economization" of all spheres of life supposedly maximizes freedom while reducing government interference in individual choices, but unlike classical nineteenth century liberalism, that simply validated the market and advocated a minimal state, the neoliberal state adopts measures to affirmatively act to create competition and market logic in all areas of society, reregulating more than deregulating society (Peck), as well as creating the very choosing subjects that make choices within constructed range of options. Brown gives the example of students, acting as self-entrepreneurs maximizing their human capital by their educational and occupational choices (or investments) from the array of options in an educational field constructed by public policies (for example, the reduction of public education investments and student aid and their substitution with student loans). Neoliberalism reveres choice, but relegates individuals to narrow roles in choosing, for example, as consumers rather than as producers or owners.

Freedom of choice depends on the "choice set" (Steinfeld 2009) or alternative options available, and while neoliberalism offers choice among options, it denies citizens any role in determining the set of options available. Neoliberal choice thus offers us a menu of choices like consumers in a restaurant, but not choices to be the restaurant owner, who determines the menu. It also denies the role of citizens as it elides the state's role in constructing the conditions of choice (e.g., the health regulations that safeguard the food, the streets that give access, the work conditions of the employees) that indirectly condition the

restaurant's very existence. Neoliberalism ignores inequalities in resources and traditional social hierarchies that determine roles such as customer or owner as well as the choice sets available to individuals. Indeed, Professor Samuel Freeman argues that by negating the democratic role of the state and blinding us to economic inequalities and social hierarchies, a neoliberal society tends to resemble feudalism.

Not surprisingly, neoliberalism has had enormous influence in U.S. law, shaping labor and employment law directly and through constitutional interpretations a well. In recent years, the neoliberal turn has been so sharp that numerous academic observers have begun to describe the new jurisprudence as a return to the Lochner Era, elevating the value of supposedly individual free choice while deprecating public rights and the democratic choices of majorities. Several Supreme Court cases illustrate the neoliberal/neoLochnerian logic of the current Court. In Epic Systems v. Lewis (2018), the majority upheld a claim that the employee had waived her rights to collective arbitration under Section 7 of the NLRA guaranteeing protection for "concerted activities" because she was deemed to have consented to an individual arbitration agreement (even though in this case, the "consent" was ridiculously fictional – employees received an email saying that if they appeared for work the next day, they would be deemed to have implicitly agreed to the company's individual arbitration contract, and the only "choice" employees had was to agree to arbitrate disputes or forfeit their jobs).

The Court claimed to be following the Congressional policy favoring arbitration adopted in the Federal Arbitration Act, even though this act dealing with commercial arbitration and was adoped in 1925, whereas the protection for concerted activities was legislated in the nation's fundamental labor law sanctioned in 1935 (Fernandez).

In Janus v. AFSCME, Local 74 (2018), the Court majority relied on a new constitutional law ruling to invalidate past court precedents upholding so-called agency fees for public employees. Past Court decisions had already held that employees could not be forced to join a union nor required to pay union dues, even though such non-union employees in a union-represented bargaining union received the same benefits of the collective bargaining agreement as dues-paying union members. The Court further whittled down mandatory union payments that the employer and union could deduct from salaries to agency fees, the minimal necessary to cover the union's cost in negotiating the contract on behalf of all workers in the unit. Plaintiff Janus objected to even this minimal payment and claimed that being forced to pay it violated his freedom of expression (although the first amendment applies only to government infringements on speech, as a public employee Janus could claim that the state of Illinois was acting as a government and not merely as a private employer). Ignoring precedent, the majority held that collecting agency fees infringed on Janus' choice that expressed his anti-union sentiment, ignoring that Janus had expressive rights to participate in the group decision to form or join a union and the group choice had been to unionize. The Court concluded that the agency fee was an infringement on Janus's freedom because he had no real choice but to pay the agency fee or quit his job, ignoring the obvious contradiction with its own reasoning in Epic Systems that the employees' choice had been "free" even though they had exactly the same "choice" as Janus: agree or quit (Bagenstos).

The Court's recent labor decisions have demonstrated a consistency unusual for the Supreme Court, manifesting an anti-union bias in rulings reminiscent of pre-New Deal courts. In Cedar Point Nurseries v. NLRB, the Supreme Court held that a California law requiring farmers to grant access to union

organizers to speak with their farm hands during limited periods of their non-working time constituted a physical taking that required just compensation, a modern variation of the Lochner-era jurisprudence that prioritized property over worker rights. In Glacier Northwest v. Teamsters, the Court declined to follow well-established precedent of deferring to the NLRB before authorizing law suits against unions in civil courts and held that unions could be held liable for foreseeable damages to company property that they failed to mitigate in calling their members out on strike. Again, the weight seems to be on employer property rather than the statutorily guaranteed right of workers to strike. And in Groff v. DeJoy, the Court ruled that Title VII's prohibition against discrimination because of religion required the Postal Service to accommodate an employee's refusal of Sunday shifts for faith reasons, without considering whether relieving the burden on the plaintiff's faith might burden his fellow union members who did not share his beliefs.

Even more serious threats to employee rights and unions stem from the current Supreme Court's recent constitutional decisions. The conservative "supermajority" (Waldman), buttressed by three Trump appointees to constitute a comfortable margin of six to three in cases falling along ideological fault lines, is using the first amendment to deregulate the economy generally, causing many academics to speak of "first amendment Lochnerism" (Cochran and Fernandez). Many cases involve free speech, or slightly more broadly, freedom of expression; as Professor Jedediah Purdy (2014) has observed, if the government cannot regulate speech, regulation is impossible, since speech is inevitably involved in regulation. In 303 Creative LLC v. Elenis, the Supreme Court held that a Colorado anti-discrimination prohibition could not prevent a putative web designer from

refusing to provide her services to gay couples because to do so would force her to express approval of such same-sex marriages that her religion condemned.

Although technically based on free speech, this case illustrates the Court's increasing willingness to use another first amendment freedom, religious freedom, specifically the free exercise of religion, not as a shield for religious practice but as a sword against government regulation. The ruling in 303 Creative struck down a statute that protected access to business services for consumers on an non-discriminatory basis, but the logic of excusing compliance with law because of religious beliefs clear could be logically extended to religious exemptions from labor and employment laws (Hobby Lobby has already granted an exemption, based on the free exercise of religion of a private corporation, not a physical person, from a mandated employee benefit, health insurance that covers reproductive health).

Although garnering less public attention than many recent controversial Supreme Court decisions, a major danger for labor and employment law could reside in administrative and constitutional law. Enforcement agencies in all areas face serious challenges in the courts in coming years as the Supreme Court manifests heightened hostility to agency decisions, and in some cases, even their very existence. Beginning with a concurrence in a decision invalidating a pandemic-era mandate on large businesses to require their employees to mask or test for Covid, the Supreme Court has developed a judge-made major questions doctrine announcing that in cases involving issues of major economic or political significance, judges will no longer defer to administrative agencies to adopt reasonable interpretations of ambiguous Congressional statutes. This rule, first adopted in West Virginia v. Environmental Protection Agency, is shockingly vague, lacking any intelligible rule as to which policies raise significant,

controversial questions, and appears to be a signal that the Court intends to relegate to itself decisions about critical policy issues, including life-or-death matters such as climate change, the policy involved in this case. This year, in Loper Bright Enterprises v. Raimundo, the Court took the even more drastic step of overruling the default rule, the Chevron doctrine, requiring judicial deference to reasonable administrative agency policy interpretations when statutes were ambiguous in force for nearly four decades. These decisions portend to have enormous political impact, amounting to a naked power grab from agencies supposedly lacking political accountability by unelected judges with life tenure, and are fraught with potential policy dangers, shifting policy making to courts absolutely lacking expertise in complex issues such as climate change.

Beyond diminishing the role of executive agencies in making policy, this term's Jarkesy v. Securities Exchange Commission strikes at the very heart of administrative enforcement of the laws. In Jarkesy, the Supreme Court that enforcement of an SEC rule by an agency administrative law judge (ALJ) violated the plaintiff's 7th amendment right to a jury trial, but the plaintiff had also argued that the SEC action was unconstitutional because its ALJs were not removable by the President, thus lacking political accountability, and that the agency performed legislative and judicial as well as executive functions, violating separation of powers, claims that the Supreme Court preferred to ignore. The impact on labor law and worker protections as well as other areas of law could be dramatic. The National Labor Relations Board, like many other agencies, relies on administrative law judges within the agency to apply the law, and although these agency decisions are appealable to federal courts, this check on agency power was not sufficient to save this enforcement scheme in Jarkesy. Already, Elon Musk's SpaceX, as well as Amazon, Starbucks, and other powerful corporations battling

unionization drives, have filed suits that the NLRB lacks constitutional authority to adjudicate unfair labor charges against them (Iafolla and Purifoy).

5. Civic Republicanism

The conservative legal movement's decades-long efforts to displace liberal legalism, reverse the "constitutional revolution" of 1937 when court packing threats by FDR led the Supreme Court to renounce Lochner Era jurisprudence, and restore the policies and constitutional perspectives that predominated a century ago is bearing fruit (Teles). While liberal resistance to these attacks on the modern state are evident in academic as well as political spheres, a growing number of legal scholars, fearing that the individualistic basis of legal liberalism provides an insufficiently potent platform for countering the growing super-individualistic libertarian conservative trends, have turned to a philosophical approach awkwardly called civic (or neo-) republicanism. Although emerging civic republicanism has arisen recently and mostly in academia, its backers claim that that it is not a new philosophy, but one deeply rooted in the American tradition, meaning that it has historical legitimacy as well as resonating profoundly with American cultural values (Sandel).

One barrier to wider acceptance of republicanism is that it is not a tightly coherent philosophy, partly owing to its many origins, including diverse ancient philosophers such as Aristotle and Cicero, as well as early modern thinkers, such as Machiavelli, Mary Wollstonecraft, and the English "country" thinkers of the 18th century. Another obstacle to acceptance is its very name, implying association with the political party of that name in the U.S.; the link between party and philosophy, however, does not extend past the early years of the party of Lincoln and its radical wing. Its various themes, articulated by scholars in diverse fields

such as Phillip Pettit, Michael Sandel, and Tom O'Shea resonate with modern American liberalism, but also have various facets that perhaps better enable it to articulate more solid philosophical foundations than liberalism for an alternative politics to the newly regnant conservativism. Civic republicanism is less hyper-individualistic than liberalism, whether in its 19th or 20th century version.

Rather than seeing people as isolated atoms, it recognizes that individuals are embedded in social relations and structures, giving republicanism more of a sense of community and of the public and common good than competing visions. Republicans also de-emphasize the split between private and public spheres, a schism so crucial to liberalism. They recognize that politics and economics cannot be sharply separated; as James Harrington, an 18th century British republican stated, "power follows property." This insight leads republicans to stress the necessity of equal citizenship, which requires some limits to economic inequality for a republican form of government. Thus, republicans such as Ganesh Sitaraman stand neoLochnerian conservatism on its head, agreeing that the constitution does necessarily entail a political economy and not just political procedures as legal liberals contend, but the republican version of constitutional political economy is the opposite of that envisioned by Lochner – not a laissez faire inegalitarian market but an economy with egalitarian limits imposed politically.

Republicans, however, do not advocate equality at the price of liberty, because they do not conceive of liberty and equality as being opposing values requiring some tradeoff, as do liberals. Instead, some measure of equality is a prerequisite of real liberty because republicans define freedom not in negative terms as freedom from interference but rather more positively as independence, lack of domination. They also recognize that private parties and social structures

as well as government can be sources of domination. Republicans value choice, but recognize that subordinate status, and not just interfering behavior, can limit choices. If liberty means being free of domination, defined as being subject to the arbitrary will of another, republicans thus place great value on citizenship and democracy, so that citizens can enjoy self-government not only as individuals but as participants in making the laws in a free state. This self-governing democracy, in turn, demands much of citizens: that they be virtuous in the sense of being devoted to the common good and willing to exercise the duties of citizenship (as opposed to the moralistic individual sense that defines that word today). The great danger to republics is seen as corruption, not merely bribery but the subversion of the general public interest by partial private interests, a corruption that historically has given rise to oligarchies and demagoguery and spelled the end of free republics (Honohan). Many of these ideas have influence in the contemporary American public sphere, even if the coherent vision of republicanism remains only vaguely articulated beyond the academy.

A distinctly civic republican approach to constitutional law has been cogently advocated in two recent books by law professors. Professor Ganesh Sitaraman traces American constitutional thought from the founding of the Republic, arguing that legal liberalism's ideal of a strictly procedural document with no substantive social theories (schematically but forcefully stated by Holmes in his Lochner dissent) is not the only alternative to newly ascendent conservatism's neoLochnerian vision of a constitution that enshrines a laissez faire theory of political economy. Sitaraman agrees with conservatives that the constitution does have a substantive theory of political economy, just that he contends that their laissez faire view is the wrong vision, that the constitution embraces republican egalitarianism. A republic of free citizens requires a political

economy sufficiently egalitarian that everyone enjoys real freedom from domination and the material basis for civic participation. From from being simply procedural and protective of negative rights, the republican constitution demands active government in defense of equal citizenship and freedom for all.

Professors Joseph Fishkin and William Forbath have published a complementary constitutional history sustaining a similar view of a constitution chiefly concerned with defending republican freedom against the counter-currents of oligarchy. According to Fishkin and Forbath, not only was this purpose built into the original document, but at various "anti-oligarchy moments," amendments, interpretations, or policies have been necessary to protect the democratic constitutional vision against social and economic structures and trends, whether slavery, industrialization, corporations, or segregation, that undermined equal freedom for all citizens. They also impute constitutional significance to what liberals view as ordinary policy, such as labor law or welfare provisions, arguing that a political republic requires a republican society and economy as a foundation. Hence, they advocate a "democracy-of-opportunity" with less extreme differences in its distribution of wealth and income and a more egalitarian political economy necessary to maintain what Sitaraman calls our "middle class constitution." This republican perspective has important implications for constitutional law, civil rights and liberties, economic policies such as anti-trust, full employment, media regulation, and industrial policy, as well as social policies such as education, immigration, and religious freedom, but also labor and employment law.

6. NeoRepublican Labor Law

Labor and employment law rooted in civic republican philosophy might overlap considerably with the liberal approach that emerged from the New Deal and post-WWII eras, but its emphases and rationales might be slightly different. Republican views of work might be more egalitarian, challenging the extreme inequalities that have been so exacerbated by neoliberalism. This insight might entail a wider view of socio-economic equality and government policies necessary to moderate the savage inequalities of neoliberalism as well as a more skeptical view of the domination inherent in the capitalist employment relationship. Republicanism might also impart a more emphatic centrality on active participation of workers in determining decisions in the workplace and in the broader economy. And republicanism might suggest constitutional significance to labor and employment issues, linking them more directly to political freedom and democracy.

Viewed from a republican angle, individual freedom of contract in conditions of extreme inequality, fragmentary and precarious work, concentrated economic power, and anemic social welfare policies looks almost as hauntingly hollow and abstract as it appeared in the Lochner era. With limited support available from the state, workers, without capital or ownership of their own means of production, have no realistic alternative but to sell their labor to an employer. Of course they can choose which employer to whom to sell their labor, but they cannot refuse to sell altogether, that is, they cannot reject employment as a social relationship itself. Not only is the bargain likely to favor the employer, who only risks his profits instead of his very means of livelihood should an agreed sale not be reached, but the concentrated size of giant corporations of collectivized capital not only means less need for immediate contraction but also less

competition among employers for workers, as employers implicitly coordinate wage policies. Such an obvious power imbalance obviously makes workers subject to the arbitrary will of their employers. Professor Alexander Gourevitch (2013, p. 602) argues that employment is thus "voluntary" but not "free." Professor Guy Davidov argues that employment inevitably involved subordination, that having sold labor to an employer, a worker is subject to the employer's authority in the workplace for production to function. Domination, however, entails more – it is subjection to the arbitrary will of another. Various republican authors seek to understand "arbitrary" in various ways, but Davidov suggests that the capabilities theory of Amartya Sen and Martha Nussbaum offers criteria for defining arbitration as the power to deprive persons of the resources necessary to develop their capabilities and flourish.

Liberalism has not been blind to the realities of power discrepancies in the labor market and employment, but its approach has generally been limited to remedying what appear to be market failures or rather minor flaws in the capitalist institutions. In contrast, a republican perspective on labor and employment would encourage a wider lens through which to view the problems of power disparities and a deeper criticism of the laws and institutions of capitalist political economy. A more realistic approach to individual employment contracting would suggest some policies that both liberals, perhaps even libertarians, and republicans could support. For example, banning so-called non-compete clauses that bar employees leaving the employ of one firm from accepting employment in the same or related fields (usually limited by scope and time) would make the labor market more competitive, and freer. Prohibiting forced arbitration agreements as a condition of employment (which Congress recently did at least for complaints about sexual assault) would ensure that

public worker rights could be vindicated in public courts. Beyond measures to make individual employment contracts fairer, an obvious starting point, in light of the anti-domination imperative of republicanism and its skepticism of market outcomes as necessarily free and just, it seems likely that a republican labor law would stress the liberty worker organization and collective bargaining rather than individual contractual liberty. It would certainly perceive discrimination and harassment as arbitrary and prohibit it forcefully in employment law, as now aspired to in U.S. law, but where American worker protection is currently failing most egregiously is in collective protections. Certainly the proposed Protecting the Right to Organize (PRO) bill would merit republican support; probably even more assertive policies, such as those advocated in the Clean Slate for Worker Power, a project of Harvard Law School's Center for Labor & a Just Economy Program would be endorsed with even fuller backing because its provisions go further in facilitating unionization and effective collective bargaining.

The broader social context would require government policies that were both more generous and comprehensive that the current beleaguered American welfare state to ensure a labor market that was a more level playing field. A higher minimum wage (not raised nationally in the last years and set at a paltry $7.25/hour) would be a start, but other benefits also require a legislated floor. For example, there is no nationally mandated vacation or even sick leave policy in the U.S., and the family leave law guaranteeing time off to care for children or relatives is unpaid, excuses employees for only twelve-week absences, and covers only 50% of American employees because of a small business exemption. Benefits in general need to be severed from employment and guaranteed publicly. For example, few workers anymore receive the old defined benefit pensions, replaced by various voluntary retirement savings plans, yet Americans

have pitifully few resources saved for retirement just when longer lifespans require more sustenance. Despite the success of the Affordable Care Act, popularly known as Obamacare, medical care remains a huge flaw in America's stunted welfare state, as holes in coverage remain, buying insurance remains expensive despite government subsidies, insurance companies continue to deny or limit treatment, and employers remain empowered because many employees hesitate to change employment because coverage for many remains tied to employer benefit plans. Care work in particular, whether done for pay on the labor market or as part of the reproductive work necessary for social sustainability, needs more public support; support could take any number of forms, from organizing care workers, to public day care, to subsidies or tax credits for care work, to perhaps even wages for house work. Some republican writers have joined the call for a universal basic income, arguing that such minimal payments not tied to employment could strengthen workers' bargaining positions in the labor market as well as provide a set of resource that would stimulate numerous other common goods, from entrepreneurship, further education, care work, and less unnecessary economic waste of labor as a potential economic resource.

Despite the liberatory potential, organizational and technological innovations have also heightened the problem of domination of workers. Digitalization of data collection and analysis has facilitated the precise micro-management of staffing, allowing management to introduce zero-hour contracts subjecting workers to highly variable and unpredictable work schedules. Such random work routines introduce not only lower and less reliable income for workers but also play havoc with workers' lives outside of work, straining family and social life to the breaking point (and, republicans might note, making a travesty of the idea that ordinary workers could participate in the public

sphere or even fulfill minimal civic duties). Large corporations have decentralized, often outsourcing many even essential functions. Such fissuring of companies (Weil) makes it difficult for workers to even identify who their employer is and create formidable accountable for regulating and holding accountable employers. Especially with the advent of artificial intelligence, employers are increasingly relying on algorithmic management strategies and paying algorithmic wages to workers; the lack of transparency in these techniques not only drive wages to their absolute lowest tolerable level, but keep workers in the dark as to the real content of their employment contracts, constituting the essence of the kind of arbitrariness that amounts to domination at work (Teachout). The rapid expansion of the gig economy has exacerbated all these problems. Many gig workers perceive a real gain in freedom from direct management and appreciate the enhanced choices they enjoy, for example, in determining their own work hours. Research has demonstrated, however, how the choice sets of gig workers are limited (e.g., setting rates, choosing customers, conduct on the job, discipline, etc.) and their choices themselves manipulated by gaming their incentives and other psychological stratagems (Rosenblatt; Cochran 2017).

Furthermore, the freedom to contract in the labor market, emphasized in liberal veneration of the liberty in hiring and in quitting, is blind to the domination that characterizes the actual employment relationship in capitalist firms. The worker is assumed to have agreed to obey the authority of the employer during working hours, an implicit form of domination by the absolute will of the employer, recognized as management prerogative. In fact, under U.S. at will law, employers can even dictate aspects of workers' lives outside of work, such as choice of partners, political activities and opinions, recreational options, etc., punishing

disfavored life choices by discharge from employment. Philosopher Elizabeth Anderson has argued that management prerogative is in fact a kind of private government, defined as an authority that is unaccountable to those affected, the governed. Firm management under capitalism is a private government that is arbitrary, because workers have no control over management and management decisions are wholly unaccountable to those they affect most, the workers.

In modern, complex work organizations, some form of authority and coordination may be necessary; Davidov suggests that worker subordination may thus be inevitable in contemporary employment. But as he notes, domination or subordination to arbitrary power and control is what republican theorists object to. Worker voice in the workplace, therefore, would be a top priority for republicans, as it is for Anderson. Participation or "voice" is a complex phenomenon; in arguing for a republican approach to worker democracy, Professor Gonzalez-Ricoy develops one analytical scheme that posits five dimensions for participation. Likewise, various mechanisms for worker participation aim at different dimensions of voice and their performance varies in effectiveness in realizing the goal of genuine influence for workers. Even liberals recognize the contribution of unions in giving organized workers some say in the terms and conditions of their employment, even if union influence is narrowly limited under U.S. law. In the 1980s and 1990s, American companies, under pressure of international competition, turned to the so-called "Japonese style of management," introducing a wide variety of participatory measure to many workplaces, ranging from quality circles, team work, quality of work life programs, to employee involvement committees. Some of the experiments in employee participation ran afoul of the NLRA's section 8(a)(2) which prohibits employers from dominating labor organizations. Some of the litigation was aimed at

whether these experiments replicated the functions of unions (constituting de facto labor organizations), while others were challenged for allegedly being dominated by employers, rather than authentic vehicles of employee voice. Whereas courts had taken a much more "republican" approach (implicitly) during the New Deal era, recognizing that the law's prohibition of "sham" or "company unions" invalidated worker elections if objective conditions rendered the workers structurally dominated. Later, courts adopted a more neoliberal perspective, validating individual choice and ignoring factors creating possibilities of structural domination (Cochran 1995). The Dunlop Commission created under President Bill Clinton sought a compromise between labor and business, with unions gaining ease of organization and management gaining permission to institute worker participation schemes by the repeal of 8(a)(2). Interest in such a truce waned as Republicans assumed political leadership and businesses turned more toward fissuring and precarity as methods of labor control. Recently, however, conservative interest in worker participation in company decisions has revived, as Republican think tanks have rediscovered employee involvement and dredged up the TEAM Act (Teamwork for Employees And Managers) Act, vetoed by Clinton when passed by a Republican Congress in 1996, as a way to deepen Donald Trump's appeal to the working class (Cass). Although there are comparable proposals for work councils analogous to European-style codetermination, from a republican perspective these mechanisms for worker participation are desirable only if they guarantee protections against employer domination and offer valid opportunities for genuine worker voice (Befort).

One structural limit on worker participation is ownership, as American corporate law gives governance authority in firms to shareholders. One reform is to diversify by broadening the voices taken into account in corporate decision

making, replacing shareholder governance with stakeholder governance (cite). Another innovation is to give workers shares in the ownership of their companies through Employee Stock Ownership Plans (ESOPs). Although there is some evidence that these worker ownership plans have some positive effect in motivating workers and making companies more inviting workplaces, their efficacy as means of worker voice is often doubted, especially since some ESOPs grant employees non-voting shares (Blasi). Classic labor republicanism advocated a much more fundamentally different economic model, one that combined worker voice and ownership in producer cooperatives (Gourevitch; Fink). Cooperative organizations vary, but in its purest form, workers own equal shares (or shares that vary by labor input, not financial investments) and have equal voice and votes in a workers' assembly that constitutes the governing body of the firm (and these basic mechanisms may or may not be supplemented by egalitarian measures such as low income differentials, job redesign to distribute responsible functions, and democratic training and culture). Trevor Scholtz has argued that cooperative models are practical alternatives to giant tech firms, such as Uber, even taking into account the complex technologies and vast scales of contemporary platform capitalism.

Like labor republican activists historically in the nineteenth century, contemporary republican theorists emphasize democracy in the workplace, reflecting the twentieth century experience of socialist and communist overemphasis on reappropriation of capitalist ownership as the solution to class domination. This fixation on ownership, however, was blind to issues of control and generally opted for formal ownership of the means of production by the state, leaving workers as dominated by state managers as they had been by capitalist managers. Some republican theorists of political economy, however, now warn

against a reaction to this one-sidedness by overemphasizing democracy in the workplace while neglecting worker power in the broader economy (Cumbers). The precise type of mechanisms to channel worker influence varies and whether worker control is necessary or merely some institutions to balance inordinate capitalist power in contemporary capitalist economies of often undertheorized (or left as an open question or even purposefully ignored or muddled). Tom Malleson has given one comprehensive blueprint for a top-to-bottom democratization of the economy. Cassasas and DeWispaere have used republican political principles even more explicitly to describe a restructured economy meeting the criteria of republican values, while an international group of more than 3,000 academics has signed a Manifesto calling for "the democratization of firms, the decommodification of work, and the decarbonization of our environment" (www.democratizingwork.org; Ferreras). And O'Shea (2020) has suggested that various types of social ownership might be necessary to realize genuine worker control in the workplace, a kind of "socialist means for republican ends." Whether a more democratic macro-economy would be "socialistic" or not largely turns on definitions and assumptions about the role of law and public policy in structuring the economy. Robert Reich, for example, following Polanyi's insights that all markets require rules, has argued for "saving capitalism" by rewriting the rules in a more democratic, worker-friendly manner, rather than the liberal approach of trying to redistribute a little of the wealth redistributed upward to the wealthy under neoliberalism's rules and limiting policies (vainly) attempting to fix "market failures."

"New rules" could involve many aspects of both the organization of production and the overall framework of the economy. On critical issue, that has been contentious since the origins of industrial capitalism move production out of

the home and that figured so prominently in the Lochner case, is the balance between work and leisure. The number of working hours is again on the agenda in some countries, and reformers are somewhat torn between trying to improve work as opposed to reduce work (Bueno; Weeks). Historically at leaest, republicans aimed to achieve both, arguing that both control of their work lives and more time for their families and public duties were both essential to republican citizenship. Presumably, more worker power over political economic policies would result in more worker- friendly, "high road" industrial policies or development models, in contrast to the propensity of countries to adopt more "low road" models resulting in a "race to the bottom" in terms of competing economically at the expense of their workers (Galbriath; Childers). Such high-road models would not only benefit workers; they would also create the socio-economic conditions that minimize domination and create real republican freedom. Although the mixture of market and planning in any future republican vision of political economy might be unclear (Albert), whatever the institutional design adopted it seems clear that the economy will have to be subject to more political direction, not merely to ensure more egalitarian and democratic control of economic decisions but also to provide for more rational, comprehensive, coordinated, and long-term solutions to today's pressing problems such as climate change.

7. Citizenship and Democracy

This paper has focused on republican ideas about political economy, specifically surveying the implications of republican philosophy for labor and employment law, while recognizing that the republican approach to labor and employment issues would cast a wider gaze on broader questions of political

economic policies and institutions than liberalism traditionally has. In conclusion, however, it is well to remember that the central question posed about political economy by republicans is, what type of political economy is necessary to maintain a republic. The key goal is political freedom and democracy, and political economy policies, laws, and institutions should serve that end.

This focus makes republican theory extremely timely, as the United States is in the midst of a political quandary unlike any experienced in many years. Even two mainstream, that is, fairly conservative political scientists, Thomas Mann and Norman Ornstein, after life-time careers defending American institutions, have written that American government is now dysfunctional. They blame a mismatch between constitutional structures, particularly separation of powers, and the new form that U.S. political parties have assumed in recent years: the U.S. has a presidential system with power diffused by separation of powers as well as federalism, while our formerly "big tent" open, moderate, and non-ideological parties have come to resemble the more closed, extreme, and ideological parties of parliamentary regimes. They note that these changes in the nature of political parties, while our constitutional structures remain unamended, have resulted not merely in the traditional legislative process that made policy-making slow and difficult but now has produced a government that is paralyzed by gridlock. Other analysts point to not unrelated but more serious contradictions undermining political democracy, for instance, by noting that grotesque inequality as seen today is incompatible with a functioning democracy (Sitaraman). In the short run, this analysis points to the political infeasibility of republican or any other types of labor and employment law reforms. In the long run, it points to the necessity of more fundamental reforms to restore a workable democracy and the illumination that republican perspectives can provide to guide such restructuring.

In particular, worker voice must be key to deepening democracy in the United States. At a minimum, extending worker organization holds potential to begin a process of overcoming gridlock (presumably by restoring the political basis that the Democratic Party had during its New Deal heyday and supporting healthy majorities that could then legislate meaningful reforms) and of addressing the inequalities that have arisen in the neoliberal era. Research has established clear links between rates of unionization and democratic politics. Unions have also been key in establishing and maintaining successful welfare states, for example, in Sweden and the Nordic countries (Stephens; Korpi). and studies have found a clear correlation between the decline of unionization and the rise of inequality in recent decades (Richman).

But a stronger worker voice beyond a revival of unions is needed to address increasing inequality, the decline of welfare states, and the threat to democratic politics. Australian political scientist Carole Pateman (1972) provides the theoretical justification for centering democracy at work as the solution to our ebbing political democracy. Pateman, examining the history of modern democratic theory, discovers two strands of thinking, one more individualist and negative and the other emphasizing a more positive view of freedom and the importance of active participation by citizens. Pateman argues that to be prepared to play this active role, people must learn the art of participation in decision-making. But the way to learn to participate is by participating (a kind of practice makes perfect dictum), and she notes that the best locale for learning to participate is in the workplace, which she views as a veritable school or democracy. Not only will workers develop their skills in participation, she argues, but these skills will then carry over into their roles as citizens. On these two big

gambles, developmental and spillover hypotheses, she stakes her claim that democracy at work is the secret to political democracy.

American democracy is today faced with numerous dangers more intense, both taken singularly and in combination, than experienced in several lifetimes, perhaps in its history - political polarization, social division and sorting out, an irrational mediascape filled with misinformation and disinformation, a democratic deficit resulting from fragile and unrepresentative electoral and political institutions, policies that fail to address the insecurity of its citizens, decades-long intensification of economic inequality, and above all, the threat of political authoritarianism no longer hovering in the background, but now poised front and center in the 2024 presidential election. Labor and employment law cannot resolve all these issues, but they are critically placed to be a crucial part of any ultimate solutions. This paper has argued that civic republican perspectives on labor and employment issues do not offer easy or certain solutions but perhaps they provide proposals for how to improve work regulations and worker protections. And to the extent that civic republicanism addresses the pillars necessary to sustain republican, that is democratic, self-government, it is hoped that its insights can suggest steps necessary to resolving our current crisis of democracy. Perhaps, as Fishkin and Forbath's and Pope's (1990) historical narratives seem to imply, we have arrived at another anti-oligarchical, republican moment, requiring popular measures to retake and restore democratic self-rule, both in private spheres such as the workplace and in the public sphere.

References

303 Creative LLC v. Elenis. 600 U.S. 570 (2023).

Adair v United States. 208 U.S. 161 (1908).

Albert, Michael. Parecon: life after capitalism. New York: Verso, 2003.

Anderson, Elizabeth. Life, liberty, and private government. Tanner lectures at Princeton University, March 4 and 5, 2015. http://tannerlectures.utah.edu/_resources/documents/a-to-z/a/Anderson manuscript.pdf.

Atkins v. Children's Hospital. 261 U.S. 525 (1923).

Atleson, James. Values and assumptions in American labor law. Amherst: University of Massachusetts, 1983.

Bagenstos, Samuel R. Consent, coercion, and employment law. Harvard Civil Rights and Civil Liberties Law Review, Cambridge, v. 55, p. 409, Summer 2020.

Baptist, Edward E. The half has never been told: slavery and the making of American capitalism. New York: Basic Books, 2016.

Befort, Stephen. A new voice for the workplace: a proposal for an American works council act. Missouri Law Review, v. 69, p. 607, summer 2004.

Berle, Adolf A., Jr., and Means, Gardiner C. The modern corporation and private property. New York: MacMillan, 1933.

Blasi, Joseph. Employee ownership: revolution or ripoff? New York: Ballinger, 1988.

Bostock v. Clayton County. 590 U.S. 644 (2020).

Breen, Keven. Non-domination, workplace republicanism, and the justification of worker voice and control. International Journal of Comparative Labour Law and Industrial Relations, v. 33, no. 3, p. 419 – 439, September 2017.

Brown, Wendy. Undoing the demos: neoliberalism's stealth revolution. New York: Zone Books, 2015.

Bueno, Nicolas. Freedom at, through, and from work: rethinking labour rights. International Labour Review, v. 160, no. 2, p. 313 – 329, 2021.

Casassas, David, and De Wispelaere, Jurgen. Republicanism and the political economy of democracy. European Journal of Social Theory, v. 19, no. 2, p. 283 – 300, 2015.

Cass, Oren. Workers deserve so much more than America's unions. New York Times, New York, p. 5 Opinion, September 1, 2024.

Cedar Point Nurseries v. Hassid. 594 U.S. ____ (2021).

Chevron USA, Inc. v. Natural Resources Defense Council, Inc. 469 U.S. 837 (1984).

Childers, Chandra. Rooted in racism and economic exploitation: the failed Southern economic development model. Economic Policy Institute, Washington, D.C., p. 1 – 32, October 11, 2023.,

Clean Slate for Worker Power. Center for Labor & a Just Economy, Harvard Law School, Cambridge, https://clje.law.harvard.edu/clean-slate (accessed September 24, 2024).

Cochran, Augustus Bonner, III. Lochner x Nova Iorque: o caso dos padeiros que trabalhavam demais. Curitiba: Juruá, 2021.

_____ . Choice is not enough: the necessity of voice. Revista Juridica de Centro Universitario Unicuritiba, Curitiba, v. 4, no. 49, p. 1 – 26, 2017.

_____ . We participate, they decide: the real stakes in revising section 8(a)(2) of the National Labor Relations Act. Berkeley Journal of Employment and Labor Law, Berkeley, v. 16, no. 2, p. 458-519, 1995.

_____ . A decade of joint regulation of working life: MBL turns ten. Working Life in Sweden, Stockholm, December 1987.

_____ and João Renda Leal Fernandez. De volta a Lochner: a ortodoxia liberal que marca novamente tendência nas relações de trabalho dos EUA e do Brasil. Revista LTr, São Paulo, v. 86, no.10, p. 1196 – 2017, outubro 2022.

Cumbers, Andrew. The case for economic democracy. Cambridge, UK: Polity, 2020.

Dagan, Hanoch, and Heller, Michael. Can contract emancipate? Contract theory and the law of work. Theoretical Inquiries in Law, Tel Aviv, v. 24, p. 49, January 2023.

Davidov, Guy. Subordination vs. domination: exploring the differences. International Journal of Comparative Labour Law and Industrial Relations, v. 33, no. 3, p. 365 – 390, September 2017.

Derber, Milton. The American ide of industrial democracy, 1865 – 1965. Urbana-Champlain: University of Illinois, 1970.

Dimick, Matt. Counterfeit liberty. Catalyst, New York, v. 3, no. 1, p. 47 – 88, spring 2019.

Dukes, Ruth, and Streeck, Wolfgang. Democracy at work: Contract, status and post-industrial justice. Cambridge, UK: Polity, 2023.

Edwards, Richard. Contested terrain: the transformation of the workplace in the twentieth century. New York: Basic Books, 1980.

Epic Systems Corp. v. Lewis. 584 U.S. ____ (2018).

Fernandes, João Renda Leal. O mito EUA: um país sem direitos trabalhistas? Rio de Janeiro: JusPodium, 3rd ed., 2024.

Ferreras, Isabelle, Battilana, Julie, and Meda, Dominique. Democratize work: the case for reorganizing the economy. Chicago: University of Chicago, 2022.

Fink, Leon. Workingmen's democracy: the Knights of Labor and American politics. Urbana: University of Illinois, 1983.

First National Maintenance Corp. v. NLRB. 452 U.S. 666 (1981).

Fishkin, Joseph, and William E. Forbath. The anti-oligarchy constitution: reconstructing the economic foundations of American democracy. Cambridge: Harvard University, 2022.

Forbath, William E. The ambiguities of free labor: labor and the law in the Gilded Age. Wisconsin Law Review, Madison, p. 767, July 1985.

Freeman, Samuel. Illiberal libertarians: why libertarianism is not a liberal view. Philosophy and Public Affairs, Princeton, v. 30, no. 2, p. 105 - 151, spring 2001.

Galbraith, James. Dangerous metaphor: the fiction of the labor market. Jerome Levy economics Institute of Bard College, Annandale-on-Hudson, NY, Public Policy Brief, no. 36A, p. 1 – 5, October 1997.

Galbraith, John Kenneth. The new industrial state. New York: Houghton Mifflin, 1967.

Glacier Northwest, Inc., v. International Brotherhood of Teamsters, Local Union No. 174. 598 U.S. 771 (2023).

Gonzalez-Ricoy, Inigo. The republican case for workplace democracy. Social Theory and Practice, v. 40, no. 2, p. 232 – 254, April 2014.

Groff v. DeJoy. 600 U.S. 447 (2023)

Gordon, David M., Edwards, Richard, and Reich, Michael. Segmented work, divided workers: the historical transformation of labor in the United States. New York: Cambridge University, 1982.

Gourevitch, Alexander. From slavery to the cooperative commonwealth: labor and republican liberty in the nineteenth century. New York: Cambridge University, 2015.

_____ . Labor republicanism and the transformation of work. Political Theory, v. 41, no. 4, p. 591 – 617, 2013.

Griggs v. Duke Power Co. 401 U.S. 424 (1971).

Hacker, Jacob, and Paul Pierson. The Republican devolution: partisanship and the decline of American governance. Foreign Affairs, v. 98, no. 4, July/August 2019.

Hahn, Steven. Illiberal America: a history. New York: W. W. Norton and Company, 2024.

Hartley, Roger C. Fulfilling the pledge: securing industrial democracy for American workers in a digital economy. Cambridge: Massachusetts Institute of Technology, 2023.

Hartz, Louis. The liberal tradition in America: an interpretation of American political thought since the revolution. New York: Harcourt Brace, 1955.

Hirschmann, Nancy J. The subject of liberty: toward a feminist theory of freedom. Princeton; Princeton University, 2003.

Honohan, Iseult. Freedom as Citizenship: the republican tradition in political theory. The Republic, The Irish Institute, no. 2, p. 7 – 24, spring/summer 2001.

Iafolla, Robert, and Purifoy, Parker. SpaceX's bid to upend NLRB follows signals from Supreme Court. Bloomberg Law, January 9, 2024.

Janus v. American Federation of State, County, and Municipal Employes, Council 31. 585 U.S. (2018).

Jarkesy, Securities and Exchange Commission v. No. 22-859 U.S. (June 27, 2024).

Judis, John. The populist explosion: How the great recession transformed American and European politics. New York: Columbia Global Reports, 2016.

Kahana, Jeffrey S. Master and servant in the Early Republic. Journal of the Early Republic, v. 20, no. 1, p. 27 – 57, spring 2000.

Kennedy v. Bremerton School District. 597 U.S. 507 (2022).

Klare, Karl. Judicial deradicalization of the Wagner Act and the origins of modern legal consciousness. Minnesota Law Review, v. 62, p. 265, 1978.

Lamoreaux, Naomi R. The great merger movement in American business, 1895-1904. New York: Cambridge University, 1985.

Lazonick, William, and O'Sullivan, Mary. Maximizing shareholder value: a new ideology for corporate governance. Economy and Society, v. 29, no. 1, p. 13 – 35, 2000.

Lechmere, Inc. v. NLRB. 502 U.S. 627 (1992).

Lichtenstein, Nelson. State of the union: a century of American labor. Princeton: Princeton University, 2003.

Lochner v. New York. 198 U. S. 45 (1905).

Locke, John. Two treatises on government. Ed. By Peter Laslett. New York: Cambridge University, 1960.

Loper Bright Enterprises v. Raimondo. 603 U.S. ___ (2024).

Malleson, Tom. Economic democracy: the left's big idea for the twenty-first century? New Political Science, v. 35, no. 1, p. 84 – 108, 2013.

Mann, Thomas, and Norman Ornstein. Finding the common good in an era of dysfunctional governance. Daedalus, v. 142, no. 2, p. 15 – 24, spring 2013.

Matsumura, Kaiponanea. Unifying Status and Contract. University of California Davis Law Review, v. 56, p. 1571 – 1633, 2023.

National Labor Relations Act, 49 Stat. 449 (1935), as amended; 29 U.S.C. Sections 151 – 69 (1988).

NLRB v. International Brotherhood of Electrical Workers, Local No. 1229 (Jefferson Standard). 346 U.S. 464 (1953).

NLRB v. Mackay Radio and Telegraph Co. 304 U.S. 333 (1938).

Nichols, John. The "s" word: A short history of an American tradition, socialism. New York: Verso, 2011.

Nussbaum, Martha. Capabilities and human rights. Fordham Law Review, v. 66, p. 273, November 1997.

Orren, Karen. Belated feudalism: labor, the law, and liberal development in the United States. New York: Cambridge University, 1991.

O'Shea, Tom. Radical republicanism and the future of work. Theory & Event, v. 24, no. 4, p. 1050 – 1067, October 2021.

_____ . What is economic liberty? Philosophical Topics, v. 48, no. 2, p. 203, fall 2020.

_____ . Are workers dominated? Journal of Ethics and Social Philosophy, v. 16, no. 1, p. 1 – 24, September 2019.

Pateman, Carole. Participation and democratic theory. New York: Cambridge University, 1970.

Peck, Jamie. Constructions of neoliberal reasoning. New York: Oxford University, 2010.

Perry, Stewart. San Francisco scavengers: dirty work and the pride of ownership. Berkeley: University of California, 1978.

Pettit, Philip. Republicanism: a theory of freedom and government. New York: Oxford University, 1999.

Phillips-Fein , Kim. Invisible hands: the businessmen's crusade against the New Deal. New York: W. W. Norton and Company, 2009.

Polanyi, Karl. The great transformation: the political and economic origins of our times. Boston: Beacon, 1971.

Pope, James Gray. Contract, race, and freedom of labor in the constitutional law of "involuntary servitude." Yale Law Journal, New Haven, Conn., v. 119, p. 1474 – 1567, May 2010.

Pope, James Gray. Republican moments: the role of direct popular power in the American constitutional order. University of Pennsylvania Law Review, v. 139, p. 287 – 368, December 1990.

Purdy, Jedediah. Neoliberal constitutionalism: Lochnerism for a new economy. Law & Contemporary Problems, v. 77, p. 195, 2014.

Reich, Robert. Saving capitalism: for the many, not the few. New York: Vintage, 2016.

Republic Aviation v. NLRB. 324 U.S. 798 (1945).

Ricci v. DeStefano. 557 U.S. 557 (2009).

Richman, Shaun. Tell the bosses we're coming: an action plan for workers in the twenty-first century. New York: Monthly Review, 2020.

Rosenblatt, Alex. Uberland: how algorithms are rewriting the rules of work. Oakland: University of California, 2018.

Rousseau, Jean-Jaques. On the social contract, in The basic political writings, ed. By Donald A. Cress. Indianapolis: Hackett, 1987.

Roy, William G. Socializing capital: the rise of the large industrial corporation in America. Princeton: Princeton University, 1997.

Sandel, Michael. Democracy's discontent: America in search of a public philosophy. Cambridge: Harvard University, 1997.

Scholz, R. Trebor. Own this: how platform cooperatives help workers build a democratic internet. New York: Verso: 2023.

Sen, Amartya. Development as freedom. New York: Anchor, 2000.

Shesol, Jeff. Supreme power: Franklin Roosevelt vs. the Supreme Court. New York: W. W. Norton and Company, 2010.

Sitaraman, Ganesh. The crisis of the middle-class constitution: why economic inequality threatens our republic. New York: Alfred A. Knopf, 2017.

Stanley, Amy Dru. From bondage to contract: wage labor, marriage, and the market in the age of slave emancipation. New York: Cambridge University, 1998.

Stephens, John D. The transition from capitalism to socialism. Urbana-Champlain, University of Illinois, 1986.

Steinfeld, Robert J. Coercion/consent in labour. Centre on Migration, Policy, and Society, University of Oxford, Oxford, UK, Working Paper no. 66, 2009.

_____ . The invention of free labor: the employment law in English and American law and culture, 1350 – 1870. Chapel Hill: University of North Carolina, 1991.

Students for Fair Admissions v. Harvard and Students for Fair Admissions v. University of North Carolina. 600 U.S. 181 (2023).

Teachout, Zepher. Algorithmic personalized wages. Politics & Society, v. 51, no. 3, p. 436 – 458, 2023.

Teles, Steven M. The rise of the conservative legal movement. Princeton: Princeton University, 2008.

Tomassetti, Julia. The powerful role of unproven economic assumptions in work law. Journal of Law and Political Economy, Berkeley, v. 3, p. 49 – 71, 2022.

Waldman, Michael. The supermajority: how the Supreme Court divided America. New York: Simon & Schuster, 2023.

Weeks, Kathi. The problem with work: Feminism, Marxism, antiwork politics, and post-work imaginaries. Durham: Duke University, 2011.

Weil, David. The fissured workplace: why work came to be so bad for so many and what can be done to improve it. Cambridge: Harvard University, 2017.

West Virginia v. Environmental Protection Agency. 597 U.S. 697 (2022).

Wright, Erik Olin. Envisioning real utopias. New York: Verso, 2010.

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The Mechelle Vinson Case (University Press of Kansas, 2004), Lochner x Nova Iorque: O Caso dos Padeiros Que Trabalhavam Demais (Editora Juruá, Curitiba, 2021), and, with João Renda Leal Fernandes, Glossário Jurídico-Trabalhista/Labor and Employment Law Glossary (Editora JusPodium, Rio de Janeiro, 2024). He taught as a Fulbright Fellow at the Universidade Federal de Santa Catarina in 2018 and as a visiting professor at the Universidade do Estado de Rio de Janeiro (PPGD) in 2023.

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