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Workers' Rights as Natural Human Rights

Anne Marie Lofaso

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ARTICLES

Workers' Rights as Natural Human Rights

ANNE MARIE LOFASO*

We live in an increasingly polarized world: one summed up by President Clinton, "we're all in this together;" the other summed up by then-presidential candidate Trump, "I alone can fix it." These world views have implications for workers and how the future workplace is ordered. In this Article, I explore the idea that a natural human rights approach to workplace regulations will tend to favor the we're-all-in-this-together view, whereas the Lochmerian or neo-liberal view tends to favor an individualistic world view.

The Article's six-step analytical approach starts with a

* Arthur B. Hodges Professor of Law, West Virginia University College of Law. This Article was substantially finished while I was a Keeley Visiting Fellow, Wadham College, University of Oxford, and a Visiting Academic on the Oxford Law Faculty. This Article grew out of a talk that the author presented at the University of Western Ontario, Western Law, in March 2012, coordinated by John Craig, Michael Lynx, and Michelle Bothwell. The author is grateful to the Oxford Human Rights Research Group led by Professor Sandra Fredman for its support and for the thoughtful comments of its members and other members of the Oxford community. This Article has also benefitted from law faculty workshops at the University of Oxford, Akron, Illinois Institute of Technology Chicago-Kent College of Law, Indiana University – Bloomington (Colloquium on Scholarship in Employment and Labor Law), Baylor University, Texas Tech University, The University of Kansas, The University of Oklahoma, West Virginia University, University College Dublin (Ireland), and Maynooth University (Ireland). As always, the author is grateful for comments received from, and discussions with, her colleagues across the world: Hugh Collins, Sandy Fredman, Mark Freedland, Jack Getman, Jim Heiko, Jeff Hirsch, Marty Malin, César F. Rosado Marzán, Paul Secunda, Martin Shotter, Joe Slater, Sandy Steel, Rachel Wechsler, and Bob Bastress. The author finally wishes to thank the WVU Law Hodges Summer Research fund and the Big XII Fellowship for financial assistance in finishing this Article. All errors are the author's alone.

historical analysis of labor law jurisprudence, concluding that U.S. labor laws must be filtered through a law-and-economic lens of U.S.-styled capitalism to predict the outcomes of legal disputes and to expose human rights infirmities inherent to that approach. In step two, I explore T.H. Marshall's account of citizenship, concluding that Marshall's rights-based rubric is too limited to fully explain workers' rights, which tend to cut across the full gamut of human rights. In step three, I expand upon Marshall's work to build a framework for evaluating workplace laws based on the worker as a citizen of the labor force who has human rights. I do this using two methodologies: (1) comparative legal analysis between U.S. law and international human rights standards; and (2) jurisprudential analysis of fundamental values within a rights-based framework. In step four, I modify John Rawls's famous thought experiment to include a veil of empathy. In that modified experiment, I conclude that participants in the original position behind a veil of empathy would generate values underlying human rights, namely autonomy (to become part author of one's work life) and dignity (to be treated as a person always as an end and never merely as a means). In step five, I apply this human rights approach to show that workers' and employers' interests conflict at the interests-level and, more fundamentally, at the values-level. I conclude that these conflicts are primarily over the distribution of that which labor and capital create. This distributional question is fundamental a question of moral and political justice, which will and does have real political consequences. In step six, I set forth a path along which this research project should explore.

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I. INTRODUCTION

A. *Two Visions of America*

There are two visions of America a half century from now. One is of a society more divided between the haves and the have-nots, a country in which the rich live in gated communities, send their children to expensive schools, and have access to first-rate medical care. Meanwhile, the rest live in a world marked by insecurity, at best mediocre education, and in effect rationed health care—they hope and pray they don’t get seriously sick. At the bottom are millions of young people alienated and without hope. I have seen that picture in many developing countries; economists have given it a name, a dual economy, two societies living side by side, but hardly knowing each

other, hardly imagining what life is like for the other. Whether we will fall to the depths of some countries, where the gates grow higher and the societies split farther and farther apart, I do not know. It is, however, the nightmare towards which we are slowly marching.¹

The capacity for Americans to live good lives necessarily depends on their capacity to provide for themselves and their families. The good life entails meaningful access to education, health care, and good jobs in a secure environment. The vast majority of Americans identify as middle class, but nearly all of us are working class, in the sense that we must work in jobs to meet our basic needs. To disrupt the path toward cementing these two visions of the American future, this Article focuses on labor rights in helping to create a context (together with other socioeconomic rights such as security, education, and health care access) that allows for self-actualization, thereby leading the way toward greater economic equality.

One challenge to disrupting this path is neoliberal rhetoric. As one neoliberal standard bearer, U.S. Representative Paul Ryan, has said, “[A] renewed commitment to limited government will unshackle our economy and create millions of new jobs and opportunities for all people, of every background, to succeed and prosper. Under this approach, the spirit of initiative—not political clout—determines who succeeds.”² Mitt Romney similarly declared: “Job and income growth can only come from a growing, successful private sectorA pro-job, pro-prosperity government works to create the conditions that enable businesses of all sizes to grow and thrive.”³ While neoliberalism purports to augment liberty for all by limiting government interference in business affairs, as this Article

¹ JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 289 (2012).

² CNN, *CNN Live Event/Special: Republicans Respond to President Obama*, TRANSCRIPTS (Jan. 25, 2011, 10:00 PM), <http://www.cnn.com/TRANSCRIPTS/110125/se.03.html>. See also Remarks to the Manhattan Institute in New York City, 2 PUB. PAPERS 1367–68 (Nov. 13, 2008).

³ Mitt Romney, *Grow Jobs and Shrink Government*, BOSTON GLOBE (Aug. 18, 2010), http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/08/18/grow_jobs_and_shrink_government/?camp=localsearch:on:twit:rtbutton.

shows, free market policies coerce workers and restrict their liberty. For example, despite increasing evidence that black lung disease has been worsening, the coal industry blocked effective coal-dust regulations until recently.⁴ Not only did the unregulated market stifle the liberty of coal miners who suffered from this heinous disease, it succeeded in snuffing out their lives.⁵

B. Modern Workplace Fragmentation Has Resulted in a No-Duty-Holder Problem

The modern workplace has become increasingly fractured.⁶ This fragmentation has been occurring on many levels. On one level, the workplace has splintered geographically.⁷ Twentieth-century outsourcing⁸ of U.S. jobs began in the 1970s and 1980s in two ways. First, companies began to outsource non-core jobs that could be done with the help of computers, such as company payroll.⁹ Shortly thereafter, jobs such as billing, accounting, and word processing, which could also be executed with the help of computers, were also outsourced.¹⁰ Second, companies began to outsource manufacturing jobs, typically consumer electronic products, to geographic areas with both expertise and lower labor costs.¹¹ By the 1990s, the U.S. witnessed offshore outsourcing, the outsourcing of jobs to foreign countries.¹² As one scholar noted, however, offshore outsourcing

⁴ See Lowering Miners' Exposure to Respirable Coal Mine Dust, 79 Fed. Reg. 24,814 (May 1, 2014). See generally Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 90–91, 94–95, 101 (2011).

⁵ See *id.* at 89–95.

⁶ Fracturing is a different, albeit related, problem to subcontracting, which is beyond the scope of this paper.

⁷ This account does not include the movement of manufacturing from the northern to the southern states. This movement of capital complicates the picture but is beyond the scope of this paper.

⁸ By outsourcing, I mean giving jobs to those who are not company employees.

⁹ See generally Daniel W. Drezner, *The Outsourcing Bogyman*, 83 FOREIGN AFF. 22, 24 (2004).

¹⁰ See *id.* at 24–25.

¹¹ See Rob Handfield, *A Brief History of Outsourcing*, N.C. STATE UNIV.: SUPPLY CHAIN RES. COOP. (June 1, 2006), <https://scm.ncsu.edu/scm-articles/article/a-brief-history-of-outsourcing>.

¹² For example, American Express established “back-office operations in India” in the early 1990s. See Drezner, *supra* note 9, at 25.

raised few concerns (except possibly among those personally affected) because more jobs were created in the U.S. (especially in the high-end service sector) than were lost to foreign countries.¹³ He added, those jobs that

will migrate offshore are predominantly those that . . . requir[e] low skill since process and repeatability are key underpinnings of the work. Innovation and deep business expertise will continue to be delivered predominantly on shore.” Not coincidentally, these are also the tasks that generate high wages and large profits and drive the U.S. economy.¹⁴

On another level, the workplace has splintered into the physical and digital spheres. When Ronald Reagan was president, there was literally one type of workplace – the physical space. Whether a factory floor, an office, a classroom, or the field, the workplace consisted entirely of physical space. Today, there are all types of physical and virtual work spaces beyond the factory floor or the office building. Now there are telecommunication centers, alternative office spaces where employees can work to cut down on communicating costs. There are also home offices, which are also used to cut down on commuting costs or to allow greater work-hour flexibility often desired to better balance work-family interests. And there are fully portable spaces that reside inside our portable computers—our laptops, electronic notebooks, iPads, smart phones, and other completely digitized work spaces.

On a third level, the workplace has splintered in an ontological sense. Employers categorize or misclassify workers as employees or

¹³ See *id.* at 23, 25. This is an application of what free-trade proponents call comparative advantage, whereby trade occurs because each economic actor (in this case, each country) has a comparative advantage in producing a good or service more efficiently or less expensively than other economic actors. See, e.g., F. W. Taussig, *Wages and Prices in Relation to International Trade*, 20 Q. J. ECON. 497, 500 (1906). The originator of this theory is David Ricardo. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 108 (John B. Bell, 2d American ed. 1830) (1817). That theory was modified by Eli Heckscher and Bertil Ohlin resulting in the Heckscher-Ohlin Theorem. See BERTIL OHLIN, INTERREGIONAL AND INTERNATIONAL TRADE 316–17 (1933).

¹⁴ Drezner, *supra* note 9, at 26 (quoting an International Data Corporation analysis).

independent contractors by manipulating legal rules.¹⁵ For example, an employer may classify a worker as an independent contractor to minimize its tax liability or to circumvent its legal duties.¹⁶

Workplace fragmentation means that many workers are no longer tied to a particular employer because of their status as virtual employees in a digital world or as independent contractors. Many workers have lost their statutory and other legal protections in the workplace simply because they do not fit the regulatory or common law definition of employee. In effect, there is no employer on which to place a legal duty. A human rights approach to workers' rights could remedy this problem by ensuring that workers' rights no longer attach to workers solely by imposing duties strictly on employers.

C. A Progressive World View Could Categorize Workers' Rights as Natural Human Rights and Would Serve Several Worker Interests

The purpose of this Article is to put forth the progressive view that workers' rights are natural human rights. By natural, I mean to suggest that these rights are grounded in particular moral values—autonomy and dignity—and in the diminishment of human coercion. As well as remedying the no-duty-holder problem identified above, there are at least five additional reasons why it is important to demonstrate that workers' rights are human rights. First, articulating workers' rights as human rights expresses their fundamental importance. For many, workers' rights are merely positive rights¹⁷ that must be balanced against employers' managerial and property interests. In capitalist states such as the U.S., the employer's interests are often viewed as more significant.¹⁸ Were a capitalist country like the

¹⁵ See DEP'T FOR PROF'L EMPS. AFL-CIO, *Misclassification of Employees as Independent Contractors* (2016), <http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf>.

¹⁶ See *id.*

¹⁷ By positive rights, I mean rights granted by the state (e.g., statutes, regulations) as opposed to natural rights. I do not mean positive human rights, which would oblige the state to take action, as opposed to negative human rights, which would oblige the state to refrain from taking action.

¹⁸ See, e.g., *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 533–35 (1992) (holding that employer's property right to exclude trespasses always outweighs employees' Section 7 rights to receive information about unionization except where

U.S. to accept that workers' rights were human rights, those rights would be viewed as weightier, and balances in favor of employer interests would be harder to justify. Second, raising the status of workers' rights to human rights places obligations on the state to respect, protect, and perhaps even actualize the fullness of those rights. Third, were workers' rights treated as human rights, additional avenues of recourse would open. Trade unions have been the traditional institution for promoting the workers' cause.¹⁹ By labeling workers' rights as human rights, transgression of those rights may come under the mandate of certain nongovernmental organizations (NGOs). At the very least, transgression would garner more attention from NGOs and the media. Fourth, if workers' rights were treated as human rights, the principle against retrogressive measures would apply.²⁰ This means that once the state granted rights to employees, it could not diminish those rights without proper justification. Fifth, a theory of workers' rights as human rights provides an alternative model to the economic model for describing work law and workplaces.²¹ Economic and human rights models often clash at a values level. The human rights model makes these conflicts clear and, to some extent, resolvable.

*D. The Law and Economics Model for Work Law Serves as A
Historical Foil for the Human Rights Model*

Part II puts forth the law and economics model for work law within its historical context. There, I describe and deconstruct the values underlying U.S. Supreme Court cases decided during the *Lochner* era. Named for the 1905 Supreme Court case, *Lochner v.*

there are no alternative means of communication); *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (holding that employer's property rights may also yield in cases where the employer is discriminating against the union).

¹⁹ See generally G. William Domhoff, *The Rise and Fall of Labor Unions In The U.S.* (Feb. 2013), http://www2.ucsc.edu/whorulesamerica/power/history_of_labor_unions.html.

²⁰ See generally UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 28 (2005), <http://www.ohchr.org/Documents/Publications/training12en.pdf>.

²¹ See *infra* Part II.

New York,²² the *Lochner* era describes a series of cases decided between 1897 and 1937 in which the Supreme Court struck down state legislation regulating business on grounds that such legislation unconstitutionally interfered with the business's liberty interests.²³ The New Deal partially disrupts this paradigm, insofar as the Supreme Court began to find constitutionally permissible statutes regulating businesses, such as the National Labor Relations Act²⁴ and the Fair Labor Standards Act.²⁵ But almost from the very start, the Court, Congress, and even executive agencies created to enforce these acts began to chip away at their efficacy in favor of business interests.²⁶ *Lochner*'s resurrection in the late twentieth and early twenty-first centuries makes a human rights account of workers' rights important in counteracting the dehumanization of workers as factors of production and whose value to society is measured instrumentally. Policy-makers need to draw upon alternative models of thinking in making rules that better society.

*E. The Human Rights Model Refocuses Our Thinking about
Workers as Citizens Who Possess Natural Human Rights Rather
Than as Factors of Production*

In Part III, I introduce the thinking of British sociologist, Thomas Humphrey Marshall, who endorsed the idea of full citizenship.²⁷ Full citizenship, as adapted here, is an account of labor law where the worker is entitled to the full gamut of rights regardless of his or her legal status (*e.g.*, statutory employee, independent contractor, migrant worker, undocumented worker) and thus helps combat the no-duty-holder problem.²⁸ Using Marshall's framework to explain that full citizens possess political, civil, and social rights, I explain that workers' rights²⁹ do not fit neatly into Marshall's rubric

²² *Lochner v. N.Y.*, 198 U.S. 45 (1905).

²³ *See, e.g., id.* at 64.

²⁴ 29 U.S.C. §§ 151–57 (2012).

²⁵ Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2012).

²⁶ *See* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 201–02 (2010) [hereinafter *The Persistence of Union*].

²⁷ *See infra* Part III.A.

²⁸ *Id.*

²⁹ For purposes of this paper, I refer to collective bargaining and the procedural rights typically found in the National Labor Relations Act and other labor

not only because they are socio-economic rights (which Marshall had not contemplated) but also because they cut across these and other categories.

Building on Marshall's citizenship model, Part IV presents a framework for evaluating workplace laws based on the worker as a citizen of the labor force who has human rights. This framework starts by deconstructing the terms "human" and "rights." Drawing primarily on the theories of Immanuel Kant, Joseph Raz, and others, I conclude that workers' rights must be grounded in at least two values—autonomy and dignity—and that such rights must be as autonomous as possible from employer coercion.

Part V introduces the work of John Rawls's *Theory of Justice*.³⁰ I show that Rawls' original position, applied to the workplace, brings us close to generating a set of natural rights grounded in moral values. I argue that we can get even closer by tweaking Rawls so that the original position is filled with individuals who are not only behind a veil of ignorance—insofar as they don't know their particular circumstances—but also have the capacity to feel what every member of society feels given any policy decision. In this position, individuals would agree on two values to ground workplace rules—autonomy and dignity—and would take steps to minimize workplace coercion.

F. Refocusing Our Attention on Workers as People Clarifies the Conflict Between Employers' and Workers' Interests Over How the Wealth They Create Should Be Distributed

In Part VI, I apply the thinking used in Parts IV and V to the workplace to show that employers' and employees' interests conflict at the foundational level. This conflict results in gridlock between those who believe that promoting employers' interests will result in a more liberated, and therefore better, society and those who believe that promoting workers' interests will create a more just, and therefore better, society. I show that the point of greatest conflict is not on the financial well-being of the firm (in which both labor and management/owners have an interest) but on how the wealth created by

statutes as labor rights; substantive rights for workers as the floor of rights; I reserve the general term workers' rights to include all rights that workers might enjoy including the basic labor and substantive work rights.

³⁰ JOHN RAWLS, A THEORY OF JUSTICE (1999).

labor and capital working together should be distributed. In Part VII, I share some concluding thoughts.

II. THE U.S. LAW AND ECONOMICS MODEL: A HISTORICAL PERSPECTIVE

A. During the Lochner Era, the Court Grants Constitutional Protection to a Business Entity's Right To Discharge its Workers

In the nineteenth century, U.S. workers fought for labor rights by engaging in economic pressure, where laborers banded together for mutual aid or protection.³¹ These workers—whether formally or informally organized into unions—bargained collectively for better wages and working conditions or conducted strikes, under the supposition that there was strength in numbers.³² Where the federal or state government did act to grant workers' rights, businesses reacted quickly, moving courts to strike down such laws and regulations as unlawful interference with their rights to contract freely with workers.³³ Labor law thinkers have also long noticed the tension between the values underlying a free market economy, which in particular has valued the property rights of those individuals who own capital, and those values underlying workers' rights, whether collective or individual in nature.³⁴ These arguments and judicial decisions were based on emerging economic theories underlying laissez-faire capitalism. These theories soon established the dominant legal paradigm in early twentieth-century jurisprudence during what is now called the *Lochner* era.³⁵

Nowhere is this free market legal paradigm better illustrated in the labor context than in *Coppage v. Kansas*,³⁶ where, in the context

³¹ See Domhoff, *supra* note 19.

³² The history of judicial repression of early unions is beyond the scope of this paper. For more information, see *The Persistence of Union*, *supra* note 26, at 200, 206.

³³ See, e.g., *Lochner v. N.Y.*, 198 U.S. 45, 57–58 (1905).

³⁴ See *infra* Part II.B.

³⁵ See *Lochner*, 198 U.S. at 57–58 (striking down as unconstitutional New York state law prohibiting bakers' from working more than 60 hours per week on the rationale that the state statute unlawfully interfered with the bakers' freedom to contract to work more hours).

³⁶ *Coppage v. Kansas*, 236 U.S. 1, 19 (1915).

of reaffirming an employer's right to terminate the employment relationship because of an employee's union membership, the Court wrote:

[W]herever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employ[ee]. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of . . . liberty, or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.

And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot

be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.³⁷

Here, the Court acknowledges the inequities inevitable in a free market system grounded in property and contract rights.³⁸ On grounds that the Fourteenth Amendment grants cognizable property and liberty rights, with which the state may not interfere even in the name of removing these unfortunate inequities, the Court upholds the employer's right to force employees to sign a yellow-dog contract (agreement to renounce union membership as a condition of employment) on threat of termination.³⁹ Accordingly, in *Coppage v. Kansas*, the Court resolved in the employer's favor the tension between the worker's interest in banding together for mutual aid or protection in the form of union membership and the employer's interest in running its business free from union interference, that is, the interference of workers' collective voice.⁴⁰

Notice the following three facets of the Court's resolution of the tension inherent in the employee-employer relationship. First, the Court reifies the business entity into a person.⁴¹ The facts of *Coppage*—in which the state convicted supervisor Coppage for discharging employee Hedges when Hedges refused to sign a yellow-dog contract with employer St. Louis & San Francisco Railway Company disavowing his union membership—allowed the Court to personify the business entity.⁴² The rationale for reversing Coppage's conviction had nothing to do with his conviction being unjust (i.e., he didn't do it) or procedurally flawed. Instead the Court found the criminal law itself unconstitutional based on the following argument typical of the *Lochner* era:⁴³ (1) business entities and their employees have a cognizable liberty interest to freely contract with one

³⁷ *Id.* at 17–18.

³⁸ *See id.*

³⁹ *See id.* at 25–26.

⁴⁰ *Id.* at 26. *See, e.g.*, Alan Bogg & Tonia Novitz, *The Purposes and Techniques of Voice: Prospects for Continuity and Change*, in *VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD* 4, 13–14, 16 (Alan Bogg & Tonia Novitz eds. 2014).

⁴¹ *See Coppage*, 236 U.S. at 8–13.

⁴² *See id.* at 7.

⁴³ *See id.* at 25–26; *see also* *Lochner v. N.Y.*, 198 U.S. 45, 57–58 (1905).

another; (2) inequality between or among parties is natural and based on property rights; (3) liberty and property rights are constitutional equals and, therefore, the law cannot favor one over the other; and (4) at-will employment actualizes this mutual liberty between the parties without interfering with the parties' property rights.⁴⁴

Second, personifying the business entity permits the Court to treat the business or employer as an individual who possesses liberty and property rights. Although the Court also views workers as individuals who possess these rights, it misses the point that these workers have no property (outside their own labor power) and therefore no property rights. For that reason, they cannot use their liberty to contract in any meaningful way without strengthening their bargaining position in some other manner. For nearly 200 years, workers have strengthened their bargaining position by banding together to aggregate their one possession—their labor power.⁴⁵ The collective thereby enhances individual power in much the same way that property enhances the employer's power. In stark contrast to the way businesses are personified, the Court treats the workers' interest in concerted activity as a non-personal, collective interest in union membership.⁴⁶ The business is a person who has the *capacity* to hold rights; the union remains an entity devoid of capacity—one which cannot hold rights.⁴⁷ The Court's analysis ironically grants human rights to a state-created entity and removes the basic human right—the right to associate—from live humans. In effect, the Court de-personifies the individual. Moreover, by arrogating the employer's interest in discharging an employee to the level of a cognizable liberty and property right—indeed, a human right, the Court constitutionally protects, that is, forbids states from interfering with that right, absent a compelling justification.⁴⁸ The Court did not need to worry about the effect such protection might have had on the union because, at least in the view of some, a union was considered a corrupt institution, in the way we might today think of organized crime or monopolistic businesses.

⁴⁴ See *Coppage*, 236 U.S. at 12–13, 17–18, 23–26.

⁴⁵ See Domhoff, *supra* note 19.

⁴⁶ See *Coppage*, 236 U.S. at 19–20.

⁴⁷ *Id.*

⁴⁸ *Id.* at 16, 25–26.

Relatedly, the Court gave no thought to the fact that a union is actually a collection of human beings who gather together for the legitimate purpose of augmenting their own individual interests in survival, autonomy, dignity, and personal actualization. Accordingly, no thought was given to the collective interest of workers' in augmenting their own liberty to participate in workplace decisions that affect their well-being or even to the idea that the employer's actions themselves might be interfering with the employee's freedom to associate with other members of the working class. In effect, the Court chose (probably subconsciously) the employer's autonomy interest to engage in unilateral decision-making in the workplace over the employee's autonomy interest to engage in decisions affecting his or her work life.⁴⁹ Whether consciously or subconsciously, the effect was the same—collectivized capital (a state fabrication) was branded as natural, while collectivized labor (an organic collection of real people) was not.

Third, the Court's disregard for worker Hedges' interest in augmenting his own liberty to join a union as well the liberty-augmentation resulting from union membership (which would have allowed him to participate in workplace decisions that affected his own well-being) was achieved primarily in two ways: (1) by focusing on property rights—the employer has them, the employee does not—and (2) by defining liberty as the freedom *from* government coercion (negative right) as opposed to the right of US citizens to expect the government to help provide the resources workers need to fulfill their own destinies (positive right).⁵⁰ The Court's formalistic reading of the Constitution when it notes quite correctly that the Constitution does not favor liberty (defined as the negative right, *freedom from*) over property rights (defined by *those who have them*) seals the deal.⁵¹

Combining these ideas, the Court creates the illusion of a tautology. If the government's constitutional duty is to refrain from interfering with person O's liberty to do what O wants to do with O's property, then the government cannot interfere with that right even

⁴⁹ See Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 29, 47–48 (2007) [hereinafter *Toward a Foundational Theory*].

⁵⁰ See *Coppage*, 236 U.S. at 12–18.

⁵¹ See *id.*

when what O wants to do is to interfere with another person's (E's) liberty. The argument appears tautological because the "even when" clause is never acknowledged; it is simply invisible. The government owes O a duty not to interfere with his property rights because O has property rights. Full stop. There is no consideration of the so-called equal liberty interests of E. As a result, the Court never has to explain why it is permissible to interfere with the employees' equally valid liberty interests and free associational rights. As prominent constitutional law theorist Professor C. Edwin Baker (1947–2009) observed, "This stipulation, often an intellectually lazy way to avoid thinking through the legal implications of a state commitment to respect autonomy, makes the term [liberty] virtually meaningless for purposes of constructive legal theory or political theory"⁵²

In sum, the Lochnerian free market paradigm features several characteristics. Business entities are persons with individual rights, including constitutional rights; freedom of contract encompasses a business entity's cognizable liberty interest to enter into a contract to buy the labor of individual workers; workers also possess cognizable liberty interests, including the freedom to enter a contract with business entities to sell their labor, which interests are protected by *Lochner*.⁵³ The freedom to associate with other workers or to band together with other workers for the purposes of augmenting bargaining leverage is invisible and, therefore, weightless.

B. *The New Deal Partially Disrupts the Free Market Paradigm*

The Lochnerian paradigm perished as a matter of U.S. constitutional jurisprudence. In a series of cases challenging the Roosevelt administration's New Deal legislation, which expanded the power

⁵² C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 252 (2011).

⁵³ See *Coppage*, 236 U.S. at 12–26; *Lochner v. N.Y.*, 198 U.S. 45, 63 (1905).

of the federal government to regulate business, the Court held constitutional federal statutes regulating labor relations⁵⁴ and social security,⁵⁵ as well as public utilities⁵⁶ and other industries.⁵⁷ It also

⁵⁴ See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 528, 553–54 (1937) (upholding amendment to the Railway Labor Act under interstate commerce clause); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 12, 30 (1937) (upholding the National Labor Relations Act under the Commerce Clause as applied to large steel manufacturer); *N.L.R.B. v. Fruehauf Trailer Co.*, 301 U.S. 49, 53, 57 (1937) (same; as applied to manufacturer of commercial trailers); *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72, 75 (1937) (same; as applied to manufacturer of men's clothing); *Associated Press v. N.L.R.B.*, 301 U.S. 103, 128–29 (1937) (same; as applied to a not-for-profit news association); *Wash. Va. & Md. Coach Co. v. N.L.R.B.*, 301 U.S. 142, 144, 146–47 (1937) (same; as applied to interstate bus company).

⁵⁵ See *Helvering v. Davis*, 301 U.S. 619, 634, 645 (1937) (upholding Social Security Act); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937) (upholding provisions of the Social Security Act relating to taxes on employers and credits toward those taxes for payments made to state unemployment insurance funds).

⁵⁶ See *Am. Power & Light Co. v. Sec. & Exch. Comm'n*, 329 U.S. 90, 99–100 (1946) (enforcing the Public Utility Holding Company Act); *Am. Tel. & Tel. Co. v. U.S.*, 299 U.S. 232, 235, 247 (1936) (upholding FCC provisions regulating telephone companies).

⁵⁷ See, e.g., *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 340, 351–52 (1937) (upholding Agricultural Adjustment Act); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324, 340–41 (1937) (upholding federal monetary policy embodied in the Gold Reserve Act of 1934); *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 311–312 (1937) (upholding tax imposed on first domestic processor of coconut oil); *Sonzinsky v. U.S.*, 300 U.S. 506, 512–13 (1937) (upholding under Congress's taxing powers the National Firearms Act, which provides for an annual federal license tax on firearms dealers, as an aid to collecting tax revenue); *Wright v. Vinton Branch of the Mountain Tr. Bank*, 300 U.S. 440, 460–61 (1937) (upholding Bankruptcy Act's regulatory effect on banking industry); *U.S. v. Hudson*, 299 U.S. 498, 500–01 (1937) (upholding 35-day retroactive period on federal tax on profits accruing from sale of interests in silver bullion); *Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co.*, 299 U.S. 334, 348, 352–53 (1937) (upholding restrictions on the importation of goods made by prisoner labor into states prohibiting their sale); *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 325–28 (1936) (upholding President's authority to declare embargo on the sale of arms to promote peace).

upheld state statutes implementing the New Deal or regulating industry under the states' police powers,⁵⁸ thereby officially ending the *Lochner* era.⁵⁹

The idea that the federal government is authorized to regulate business entities disrupts the *Lochnerian* world view. The National Labor Relations Act (NLRA) illustrates this disruption and how, in particular, Congress's findings are in stark opposition to those posited by the Supreme Court in *Coppage*. NLRA Section 1 recognizes that "employers who are organized in the corporate or other forms of ownership association" are collective entities, as opposed to individual persons.⁶⁰ Section 1 recognizes that there is an "inequality of bargaining power" between these collective business entities and "employees who do not possess full freedom of association or actual liberty of contract[.]"⁶¹ Based on these congressional findings, NLRA Section 7 grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"⁶²

Enactment of the NLRA and its subsequent enforcement by the U.S. Supreme Court in *NLRB v. Jones and Laughlin Steel Corporation*,⁶³ shattered the legal illusion of freedom of contract. But these

⁵⁸ See *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 525–26 (1937) (upholding Alabama's implementation of the Social Security Act); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (upholding state minimum wage law for women).

⁵⁹ See *Lochner v. N.Y.*, 198 U.S. 45, 57–58 (1905) (striking down as unconstitutional New York state law prohibiting bakers' from working more than 60 hours per week on the rationale that the state statute unlawfully interfered with the bakers' freedom to contract to work more hours).

⁶⁰ 29 U.S.C. § 151 (2012).

⁶¹ *Id.*

⁶² 29 U.S.C. § 157 (2012).

⁶³ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 12, 30 (1937) (upholding the National Labor Relations Act under the Commerce Clause as applied to large steel manufacturer); see also *N.L.R.B. v. Fruehauf Trailer Co.*, 301 U.S. 49, 53 (1937) (same, "manufacture, assembly, sale, and distribution of commercial trailers and of trailer parts and accessories" industry); *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 72, 75 (1937) (same, purchase of raw materials and the sale and distribution of men's clothing industry); *Associated Press v. N.L.R.B.*, 301 U.S. 103, 128–29 (1937) (same, news gathering and distributing and interstate communication industries); *Washington, Va. & Md.*

governmental acts did nothing to disrupt the economic paradigm upon which the *Lochner* era was built. Just as progressives took action to chip away at and ultimately disrupt the *Lochner* judicial view, free market conservatives took action almost immediately to whittle away at the regulatory system. Perhaps tensions would have intensified even more rapidly had World War II not erupted and had organized labor not be so useful in the war effort.

C. *Lochner's Resurrection*

During the post-war era, Congress, U.S. courts, and even the NLRB itself have resurrected a Lochnerian paradigm by using free market values to chip away at New Deal values and reinstate a view of workers as mere factors of production rather than as individuals who hold human rights. Sundry legislative acts, cases, and administrative orders illustrate this phenomenon.⁶⁴ The 1947 Taft-Hartley amendments, as interpreted, present the earliest and the most infamous illustration of resurrection by Congress. For example, amended Section 2(3) writes “supervisors” and “independent contractors” out of the NLRA’s protection,⁶⁵ thereby returning those workers to a pre-New Deal legal state, factors of production who do not possess the right to freely associate.⁶⁶ Indeed, Congress defined “supervisor” broadly, so that any worker who, using “independent judgment,” exercises even one of twelve enumerated powers “in the interest of the employer” is a statutory supervisor and is not protected.⁶⁷

Coach Co. v. N.L.R.B., 301 U.S. 142, 144, 146–47 (1937) (same, transportation industry).

⁶⁴ See *infra* notes 65–71 and accompanying text.

⁶⁵ NLRA Section 2(3) broadly defines the term “employee” to include “any employee” unless expressly excluded. 29 U.S.C. § 152(3) (2012). In 1947, Congress amended Section 2(3) to exclude supervisors and independent contractors. See 29 U.S.C. §§ 141–97 (2012), *legislatively overruling* Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491–92 (1947) (holding that low-level foremen are statutory employees) and N.L.R.B. v. Hearst Publ’ns, Inc., 322 U.S. 111, 131–32 (1944) (holding that newspapers boys are statutory employees). See also 29 U.S.C. § 152(11) (2006). See generally Anne Marie Lofaso, *The Vanishing Employee*, 5 F.I.U. L. REV. 495, 520–21 (2010) [hereinafter *Vanishing Employee*].

⁶⁶ *The Persistence of Union*, *supra* note 26, at 201.

⁶⁷ Section 2(11) provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

The Court continued this trend most recently in a series of professional-supervisor cases, in which the Court twice rejected the Board's construction of the statutory exemption for supervisors to exclude professionals who may direct other employees but should not be considered statutory supervisors because in exercising such direction those professional employees are using professional rather than supervisory judgment.⁶⁸ And most disappointingly, the NLRB, the agency charged by Congress with fulfilling the purposes of the NLRA, brought this trend to a new low by reading out of the NLRA's protection several subclasses of employees, including graduate assistants⁶⁹ and mentally disabled workers,⁷⁰ neither of whom are statutorily exempted.⁷¹

In late August 2016, the Obama Board tried to reverse this trend by issuing *Columbia University*, which held that graduate teaching assistants are employees, expressly overruling prior precedent.⁷² There, the Board acknowledged that answers to the question about

reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11); see *The Persistence of Union*, *supra* note 26, at 210.

⁶⁸ See *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 715–717 (2001) (rejecting N.L.R.B.'s definition of “independent judgment”); *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571, 578–579 (1994) (rejecting the Board's construction of the statutory phrase “in the interest of the employer”); see also *The Persistence of Union*, *supra* note 26, at 211.

⁶⁹ See *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004) (holding that graduate student assistants are not statutory employees because they “have a predominately academic, rather than economic, relationship with their school.”) *overruled by* *Columbia Univ.*, 364 N.L.R.B. 1, 1 (2016). See also *Leyland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (holding that research assistants were not employees because they were “primarily students”).

⁷⁰ See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 982–83 (2004) (holding that mentally disabled workers are not statutory employees because their relationship with their employer is “primarily rehabilitative”).

⁷¹ There are only seven statutory exemptions: agricultural workers, domestic servants, children/spouses, independent contractors, supervisors, employees covered by the Railway Labor Act, and public employees. 29 U.S.C. § 152(3) (2012). The Act expressly covers all other workers. See *The Persistence of Union*, *supra* note 26, at 212.

⁷² *Columbia Univ.*, 364 N.L.R.B. 1, 1 (2016).

whether graduate teaching assistants were employees or not had oscillated several times in the past half century.⁷³ Protections for these workers is likely short-lived under an NLRB whose members will be appointed by President Donald Trump and a Republican-dominated Senate.

What, if anything, does the NLRA's definition of "employee" say about *Lochner*, its counter-world view embodied in the New Deal, and *Lochner*'s resurrection? The history of the congressional amendment to that term, coupled with the judicial and administrative constructions of it, relays the philosophical conflict that is currently directing U.S. political theatre. As President Bill Clinton stated at the 2012 Democratic Convention, "[w]e think 'we're all in this together' is a better philosophy than 'you're on your own[,]'" referring to the conflicting world views of the Democratic and Republican Party platforms.⁷⁴ President (then-candidate) Trump put his unique spin on that philosophy when he now-infamously told

⁷³ *Id.* (overruling *Brown Univ.*, 342 N.L.R.B. 483 (2004), which itself had overruled *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000) (holding that NYU graduate assistants are employees)).

⁷⁴ President Bill Clinton, Address to the Democratic Nat'l Convention (Sep. 5, 2012), http://articles.marketwatch.com/2012-09-05/economy/33617274_1_jobs-equal-opportunity-democrats [hereinafter Clinton Address]. He ended the speech with a similar comparison:

My fellow Americans, you have to decide what kind of country you want to live in. If you want a you're on your own, winner take all society you should support the Republican ticket. If you want a country of shared opportunities and shared responsibilities - a "we're all in it together" society, you should vote for Barack Obama and Joe Biden. If you want every American to vote and you think it's wrong to change voting procedures just to reduce the turnout of younger, poorer, minority and disabled voters, you should support Barack Obama. If you think the President was right to open the doors of American opportunity to young immigrants brought here as children who want to go to college or serve in the military, you should vote for Barack Obama. If you want a future of shared prosperity, where the middle class is growing and poverty is declining, where the American Dream is alive and well, and where the United States remains the leading force for peace and prosperity in a highly competitive world, you should vote for Barack Obama. *Id.*

audience members at the 2016 Republican National Convention that “I alone can fix it.”⁷⁵

A similar observation—that a society with unions and a world without unions reflects differing world views—has been repeated by one of U.S. Labor’s academic gurus, Professor James A. Gross, who wrote:

[T]hough some see workers’ human rights as threats to the free enterprise system, others see the same rights as concealing a selfish egoism no different than the libertarian individualism central to the unregulated market philosophy. The language of individual rights does encourage people to consider only “my rights,” “my house,” “my money,” “my property,” and “my family” No doubt, as Louis Blanc wrote in 1847, claims of rights can and have been used “to mask the injustice of a regime of individualism and the barbarism of the abandonment of the poor” *This ego-centric focus of human rights, some have argued, operates to the detriment of worker solidarity and collective action.*⁷⁶

What we see here, then, is an attempt by those who wish to augment the power of the powerful by critically characterizing policies designed to empower working people as interfering with the property and liberty rights of those who already dominate society.

III. DEVELOPING A HUMAN RIGHTS RUBRIC FOR WORKERS’ RIGHTS

A. *Interdependence: T.H. Marshall’s Political, Civil, and Social Rights Rubric*

British sociologist Thomas Humphrey Marshall (1893–1981) focused on the idea of rights through citizenship. Writing in the mid-

⁷⁵ Yoni Appelbaum, ‘I Alone Can Fix It’, THE ATLANTIC (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/>.

⁷⁶ James A. Gross, *The Human Rights Movement at U.S. Workplaces: Challenges and Changes*, 65 INDUS. & LAB. REL. REV. 3, 4 (2012) (citing LOUIS HENKIN ET AL., HUMAN RIGHTS 59 n.1 (Found. Press 1999) (emphasis added)).

twentieth century in post-war Europe, T. H. Marshall presented a historical account of the development of citizenship rights.⁷⁷ These rights, according to Marshall, can be divided into three types: political rights, civil rights, and social rights:

I propose to divide citizenship into three parts . . . civil, political, and social. The *civil element* is composed of the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law. This shows us that the institutions most directly associated with civil rights are the courts of justice. By the *political element* I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. The corresponding institutions are parliament and councils of local government. By the *social element* I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. The institutions most closely connected with it are the education system and the social services.⁷⁸

Using Marshall's rubric, political rights⁷⁹ might be thought of as the basic rights needed to participate in self-governance such as the right to vote or to serve in political office; civil rights⁸⁰ as the basic freedoms enjoyed in the U.S., Canada, and other democracies such

⁷⁷ T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (Doubleday & Co., Inc., 1964), reprinted in *CLASS, CITIZENSHIP & SOCIAL DEVELOPMENT* 71–95 (Greenwood Press, 1973).

⁷⁸ *Id.* at 71–72 (emphasis added).

⁷⁹ *See id.* at 71–72.

⁸⁰ *See id.* at 71.

as freedom of expression and religion; and social rights⁸¹ as the basics for survival in an advanced capitalist society, such as the right to food, clothing, shelter, education, and health care. We can expand this rubric to include two other types of rights: cultural rights⁸²—such as the right to speak one’s native language and the right to participate in one’s own cultural life—and economic rights⁸³—such as the right to a living wage and safe working conditions.

These ideas—to be a full member of society a person must have certain basic civil, political, and social (including economic and cultural) rights—were highly influential in the establishment of the European Economic Community in 1957⁸⁴ and its development into the European Union. But even in Europe and internationally, these rights were weighted differently. As Canadian Professor Judy Fudge has noted:

[D]uring the post-war period human rights were generally divided into different types with different legal statuses The distinction between civil and political rights, on the one hand, and social and economic rights, on the other, deepened with the Cold War, and in 1952 the United Nation’s General Assembly passed a resolution to divide the rights proclaimed in the UDHR [Universal Declaration of Human Rights] into two separate covenants. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and*

⁸¹ See *id.* at 72.

⁸² See BEN SAUL ET AL., *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 1191 (Oxford Univ. Press, 2014).

⁸³ See UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R., FREQUENTLY ASKED QUESTIONS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1–3 (2008), <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>.

⁸⁴ Treaty Establishing the European Economic Community art. 3, Mar. 25, 1957, 298 U.N.T.S. 11.

Cultural Rights (ICESCR) were adopted in 1966, and came into force in 1976.⁸⁵

By contrast, the idea that citizens are entitled to the full gamut of political, civil, and social rights has not been as influential in the U.S., which has focused on civil and political rights often at the expense of social rights.⁸⁶ Indeed, while the U.S. has ratified the ICCPR, it has not ratified the ICESCR.⁸⁷

B. *The Rights of Workers at the Workplace Are Often Difficult to Classify Using T.H. Marshall's Rubric*

This returns us to Marshall's rubric. My concern is not so much in classifying rights, which can be used to misdirect the debate, as President Clinton⁸⁸ and Professor Gross⁸⁹ point out, and as an analysis of the *Lochner* cases demonstrates, but in using rights-based classifications to better understand the nature of workers' rights. Given this jurisprudential goal, the following observation about Marshall's rubric is illuminating. There appear to be easy cases and hard cases in determining what types of rights fit into each category. For example, free speech fits nicely into civil rights and the right to vote fits squarely into the category of political rights. But where does the right to bargain collectively fit? To the extent that collective bargaining can be categorized as an exercise of a worker's freedom

⁸⁵ Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29, 35–36 (2007) (emphasis in original); see also David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L. J. 189, 193 (2012) (explaining that “[t]he ideological importance of [social] rights gained force in the post-World-War II period, with a parade of post-colonial constitutions in the developing world.”).

⁸⁶ See Landau, *supra* note 85, at 193–202 (characterizing the U.S. as “exceptional” in its rejection of incorporating social rights at the constitutional level, but hypothesizing (and testing the hypothesis) that even countries, which have consciously attempted to incorporate social rights into their jurisprudence, tend to favor middle and upper-class citizens rather than poor and other marginalized citizens).

⁸⁷ See UNITED NATIONS TREATY COLLECTION, *Status of Treaties: International Covenant on Economic, Social and Cultural Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Mar. 10, 2017).

⁸⁸ Clinton Address, *supra* note 74.

⁸⁹ Gross, *supra* note 76, at 4.

of association, it appears to be a civil right. To the extent that it can be categorized as participating in work-life decision-making, thereby helping workers become more active members of their political communities, it may be a political right. Even more on point, to the extent that the worker is a public-sector employee, then the connection between collective bargaining and political rights is even more robust.⁹⁰ To the extent that the right to bargain collectively can be viewed as the process by which workers secure a living wage, then perhaps that right is an economic right.⁹¹ To summarize, the composition of these rights is fuzzy at the boundaries and sometimes overlapping even if we can imagine examples of these rights that fall squarely into each category.

Whether workers' rights or labor rights are civil rights, political rights, social rights, some combination of these rights, or some other unique right, such as economic or socio-economic rights, is not answered by Marshall's rubric.⁹² Marshall indirectly concedes this point when, just a few paragraphs after introducing his rubric, he notes:

In the economic field the basic civil right is the right to work, that is to say the right to follow the occupation of one's choice in the place of one's choice, subject only to legitimate demands for preliminary technical training By the beginning of the nineteenth century this principle of individual economic freedom was accepted as axiomatic.⁹³

Marshall then notes:

The original source of social rights was membership of local communities and functional associations. This source was supplemented and progressively re-

⁹⁰ See, e.g., Anne Marie Lofaso, *In Defense of Public Sector Unions*, 28 HOFSTRA LAB. & EMP. L. J. 301, 316–17, 321 (2011) [hereinafter *Public Sector Unions*].

⁹¹ See generally MARSHALL, *supra* note 77, at 75.

⁹² For purposes of this paper, it doesn't matter to me how we classify labor rights. Instead, I am applying the insights of previous human rights thinkers to better understand how we should think of labor rights.

⁹³ MARSHALL, *supra* note 77, at 75–76.

placed by a Poor Law and a system of wage regulation which were nationally conceived and locally administeredAs the pattern of the old order dissolved under the blows of a competitive economy, . . . the Poor Law was left high and dry as an isolated survival from which the idea of social rights was gradually drained away. But at the very end of the eighteenth century there occurred a final struggle between the old and the new, between the planned (or patterned) society and the competitive economy. And in this battle citizenship was divided against itself; social rights sided with the old and civil with the new.⁹⁴

What we see in just these few paragraphs is that workers' rights appear to cut across categorical boundaries.⁹⁵ A worker's freedom to choose to work or not to work, or to select his or her profession and professional training, may be classified as a civil, social, or economic right that is not enjoyed by everyone. Think of children of the former Soviet Union forced to leave home at a young age to become world-class gymnasts.⁹⁶ A public school teacher's right to strike to protest a local school board's action affecting teachers' wages might be classified as a political right,⁹⁷ while wage and hour regulations might best be seen as social rights. How should we characterize, however, the rights of private-sector workers to distribute literature at the workplace protesting a Presidential veto of a federal minimum

⁹⁴ *Id.* at 79.

⁹⁵ *See id.*

⁹⁶ *See Toward a Foundational Theory, supra* note 49, at 28. For an in-depth examination of this issue, *see* Lisa Lindhorst, Note, *Behind the Mask of Glory: Combating Child Abuse in Olympic Boarding Schools*, 47 GEO. WASH. INT'L L. REV. 353, 354 (2015).

⁹⁷ *See Pickering v. Board of Educ.*, 391 U.S. 563, 574–75 (1968) (holding teacher's discharge unconstitutional under First Amendment). There, a school board discharged a public school teacher for writing and publishing in a local newspaper a letter critical of a proposed tax increase based primarily on the school board's allocation of money between educational and athletic programs. The Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment" "absent proof of false statements knowingly or recklessly made by him[.]" *Id.* at 574.

wage law or protesting a state's attempt to constitutionalize its right-to-work statute?⁹⁸ Is this act of concerted activity best viewed as part of the civil right to freedom of association; the political right to protest; or the social right to obtain a living wage? In this case, the classification matters, because the National Labor Relations Board generally does not extend its legislative protections to non-economic concerted activity and the U.S. Constitution does not protect civil or political protests conducted on private property.

The sundry nature of workers' rights explains this classification problem. The workplace is a microcosm of society. Just as citizens want to limit the government's coercive powers, workers want to limit their employers' coercive authority over them.⁹⁹ Just as citizens can limit the government's authority both procedurally and substantively, workers can enjoy both procedural and substantive rights.¹⁰⁰

Labor rights suffer another classification infirmity. When thinking of workers' rights in terms of classical labor rights, we think of the procedural rights afforded under Section 7 of the National Labor Relations Act:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities¹⁰¹

Notice that not one of the rights guaranteed under Section 7 is an actual substantive right.¹⁰² There is no right to a particular wage,

⁹⁸ *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 558 (1978).

⁹⁹ See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 4 (1988).

¹⁰⁰ See Gross, *supra* note 76, at 3 (noting that "[t]he purpose of human rights is to eliminate or minimize the vulnerability that leaves people at the mercy of others who have the power to hurt them.").

¹⁰¹ 29 U.S.C. § 157 (2012).

¹⁰² In a conversation with Hugh Collins, Vinerian Professor of English Law, in April 2016 at AllSouls College, Oxford, Professor Collins pointed out to me that the right to bargain collectively and to be recognized by an employer are sub-

a particular work schedule, or a particular job. There is no right to job security, safe working conditions, or freedom from discrimination.

Instead, Section 7 guarantees workers the right to band together for two purposes. First, Section 7 guarantees workers the right to band together “for the purpose of collective bargaining”¹⁰³ over “wages, hours, and other terms and conditions of employment[.]”¹⁰⁴ No particular outcome is, however, guaranteed. This interest in allowing the parties to come to their own private order is so embedded in U.S. tradition that the NLRA forbids the government from intervening to create a particular outcome that it deems socially more desirable.¹⁰⁵ Second, Section 7 guarantees workers the right to band together for the purpose of other mutual aid or protection. As Judge Learned Hand so eloquently explained:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of

stantive rights. That is true, but not in the sense that I am contemplating. By substantive, I mean more than being able to claim an affirmative duty on the employer. I mean those goods for which unions might bargain – living wages, benefits, good working conditions, among other goods.

¹⁰³ 29 U.S.C. § 157 (2012).

¹⁰⁴ 29 U.S.C. § 158(d). *See also* N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (limiting an employer’s duty to bargain with a union to mandatory subjects of bargaining; explaining that the parties may bargain over other “permissive” subjects; and forbidding bargaining over “illegal” subjects—subjects that conflict with the obligations and rights granted under the NLRA).

¹⁰⁵ *See* H.K. Porter Co., Inc., v. N.L.R.B., 397 U.S. 99, 108–09 (1970) (holding that the Board is without power to compel a company or a union to agree to any particular substantive contractual provisions of a collective-bargaining agreement).

the support of the one whom they are all then helping; and the solidarity so established is “mutual aid” in the most literal sense, as nobody doubts.¹⁰⁶

This clause grants workers the right, among others, to organize at the workplace;¹⁰⁷ to protest low wages or poor working conditions by handbilling,¹⁰⁸ by picketing,¹⁰⁹ by striking, and even by engaging in a spontaneous walkout;¹¹⁰ to protest—even at the workplace—low employment standards of the working class in general;¹¹¹ to use governmental processes to force nonunion employer’s to create better working conditions;¹¹² to demand a witness at a disciplinary meeting;¹¹³ to make political pleas involving workers’ rights at the workplace;¹¹⁴ to bring a union witness to an investigatory interview

¹⁰⁶ *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–06 (2d Cir. 1942). *See also* *Hous. Insulation Contractors Ass’n v. N.L.R.B.*, 386 U.S. 664, 668–69 (1967).

¹⁰⁷ *See, e.g., Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 795–96, 798 (1945) (holding that employees have the right to organize at workplace during nonworking time and in nonworking areas).

¹⁰⁸ *See, e.g., Roundy’s Inc. v. N.L.R.B.*, 674 F.3d 638, 655 (7th Cir. 2012) (holding that nonemployee union organizers have a Section 7 right to handbill customers of grocery store to protest store’s use of cheap labor and to inform customers that the savings were not passed down to them).

¹⁰⁹ *See, e.g., N.L.R.B. v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999) (explaining that Section 7’s mutual-aid-or-protection clause protects area standards picketing).

¹¹⁰ *See, e.g., N.L.R.B. v. Wash. Aluminum Co.*, 370 U.S. 9, 14–15 (1962) (holding that NLRA Section 7 protects spontaneous walkout by at-will employees in protest of frigid cold working conditions).

¹¹¹ *See, e.g., Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565–67 (1978) (holding that employer unlawfully prevented employees from distributing at the workplace union newsletter criticizing presidential veto of minimum wage law).

¹¹² *See, e.g., Petrochem Insulation, Inc. v. N.L.R.B.*, 240 F.3d 26, 30–31 (D.C. Cir. 2001) (upholding Board’s determination that filing environmental objections to nonunion company’s construction and zoning applications constitutes Section 7 protected activity because its purpose was to force that company to pay area standard wages, which would in turn benefit union workers in the area by increasing job opportunities and augmenting bargaining power).

¹¹³ *See N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 260–64 (1975).

¹¹⁴ *See Eastex, Inc.*, 437 U.S. at 565–70 (holding that employer unlawfully prevented employees from distributing at the workplace union newsletter urging workers to write to their state representatives to oppose incorporating state right-to-work statute into state constitution).

that the employee reasonably believes may result in discipline;¹¹⁵ to invoke contractual rights under a collective-bargaining agreement;¹¹⁶ and to utilize the Board's processes to vindicate Section 7 rights.¹¹⁷ It is in these senses that Section 7 is the labor analogue to political rights.

These predominantly procedural labor rights are not to be confused with the situation where a labor union flexes its political power. For example, in South Africa, black trade unions wielded political power to oppose apartheid:

The development of black trade unionism in the late apartheid era occurred in the context of opposition to racist and authoritarian workplace regimes. Its power derived from its ability to organise and to render first the workplace and then the country 'ungovernable.' In short, the militant unionism of this period, its ability to unite black workers and the influence it exercised in the rest of society, was a product of racial despotism in general, compounded by employer intransigence and state repression.¹¹⁸

The "right" of black trade unions in apartheid South Africa to engage in such protests is reminiscent of the "right" of unions in the U.S. to protest poor wages, hours, and working conditions when the union is seeking legislative change from the government.¹¹⁹ Think of the protests of public sector workers in Wisconsin who sat in protest of Governor Scott Walker's legislative initiatives to strip those workers of their collective bargaining rights.¹²⁰ Those actions start to look political in nature.

¹¹⁵ See, e.g., *J. Weingarten, Inc.*, 420 U.S. at 262–64.

¹¹⁶ See, e.g., *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 831–37 (1984).

¹¹⁷ See 29 U.S.C. § 158(a)(4) (2012); see generally *N.L.R.B. v. Scrivener*, 405 U.S. 117, 121–26 (1972).

¹¹⁸ SAKHELA BUHLUNGU, *The State of Trade Unions in Post-Apartheid South Africa*, in *STATE OF THE NATION: SOUTH AFRICA 2003–2004* 185 (John Daniel et al. eds., HSRC Press 2003).

¹¹⁹ See *supra* notes 107–117 and accompanying text.

¹²⁰ See Monica Davey & Steven Greenhouse, *Angry Demonstrations in Wisconsin as Cuts Loom*, N.Y. TIMES (Feb. 16, 2011), <http://www.nytimes.com/2011/02/17/us/17wisconsin.html>.

That traditional labor rights tend to be procedural rights in furtherance of economic rights also does not mean that substantive rights for workers are absent from the legal landscape.¹²¹ Such substantive rights are typically not called labor rights in the U.S. We have different labels for them. “Civil rights” is the term we use when speaking of Title VII’s prohibition on workplace discrimination and harassment.¹²² The Fair Labor Standards Act’s minimum wage and maximum hour provisions typically fall into the category of socio-economic rights.¹²³ Health and safety laws under the Occupational Safety and Health Act might be viewed as social rights.¹²⁴ Whatever we call them, they constitute, in theory, the basic floor of rights upon which all workers are entitled to walk. All too often in the U.S., that floor of rights is also a ceiling and sometimes a drop ceiling, below which workers’ often find themselves.

T.H. Marshall makes a similar observation: “Trade unionism has . . . created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship.”¹²⁵ It is through this industrial citizenship and system of industrial democracy where workers can fight for some of the things that matter most to them as U.S. citizens—job security with a living wage and good working conditions.¹²⁶

¹²¹ See Angie Cowan Hamada, *The NLRA: A Real Class Act: Employees’ Substantive NLRA Right to Pursue Concerted Legal Action*, A.B.A. SEC. LAB. & EMP. L. 1, 7 (Mar. 4, 2015), http://www.americanbar.org/content/dam/aba/events/labor_law/2015/march/dll/hamada.authcheckdam.pdf.

¹²² 42 U.S.C. § 2000d (2012).

¹²³ 29 U.S.C. §§ 206, 207 (2012).

¹²⁴ 29 U.S.C. §§ 651–78 (2012).

¹²⁵ MARSHALL, *supra* note 77, at 94.

¹²⁶ Professor Guy Mundlak reads Marshall as suggesting three themes tying labor with citizenship: “[T]he importance of labor market institutions (most notably — trade unions), their distinct position in comparison to end-norms (labor standards), and the importance of active participation.” Guy Mundlak, *Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 8 THEORETICAL INQUIRIES L. 719, 724 (2007).

IV. A TALE OF TWO CITIES:¹²⁷ A POSITIVE LAW AND NATURAL LAW ACCOUNT OF WORKERS' HUMAN RIGHTS

To assess a legal system's record on human rights, it is useful, if not necessary, to compare laws and/or legal practices within a specific jurisdiction to a human rights standard. In this Article, I am interested in comparing U.S. labor law to two such standards: (1) positive law, by which I mean well-established, well-respected international labor standards; and (2) natural law, by which I mean law cognizable through reason and derived from human nature, which would universally apply to all humans. To clarify, my argument is two-tiered. In Section IV.A and IV.B, I examine some answers to the question, "What are human rights?" In Section V, I examine answers to the question, "What human rights standards guide (positive law) or should guide (natural law) labor law?"

To clarify, Section IV describes standards. In Section IV.A, I examine positive human rights both as a concept and as they exist. I do not develop a theory of what positive law is. I am only interested in identifying (Sections IV.A.1 and A.2) and then applying (Section IV.A.3) well-established, well-respected international human rights standards to U.S. labor law for purposes of assessing how they compare with these positive human-rights standards.¹²⁸ By contrast, in Section IV.B, I do attempt to develop a comprehensive natural law definition of human rights. Admittedly, this is confusing because natural law has traditionally influenced the positive law of human rights. But the two projects are distinct. One ultimately compares

¹²⁷ This reference, although apropos of Charles Dickens' book by the same name, is intended to evoke images of the SAINT AUGUSTINE, THE CITY OF GOD 3 (Marcus Dods trans., Random House, Inc. 1993). In that book, St. Augustine compares human laws and culture of the Roman Empire to the ideal society in which God's laws rule. While there is a struggle between the two, the City of God will ultimately prevail. *Id.* at 3–5, 38–39.

¹²⁸ For purposes of this paper I am not interested in the questions that the late-twentieth century legal philosophers tried to answer. For my purposes, whether the law is a sovereign's command backed by threat of sanction or whether law is a system of primary and secondary rules is irrelevant to my immediate goals – to identify legal rules that govern particular circumstances, a task that lawyers understand and perform routinely. Compare JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE XXV–XXIX (Isaiah Berlin et al. eds., The Curwen Press 1954) (1832) with H.L.A. HART, THE CONCEPT OF LAW 213–26 (Penelope A. Bullock & Joseph Raz eds., 2d ed. 1994).

U.S. labor laws to international human rights laws¹²⁹ and the other develops a natural law theory of human rights that establishes standards by which to judge U.S. labor law.¹³⁰

A. *Comparing U.S. Labor Law to International Human Rights Law*

1. STANDARD: THE U.N. DECLARATION OF HUMAN RIGHTS PROMOTES HUMAN RIGHTS AS UNIVERSAL, INALIENABLE, INDIVISIBLE, INTERDEPENDENT, AND NON-DISCRIMINATORY

According to the U.N. Office for the High Commission on Human Rights: “Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”¹³¹

The following accepted characteristics of human rights are all present here:

(1) Universal – “Human rights are rights inherent in *all* human beings.”¹³²

(2) Inalienable – “We are all equally *entitled* to our human rights”¹³³

(3) Indivisible and Interdependent – “These rights are all interrelated, interdependent and invisible.”¹³⁴

(4) Non-discriminatory – “We are all equally entitled to our human rights without discrimination.”¹³⁵

¹²⁹ For an excellent description of the positivist approach to human rights, see Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 EUR. LAB. L. J. 151, 152–56 (2012).

¹³⁰ This approach to labor rights is rare, although it is the approach that I favor. For a recent survey of the literature on this point, see *id.* at 163–69.

¹³¹ *What are Human Rights?*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Jan. 24, 2016).

¹³² *Id.* (emphasis added).

¹³³ *Id.* (emphasis added).

¹³⁴ *Id.*

¹³⁵ *Id.*

The text of the Universal Declaration of Human Rights' Preamble also promotes all four of these characteristics:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people¹³⁶

That the U.N. General Assembly in this Declaration views human rights as *universal*, *inalienable*, and *non-discriminatory* is patently obvious from the plain language of the first clause, which recognizes the “*inherent* dignity” and the “inalienable” and “equal” rights of “*all* members of the human family.”¹³⁷ The use of the terms *inherent* and *all* reveal the universal character of human rights. That humans hold these inalienable rights equally tells us that we all hold them permanently and that no one is more entitled to them than another.¹³⁸ The use of the phrase *inherent dignity* strengthens the significance of the permanent and nondiscriminatory status of these rights.

That human rights are indivisible and interdependent—that these rights reinforce one another in the sense that the whole is greater than the sum of its parts—comes from a contextual reading of the text. The first paragraph posits that state recognition of human rights is the “foundation of freedom, justice and peace in the world.”¹³⁹ The Preamble proceeds in the second paragraph to claim

¹³⁶ G.A. Res. 217 (III) A, preamble, Universal Declaration of Human Rights (Dec. 10, 1948).

¹³⁷ *See id.* (emphasis added).

¹³⁸ *See id.*

¹³⁹ *Id.*

that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind[.]”¹⁴⁰ That same paragraph then proclaims a universal goal of humanity to create “a world” enjoying certain freedoms, including the “*freedom from fear*.”¹⁴¹ The question is, of course, what rights, other than freedom of speech and belief, which the Preamble specifically mentions, when taken together, would create a world free from fear? Freedom of speech and belief, alone, are not sufficient. If life is a basic human right, then humans need subsistence in the form of food, water, shelter, and clothing.

2. OTHER CHARACTERISTICS: THE EXTENT TO WHICH INTERNATIONAL HUMAN RIGHTS LAW PROTECTS INDIVIDUAL OR COLLECTIVE RIGHTS AND OTHER STICKY ISSUES

In addition to these characteristics, we can ask whether these rights are:

- Individual, collective, or both?
- Weighty or insignificant when weighed against other rights?
- Sundry or few?
- Aspirational or minimal?
- Moral, legal, or political?
- Ideal or pragmatic?

U.S. labor law thinkers have long noticed the tension between labor rights, which have been constructed (at least originally) as collective rights, and civil rights against workplace discrimination, which have been constructed as individual rights.¹⁴² Indeed, labor rights have found only a hostile home in the U.S. in part because of their collective nature, which does not intuitively fit into the robustly individualistic and liberty-loving American culture.¹⁴³

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (emphasis added).

¹⁴² *See generally* Hamada, *supra* note 121, at 8.

¹⁴³ *See generally* *The Persistence of Union*, *supra* note 26.

But there is nothing unique about labor rights such that they must be construed as collective rights. Section 7 rights¹⁴⁴ illustrate this point. The rights to join a union or to refrain from joining a union belong to the individual.¹⁴⁵ The right to call a strike belongs to the union, at least under the NLRA.¹⁴⁶ Now, what if it is possible for either the individual or the union to hold the right. The right to strike illustrates the point. As explained above, the right to strike is often construed under U.S. law as a collective right insofar as the union calls the strike. But surely the law could have developed such that the individual held the right to strike in the sense that the individual could withhold his or her labor whether or not the union called a strike. Indeed, such a legal system could accommodate both the individual right to strike and the collective right to strike. In such a system, a conflict between the individual (who wants to go on strike) and the union (which does not), or *visa versa*, might have to be resolved.¹⁴⁷

Whether human rights are sufficiently substantial to outweigh other rights is both a legal and a moral question, which depends in part upon the significance of the rights involved.¹⁴⁸ As a matter of legal reality, judges are trained to balance rights.¹⁴⁹ Whether they get that balance right or wrong has legal, political, and moral dimensions.¹⁵⁰ For example, some might think that there is a legally correct balance between radio personality Rush Limbaugh's right to freely broadcast that Bella Abzug, Betty Friedan, Anita Hill, Pat Schroeder, Eleanor Smeal, Gloria Steinem, and Molly Yard are "feminazis"—meaning a type of feminist who is committing a modern-day Holocaust by supporting abortion rights—and the right of these women not to be slandered.¹⁵¹ The political dimensions to this

¹⁴⁴ 29 U.S.C. § 157 (2012).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See* Emporium Capwell Co. v. W. Addition, Cmty. Org., 420 U.S. 50, 52, 76 (1975).

¹⁴⁸ *See* Gross, *supra* note 76, at 3–4.

¹⁴⁹ *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975).

¹⁵⁰ *See id.*

¹⁵¹ A young Ronald Dworkin's "The Right Thesis" comes to mind here. *See id.* at 1063–64 (arguing that judges should determine the right answer in hard cases by determining which proposed solution better fits the case law); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 2 (1978).

question are more obvious. Those who sincerely believe that abortion is morally reprehensible are more likely to view Limbaugh's free speech rights as weightier than the women's rights to maintain their reputation. Pornography might afford a better example here. Those who view pornography as harmful to women because of its ostensibly degrading nature are less likely to consider the right to produce, distribute, possess, or view pornography as a weighty free speech right.

Furthermore, the number of human rights is both a political question and a moral question.¹⁵² It's a political question in two ways. First, a sovereign nation's legislative body may be tasked with enacting positive law, including laws protecting human rights. Second, a group of sovereign nations may sign treaties agreeing that certain rights count as human rights.

But just how many human rights there are can also be formulated as a moral question. For example, Harvard Professor John Rawls (1921–2002) wrote that human rights are:

[A] special class of rights of *universal application* and *hardly controversial* in their general intention. They are part of a reasonable law of peoples and *specify limits on the domestic institutions* required of all peoples by that law. In this sense *they specify the outer boundary of admissible domestic law of societies in good standing in a just society of peoples*.¹⁵³

Rawls added that human rights play three roles: they legitimize the legal order, they justify military or economic sanctions if violated, and they “set a moral limit to pluralism.”¹⁵⁴ Rawls concedes that only a few rights – the “right to life, liberty, and security in person”; freedom from torture, could ever meet this definition.¹⁵⁵ He

¹⁵² See Gross, *supra* note 76, at 3, 14.

¹⁵³ John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36, 59 (1993) (emphasis added).

¹⁵⁴ *Id.* (quoting David Luban, *The Romance of the Nation State*, 9 PHIL. & PUB. AFFAIRS 392, 396 (1980)).

¹⁵⁵ Rawls, *supra* note 153, at 59 n.45 (adding that the conventions against genocide and apartheid implicate human rights). See also Joseph Raz, *Human Rights Without Foundations*, in THE PHILOSOPHY OF INTERNATIONAL LAW 332 (Samantha Besson & John Tasioulas eds., Oxford U. Press 2010) (expressing concern about the proliferation of rights classified as human rights).

then views other human rights (e.g., dignity, social security, equal pay) as “liberal aspirations.”¹⁵⁶

For my purposes, there are two classes (“cities”) of human rights. First are positive human rights—those enacted by legislation or agreed upon by treaty (or possibly developed by the common law). Second, are natural human rights—those that exist independent of legal action. Whether positive human rights are individual, collective, or weighty, and whether or not they are few or many is merely a function of figuring out what the law is at any given moment in time in any given culture. To the extent that positive and natural human rights don’t match, natural human rights are those to which we aspire. In my view, human rights should be individual or collective, but they must be weighty. Human rights should also be more common than Rawls would advocate, but the number of them would be limited by their significance. However, it does not make sense to me to think in terms of the number of human rights. Rather a values-based approach to human rights allows us to generate many different kinds of rights dependent on the type of society in which we live.¹⁵⁷ In this way, positive and natural human rights will eventually align.¹⁵⁸

3. THE MODERN INTERNATIONAL LABOR COMMUNITY CONSIDERS FREEDOM OF ASSOCIATION, ABOLITION OF SLAVERY AND CHILD LABOR, AND FREEDOM FROM DISCRIMINATION IN THE WORKPLACE TO BE HUMAN RIGHTS

The League of Nations, the brainchild of U.S. President Woodrow Wilson,¹⁵⁹ was founded in 1919 as part of the Treaty of Versailles,¹⁶⁰ ending World War I.¹⁶¹ The purpose of establishing the

¹⁵⁶ Rawls, *supra* note 153, at 59 n.45.

¹⁵⁷ See, e.g., *Vanishing Employee*, *supra* note 65, at 500.

¹⁵⁸ See *id.*

¹⁵⁹ See NOBEL LECTURES: PEACE 1926–1950 (Frederick W. Haberman ed., World Scientific Publishing Co., 1991) According to the Nobel Peace Prize address, the Committee awarded President Wilson the Nobel Peace Prize “because in his celebrated Fourteen Points the President of the United States has succeeded in bringing a design for a fundamental law of *humanity* into present-day international politics.” *Id.* (emphasis added).

¹⁶⁰ Treaty of Versailles, pt. 1, June 28, 1919, 2 U.S.T.I.A. 43.

¹⁶¹ See *id.* The idea of linking peace with some sort of international organization appears to go back as far as the Enlightenment. For example, Immanuel Kant

League of Nations was “to promote international co-operation and to achieve international peace and security.”¹⁶² The idea was to promote peace through collective action—political, economic, social, and military.¹⁶³ Article 23 of the League of Nations’ Covenant made two promises with regard to labor:

Subject to and in accordance with the provisions of international conventions . . . the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children¹⁶⁴

At the same time, as part of the same treaty that ended World War I and in partial fulfillment of these promises, the International Labour Organization was created, “to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.”¹⁶⁵ The ILO Constitution identified the following areas of improvement that it deemed necessary for universal and lasting peace:

advocates for a “league of nations,” in which all sovereigns would “enter . . . into a constitution similar to the civil constitution.” IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>. This paper does not purport to trace the history of this linkage, although such a study would be useful.

¹⁶² Treaty of Versailles, *supra* note 160, at 48.

¹⁶³ *See id.*

¹⁶⁴ Treaty of Versailles, *supra* note 160, art. 23 at 57.

¹⁶⁵ Int’l Labour Organization [ILO], *Origins and History*, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Mar. 7, 2017).

- the regulation of the hours of work, including the establishment of a maximum working day and week[;]
- the regulation of labour supply, [and] the prevention of unemployment[;]
- the provision of an adequate living wage[;]
- the protection of the worker against sickness, disease and injury arising out of his employment[;]
- the protection of children, young persons and women[;]
- provision for old age and injury[;]
- protection of the interests of workers when employed in countries other than their own[;]
- recognition of the principle of equal remuneration for work of equal value[;]
- recognition of the principle of freedom of association[;]
- the organization of vocational and technical education, and other measures¹⁶⁶

These areas of improvement, which focus on social and economic rights—wages; hours; social security provisions for children, the elderly, the disabled, and the unemployed; immigration; discrimination; and job training/education—remain relevant today.¹⁶⁷

More international organizations were established in the aftermath of World War II. Most prominently, on October 24, 1945, the United Nations was founded to replace the League of Nations.¹⁶⁸ On

¹⁶⁶ Int'l Labour Organization [ILO], *ILO Constitution*, http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (last visited Mar. 7, 2017).

¹⁶⁷ See, e.g., 29 U.S.C. §§ 157, 158(d).

¹⁶⁸ United Nations, *History of the United Nations*, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Mar. 7, 2017).

December 10, 1948, the UN General Assembly adopted what has come to be known as the first international instrument on human rights, the Universal Declaration of Human Rights [UDHR].¹⁶⁹ Article 1 proclaimed that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁷⁰ The UDHR’s assertion—that humans are “equal in dignity” to one another—and the additional assertion that humans are special because they are “endowed with reason and conscience”—are common Enlightenment themes (with even earlier roots).¹⁷¹

Notwithstanding this strong endorsement of fundamental human rights in the mid-twentieth century and notwithstanding the belief that peace is inextricably linked to social and economic prosperity and parity, it wasn’t until fairly recently, in 1998, that the ILO adopted the Declaration on Fundamental Principles and Rights at Work.¹⁷² In this declaration, the ILO named the following four fundamental work rights:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.¹⁷³

In the U.S., our positive law fares well—at least at first blush.¹⁷⁴ Several statutes protect worker freedom of association, including the

¹⁶⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁷⁰ *See id.* at art. 1.

¹⁷¹ *See generally* KANT, *infra* note 189, at 38.

¹⁷² *See* Int’l Labour Organization [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (June 15, 2010), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf [hereinafter *ILO Declaration*].

¹⁷³ *Id.* at 7.

¹⁷⁴ *See infra* notes 227–253 and accompanying text for in-depth discussion of how these laws have been interpreted.

National Labor Relations Act,¹⁷⁵ the Railway Labor Act,¹⁷⁶ the Federal Labor Relations Act,¹⁷⁷ and many state constitutions and legislative acts.¹⁷⁸ The Thirteenth Amendment officially ended slavery in the U.S.:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.¹⁷⁹

Congress has passed statutes to enforce this amendment, most recently, the Victims of Trafficking and Violence Protection Act of 2000.¹⁸⁰ Further, Congress abolished child labor when it enacted the Fair Labor Standards Act.¹⁸¹ Congress has endeavored to eliminate workplace discrimination with the passage of a series of statutes since the 1960s, including, for example, the Equal Pay Act of 1963,¹⁸² Title VII of the Civil Rights Act of 1964,¹⁸³ the Age Discrimination in Employment Act of 1967,¹⁸⁴ and the Americans with Disabilities Act of 1990.¹⁸⁵

In the U.S., few would argue with the proposition that freedom from forced labor and any kind of child labor constitute human

¹⁷⁵ 29 U.S.C. §§ 151–169 (2012).

¹⁷⁶ Railway Labor Act, ch. 347, §§ 2, 44 Stat. 577 (1926) (codified as amended in scattered sections of 45 U.S.C.).

¹⁷⁷ Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 701 et. seq., 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

¹⁷⁸ See generally MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 89 (2d ed. 2010).

¹⁷⁹ U.S. CONST. amend. XIII.

¹⁸⁰ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 101, 1001, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C. and 42 U.S.C.).

¹⁸¹ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

¹⁸² 29 U.S.C. §§ 206–207 (2012).

¹⁸³ 42 U.S.C. § 2000d (2012).

¹⁸⁴ 29 U.S.C. §§ 621–634 (2006).

¹⁸⁵ 42 U.S.C. § 12101 (2012).

rights. Some might argue against the idea that freedom from workplace discrimination is a human right, but those few might at least concede that it is a civil right, as the full name of the Title VII statute (the Civil Rights Act)¹⁸⁶ suggests. But there is currently no consensus regarding whether the status of freedom of association, as applied to workers, constitutes a human right.¹⁸⁷ The Republican Party platform advances the position that unions are harmful to businesses because they increase labor costs.¹⁸⁸ It promises, for example, to eliminate card check, eliminate Project Labor Agreements, and to circumvent collective bargaining by permitting employers to unilaterally raise wages for select employees.¹⁸⁹ The promise to circumvent collective bargaining would essentially eviscerate freedom of association. Given the political landscape, it is difficult to claim with a straight face that the U.S. views worker freedom of association as a human right, notwithstanding the positive law's protection of that freedom.

B. Deconstructing Human Rights

1. DECONSTRUCTING THE CONCEPT OF "HUMAN" IN HUMAN RIGHTS: KANT'S CATEGORICAL IMPERATIVE'S HUMANITY FORMULATION

Perhaps the most persuasive and influential Enlightenment thinker to espouse the view that there is something dignified about humanity is Immanuel Kant (1724–1804).¹⁹⁰ Kant posited that there is one fundamental law of morality—the categorical imperative.¹⁹¹

¹⁸⁶ 42 U.S.C. § 2000e (2012).

¹⁸⁷ See, e.g., *ILO Declaration*, *supra* note 172 (listing freedom of association as a fundamental work right, but not explicitly naming it a human right).

¹⁸⁸ See generally 2012 REPUBLICAN NATIONAL CONVENTION PLATFORM 5, 7–8 (2012), <https://assets.documentcloud.org/documents/414158/2012-republican-national-convention-platform.pdf>. For example, the Republican Party Platform claims that “the Democrats’ Davis-Bacon law continues to drive up infrastructure construction and maintenance costs for the benefit of that party’s union stalwarts.” *Id.* at 5.

¹⁸⁹ See *id.* at 7–8.

¹⁹⁰ See generally IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed. trans., Yale Univ. Press 2002) (1795).

¹⁹¹ See *id.* at 36.

In Kant's view, all other laws of morality derive from the categorical imperative (CI).¹⁹²

Although at some point Kant succinctly defined CI as "a law for every will of a rational being,"¹⁹³ Kant thought that his CI could be expressed in several different ways. The first formulation, known as the law of nature, tells us to act in accordance with principles that could become a universal rule of law that *all* members of your society (universality) would accept: "*So act as if the maxim of your action were to become through your will a **universal law of nature.***"¹⁹⁴ To determine whether an action violates the categorical imperative, simply ask yourself what would happen if everyone were to follow the proposed principle. If the answer to that question is something like, "It is possible for everyone to act in accordance with this rule and the rule would never contradict itself," then the proposed rule meets the test of the categorical imperative. One of the most common examples of a proposed rule that fails the categorical imperative is the principle of deception. Kant gives the example of the person who lies to borrow money knowing that he cannot pay it back.¹⁹⁵ That person acts in accordance with the following principle: "If I believe myself to be in pecuniary distress, then I will borrow money and promise to pay it back, although I know this will never happen."¹⁹⁶ To determine whether this principle is morally right, one must simply universalize the law.¹⁹⁷ In rejecting the maxim of deception Kant observes: "I see right away that it could never be valid as a universal law of nature and still agree with itself, but rather it would necessarily contradict itself because eventually no one could rely on promises that are routinely broken."¹⁹⁸

Before moving to the CI's second formulation, it is instructive to briefly discuss CI's third and fourth formulations—the autonomy principle and the kingdom of ends, which further universalizes Kant's first formulation of the categorical imperative.¹⁹⁹ The third formulation, known as the principle of autonomy, tells us that we

¹⁹² See *id.* at 36–37.

¹⁹³ *Id.* at 50.

¹⁹⁴ *Id.* at 38 (emphasis in original).

¹⁹⁵ See *id.* at 39.

¹⁹⁶ *Id.* (internal citations omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 36, 50, 56.

should always act as if we are making universal rules: Act as “*a will legislating universally through all its maxims[.]*”²⁰⁰ Similarly, the fourth formulation, known as the kingdom of ends, tells us to act as if we were the legal official of some universal law-making body: “Act in accordance with maxims of a universally legislative member for a merely possible realm of ends”²⁰¹

It is the categorical imperative’s second formulation, known as the principle of ends, the principle of dignity, or the humanity principle, where Kant seems to add something more.²⁰² Kant’s humanity principle tells us to treat people as if each person has intrinsic value simply because each person is human: “*Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end and never merely as a means.*”²⁰³ The humanity principle forbids us to act in ways that exploit human beings or at least in ways that merely exploit human beings.²⁰⁴ Presumably, hiring workers per se does not violate the CI even though the employer uses its workers in furtherance of its purposes. The moral question inherent in a natural human rights approach to workers’ rights is whether these workers are being used merely as a means. Those interested in workers’ rights must determine whether, as a matter of fact (as opposed to a matter of law), workers are actually being used in an exploitative manner. This is essentially an empirical assessment of the moral claim: Are institutions, which are designed to protect workers, doing their job? It is also a legal strategy for developing positive labor standards, which reflect a particular conception of human dignity and autonomy while minimizing the impact of state and business coercion of workers.²⁰⁵ This particular formulation of the CI further and most clearly shows how the CI is in tension with political (or even economic) utilitarianism, by

²⁰⁰ *Id.* at 50 (emphasis in original).

²⁰¹ *Id.* at 56 (internal citations omitted).

²⁰² *See id.* at 46–47.

²⁰³ *Id.* (emphasis in original).

²⁰⁴ *See id.*

²⁰⁵ This approach echos, at least to some degree, what Professor Mantouvalou calls the instrumental approach to labor rights as human rights. *See* Mantouvalou, *supra* note 129, at 151, 156 (quoting PHILIP ALSTON, *LABOUR RIGHTS AS HUMAN RIGHTS* 3 (2005)).

which majority rule governs and the ends justify the means.²⁰⁶ Morality requires that when people act we consider the humanity of each person and the effect of our actions on others' humanity.²⁰⁷

2. DECONSTRUCTING THE CONCEPT OF "RIGHTS" IN HUMAN RIGHTS

i. Varying Conceptions of a Legal Right Under Hohfeld's Rubric

The concept of a legal right has many formulations or conceptions.²⁰⁸ Perhaps the greatest twentieth-century thinker regarding legal-rights discourse is Professor Wesley Newcomb Hohfeld (1879–1918), who carefully distinguished among these varying conceptions of legal rights.²⁰⁹ Professor Hohfeld devised a rubric to remedy his complaint that the legal term, "right," was being used by judges in a sloppy and inconsistent manner.²¹⁰ Hohfeld comprehensively deconstructed the concept of rights into four different conceptions: claims, privileges, powers, and immunities.²¹¹ Here, I focus on what Hohfeld calls the claim right.²¹²

ii. Claim Rights Entail Rights Holders, Duty Holders, Interests, and Values

According to Professor Hohfeld, "[a] duty or a legal obligation is that which one ought or ought not to do When a right is invaded, a duty is violated."²¹³ In other words, where there's a right there's a correlative duty, to use Hohfeldian lingo.²¹⁴ Hohfeld used an example from property law to explain this conception of a claim

²⁰⁶ See *id.* at 161–62.

²⁰⁷ See KANT, *supra* note 190, at 46–47.

²⁰⁸ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter *Some Fundamental Conceptions*]; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (Clarendon Press 1986) [hereinafter *MORALITY OF FREEDOM*].

²⁰⁹ See *Fundamental Legal Conceptions*, *supra* note 208, 716–17.

²¹⁰ See *id.* at 717.

²¹¹ See *id.* at 710.

²¹² See *id.* at 718.

²¹³ *Some Fundamental Conceptions*, *supra* note 208, at 32 (quotations omitted).

²¹⁴ See *id.*

right: “if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”²¹⁵

The idea of claim holders and duty holders logically follows from Hohfeld’s analysis of claim rights.²¹⁶ However, it is Professor Joseph Raz who crystallized this aspect of the formulation: “‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”²¹⁷ This means that there are always several important variables when analyzing claim rights.²¹⁸ First there is capacity: who is the rights holder and who is the duty holder?²¹⁹ Then there is the nature of the right, which is based on interests and values.²²⁰

iii. The Claim Right: Where There’s a Right, There’s a Duty

According to Raz, “[r]ights are grounds of duties in others. The duties grounded in a right may be conditional.”²²¹ To illustrate his point, Raz uses an example from the workplace:

Consider the duty of an employee to obey his employer’s instructions concerning the execution of his job. It is grounded in the employer’s right to instruct his employees. But it is a conditional duty, i.e., a duty (in matters connected with one’s employment) to perform an action if instructed by the employer to do so. When the condition which activates the duty is an action of some person, and when the duty is conditional on it because it is in the right-holder’s interest to make that person able to activate the duty at will, then the right confers a power on the person on whose behaviour the duty depends.²²²

²¹⁵ *Id.*

²¹⁶ *See* MORALITY OF FREEDOM, *supra* note 208, at 166.

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See id.* at 166–67.

²²¹ *Id.* at 167.

²²² *Id.* at 167–68.

Raz's example shows that the *employee's duty to obey* her employer is grounded in the *employer's right to direct* its employees.²²³ Raz is a legal positivist. So his example does not mean to connote that employers have some sort of fundamental or natural right to obedience from their employees.²²⁴ His example, however, is highly descriptive of, for example, American employment law, which routinely places the duty of obedience on employees.²²⁵ Indeed, insubordination—the failure to obey an employer's instructions—is a common cause of discharge in the U.S.²²⁶ This value is so embedded in U.S. culture that when one private law school in Michigan recently fired a tenured member of its faculty for refusing to teach constitutional law, a subject she had never taught before and was likely incompetent to teach, the law school won.²²⁷

iv. Legal Capacity

According to Raz, “[a]n individual is capable of having rights if and only if either his well-being is of ultimate value or he is an ‘artificial person’”²²⁸ The example of an artificial person that Raz gives is the corporation.²²⁹ Once again, Raz's positivism comes through in so far as he notes that an artificial person—something other than a being of ultimate value—is capable of possessing rights.²³⁰ For Raz, capacity is something that is granted by the positive law.²³¹

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See generally* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers* 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

²²⁶ *See generally id.* at 68.

²²⁷ *See Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 561 (6th Cir. 2012).

²²⁸ MORALITY OF FREEDOM, *supra* note 208, at 166.

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (explaining that the Supreme Court has interpreted the First Amendment to protect corporations and “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons’”) (citations omitted); 29 U.S.C. § 185(b) (2012) (granting unions the capacity to sue or be sued thereby).

Raz's definition is problematic insofar as it includes artificial persons.²³² To be sure, Raz is descriptively correct in identifying artificial persons as entities that have legal capacity under positive law.²³³ Indeed, in our world as it is currently organized, business entities such as corporations and workers' rights institutions, such as unions, have legal capacity and therefore can possess legal rights.²³⁴ But in a world that is changing rapidly and at an exponential rate, there may be a time in which we are confronted with the question whether other entities, such as robotic cars or robotic people have legal rights.²³⁵ Relatedly, the definition does not, at least at first blush, account for animal rights—an important subject in labor law to the extent that animals may be used by humans as beasts of burden.²³⁶

v. Nature of Rights

In a democratic republic, like the U.S., positive rights come about through the political process.²³⁷ This often means compromise among competing groups based on the interests of those natural and artificial persons.²³⁸ Accordingly, “the nature and extent of any legal right is only a reflection of the value attached by the political system to various, often conflicting, interests.”²³⁹ It is therefore instructive to examine those various interests and to understand the values underlying those interests to fully describe the nature of legal rights

²³² See MORALITY OF FREEDOM, *supra* note 208, at 166.

²³³ See, e.g., *Citizens United*, 558 U.S. at 343.

²³⁴ See, e.g., *Trs. of Dartmouth Coll. v. Woodward Coll.*, 17 U.S. 518, 667 (1819) (granting corporations the same rights as natural persons to enforce contracts); *Soc'y for Propagation of Gospel v. Town of Pawlet*, 29 U.S. 480, 502 (1830) (holding that a corporation can hold land); 29 U.S.C. § 185 (2012) (granting unions the capacity to sue to vindicate their rights and the rights of their members).

²³⁵ See generally Joshua F. Cheslow, *The Future of the Law: Four Practice Areas on the Horizon*, 283 N.J. LAW. 60, 63 (2013).

²³⁶ See MORALITY OF FREEDOM, *supra* note 208, at 166; see also Denise Sullivan, *Animal Labor Laws*, CHRON, <http://smallbusiness.chron.com/animal-labor-laws-74377.html> (last visited Mar. 8, 2017).

²³⁷ See generally Anne Marie Lofaso, *British and American Legal Responses to the Problem of Collective Redundancies* (unpublished D. Phil. dissertation, Oxford University) (on file with author).

²³⁸ *Id.* at v.

²³⁹ *Id.*

and to determine whether a change in policy is needed to better fulfill the desired interests and values.²⁴⁰ In other words, using the ideas of Professors Hohfeld and Raz as guides, we can see a relationship among legal claim rights, interests, and values.

If this is correct—that rights are based on interests and grounded in values—then are rights only substantively valid when they are grounded in morally sound values? Imagine a circumstance under which a law is properly promulgated in accordance with what Professor H.L.A. Hart (1907–1992) called a sovereign nation's secondary rules.²⁴¹ A member of the House of Representatives introduces a bill; that bill goes to committee, where it is revised; the bill is then reported to the House floor where it is debated; the bill is voted on; the same process takes place on the Senate-side of Congress.²⁴² Once the bill passes both houses in the same form, the bill is sent to the President, who then has three choices.²⁴³ The President can sign the bill, in which case it becomes law; the President can veto the bill, in which case the bill returns to Congress, where a two-thirds vote of both houses can override the President's veto; or the President can do nothing, in which case the bill becomes law after ten days if Congress is in session; otherwise the bill does not become law.²⁴⁴ Let's also imagine that this law meets Professor Lon Fuller's (1902–1978) eight canons of law such that we would agree that there is an internal morality of the law.²⁴⁵ In other words, the law (1) is one of general application; (2) is published in the Federal Register and in the U.S. Code; (3) has statutory language that is clear, precise, and comprehensible so that people readily understand their legal rights and obligations; (4) does not contradict itself or any other U.S. law; (5) can be readily complied with; (6) is stable and cannot be changed without an act of Congress; (7) is not applied retroactively; and (8)

²⁴⁰ See MORALITY OF FREEDOM, *supra* note 208, at 166; *Fundamental Legal Conceptions*, *supra* note 208, at 710.

²⁴¹ See H.L.A. HART, *THE CONCEPT OF LAW* 94 (1961).

²⁴² See *Government 101: How a Bill Becomes Law*, VOTESMART.ORG, <https://votesmart.org/education/how-a-bill-becomes-law> (last visited Jan. 30, 2017).

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See LON L. FULLER, *THE MORALITY OF LAW* 39 (Yale Univ. Press, 2d ed. 1969).

is administered and enforced as written.²⁴⁶ Let's further suppose that the law conforms to that legal system's basic norm under the *Pure Theory of Law* posited by Hans Kelsen (1881–1973),²⁴⁷ or is consistent with that legal system's rule of recognition, as Hart would say,²⁴⁸ in this case, the law was challenged, and the U.S. Supreme Court has upheld that law as constitutional.

Even under these circumstances—where a law meets all the criteria of Fuller's internal morality,²⁴⁹ where the law conforms to Kelsen's basic norm,²⁵⁰ and where that law is validly promulgated under that legal system's secondary rules and rules of recognition—such a law may still be morally repugnant. Think of the Fugitive Slave Acts.²⁵¹ Think of “separate but equal.”²⁵²

Once again, there are easy and hard cases on the question of whether a positive law is so morally repugnant that perhaps it is not a law at all, or perhaps it is a law and should simply not be obeyed.²⁵³ The Fugitive Slave Act is an easy case for twenty-first century Americans—at least on the question whether that law is morally repugnant.²⁵⁴ But what about at-will employment, gender stereotyping, and outsourcing? My guess is that many would call these easy cases as well—easy because, in their view, these cases are not morally repugnant even if we might prefer a different solution. I do not

²⁴⁶ See *id.* at 39; see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595–96 (1958) [hereinafter *Positivism*].

²⁴⁷ HANS KELSEN, *PURE THEORY OF LAW* 3–4 (Max Knight trans., Univ. of California Press, 2d ed. 1967).

²⁴⁸ See HART, *supra* note 241, at 92.

²⁴⁹ See FULLER, *supra* note 245, at 39, 44.

²⁵⁰ See KELSEN, *supra* note 247, at 3–4.

²⁵¹ Congress passed two fugitive slave laws. See Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850). See also *Prigg v. Pennsylvania*, 41 U.S. 539, 666 (1842) (finding unconstitutional a state statute banning the return of fugitive slaves); *Dred Scott v. Sandford*, 60 U.S. 393, 394–96 (1857) (holding that slaves are not constitutional citizens but instead are chattel; that slaves cannot be made free by travelling into free territory; therefore, that the Missouri Compromise of 1850 is unconstitutional insofar as it deprives masters of their enslaved property when those slaves happen to be moved into free territory).

²⁵² *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding the constitutionality of an 1890 Louisiana state law providing for segregated, separate but equal, railroad accommodations).

²⁵³ See, e.g., *id.*

²⁵⁴ See 1 Stat. 302; 9 Stat. 462.

share this view. For reasons discussed in Section V, these cases are at best morally ambiguous.

C. Are Human Rights Simply the Sum of Human Plus Rights or Is the Sum Greater than the Whole?

The definition provided above tells us that human rights are claim rights that humans possess because they are human.²⁵⁵ This definition is very formulistic and does not account for several possibilities, two of which I examine. First, might human rights simply be a term of art, such that when put together the sum is greater than its parts.²⁵⁶ Second, the term does not account for other types of rights such as privileges, powers, and immunities.²⁵⁷ While this is true, these other categories are not relevant. Powers and immunities, for example, are secondary rights²⁵⁸ that merely reveal whether the rights holder, A, has the power to alter B's rights. If A has that right, we say that it has power. If A does not have that right, we say that B holds an immunity.²⁵⁹

The first possibility—that the whole is greater than the sum of its parts—is a more difficult question, which I attempt to answer in the next section. For the remainder of this Article, I challenge the view that the U.S. work law status quo is morally acceptable. To do this, I need to get to the foundational level of work law. I have already begun this analysis by deconstructing what it means to possess rights. I now proceed to deconstruct what it means for workers to possess natural human rights independent of the positive law.

V. FINDING NATURAL LAW THROUGH EMPATHY IN THE ORIGINAL POSITION

Our tale of two cities recounts a world in which we can assess a legal system's record on human rights against two different types of

²⁵⁵ See MORALITY OF FREEDOM, *supra* note 208, at 166; see also *Fundamental Legal Conceptions*, *supra* note 208, at 710, 716–17.

²⁵⁶ See *What are Human Rights?*, *supra* note 131.

²⁵⁷ See generally HART, *supra* note 241, at 79.

²⁵⁸ See *id.*

²⁵⁹ See *Some Fundamental Conceptions*, *supra* note 208, at 30; HART, *supra* note 241, at 78–79.

standards: (1) positive law, for example, well-established, international law principles; or (2) natural law, laws cognizable through reason and derived from human nature, which would universally apply to all humans. We can readily determine the positive law.²⁶⁰ The question is, what is the source of the natural law?²⁶¹ The work of Professor John Rawls might provide guidance.²⁶²

A. Rawls's Theory of Justice Promises a Well-ordered Just Society Governed by Two Principles: Equality in the Assignment of Basic Rights/Duties and Socio-Economic Inequalities Permitted Only if They Do Not Make the WORM Worse Off

In *A Theory of Justice*, Professor Rawls is concerned with establishing principles of justice in a well-ordered, nearly just, pluralist society peppered with inequality.²⁶³ Rawls understood that such societies are ordered, at least in part, by laws and that “laws . . . no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”²⁶⁴ The question Rawls presents is: How do we determine the principles by which society might be justly ordered?²⁶⁵ Answering this question is a particularly difficult task if, as Rawls observed, “[t]he justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society.”²⁶⁶

To answer his question, Professor Rawls posits a thought experiment where we are asked to imagine individuals in an “original position of equality” in which none of the actors in this “hypothetical situation . . . knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”²⁶⁷ In this original position, the parties are asked to choose “principles of justice” to govern their society “behind a veil of ignorance.”²⁶⁸

²⁶⁰ For a comparison with the positive law, see *infra* Section VI.

²⁶¹ See KANT, *supra* note 190, at 38–57.

²⁶² JOHN RAWLS, A THEORY OF JUSTICE 3 (1999).

²⁶³ See *id.* at 3–4.

²⁶⁴ *Id.* at 3.

²⁶⁵ See *id.* at 4.

²⁶⁶ *Id.* at 7.

²⁶⁷ *Id.* at 11.

²⁶⁸ *Id.*

Rawls was concerned with the problems of inequalities based on factors other than merit:

The intuitive notion here is that . . . [people] born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances [T]he institutions of society favor certain *starting places* over others. These are especially deep inequalities. Not only are they pervasive, but they affect [the individual's] initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply.²⁶⁹

John Rawls understood this truth: Starting points matter!²⁷⁰

According to Rawls, those in the original position would choose the following two principles, famously known as the liberty and the difference principles:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.²⁷¹

Simply put, Rawls argues that those in the original position would choose a world where all people have equal access to the basic liberties—freedom of expression, freedom of association,

²⁶⁹ *Id.* at 7 (emphasis added).

²⁷⁰ See *id.* at 7. For an excellent analysis on the point that starting points matter, see C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 940–48 (1980).

²⁷¹ RAWLS, *supra* note 262, at 53.

freedom of religious exercise, among others; and where any distribution or redistribution of wealth benefits all.²⁷²

B. *A Thought Experiment: The Veil of Empathy*

Now imagine individuals in a different “original position of equality” in which all of the actors in this “hypothetical situation” can experience every person’s “place in society, . . . class position or social status, . . . fortune in the distribution of natural assets and abilities, [] intelligence, strength, and the like.”²⁷³ In this position, the participants would still be under a veil of ignorance (that is, they would know nothing about who they are), but they would be able to walk in the shoes of every individual. Such a person would be able to empathize with every person.²⁷⁴

Empathic participants behind a veil of ignorance would likely develop a theory of workplace justice where rules reflect autonomy and dignity, while minimizing employer coercion. What that workplace might look like is described in the following section.²⁷⁵

The most common objection I have received to this thought experiment is that the use of empathy, instead of ignorance, strengthens the objection to Rawls’ original thought experiment. Namely, humans cannot even imagine what it is like to be under a veil of ignorance, let alone under a veil of empathy.²⁷⁶ I am bothered by neither objection. In my several years teaching jurisprudence, I have met only two students who have claimed that they cannot imagine what it is like to be under the veil of ignorance. Every other student has felt that, with time and imagination, they can situate themselves under the veil of ignorance. The veil of empathy should be even easier as the following anecdote illustrates. When I was 11 years old, I earned a spot on my high school’s junior varsity diving team. Our best diver was a 17-year-old young black woman, who was a county and state diving champion. I watched her in awe as she sailed

²⁷² *See id.*

²⁷³ *Id.* at 11.

²⁷⁴ A full discussion of what constitutes empathy is beyond the scope of this Article but will be developed in a future article. For an excellent treatment of empathy, see Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 LEGAL COMM. & RHETORIC 173, 176 (2012).

²⁷⁵ *See infra* Part VI.

²⁷⁶ *See generally* RAWLS, *supra* note 262, at 11.

through the air in perfect form and entered the water without a splash. One evening I had a dream that I was the best diver in the state. The only catch? I had to become black. I spent the next few days (in my dream) walking around as a black version of myself. My “friends” picked on me; told me that I was stupid; and bullied me in numerous ways. In the end, I chose to be myself—white and mediocre. In that dream, at the ripe old age of 11, I recognized that the world was unjust; that it was more unjust to black girls than to white girls; and that I was more comfortable being an invisible white girl than drawing attention to myself by being a talented athlete cloaked in black skin. I dreamt what it was like to be a black girl. Perhaps, as a blonde, blue-eyed, pale-skinned little girl, I could not completely feel the pain of racial discrimination, but I did come close to a type of empathy, without much effort.

It is by now well-established that affective instruction, using emotions to reinforce learning, is an important objective of early education.²⁷⁷ Indeed, empathy can be defined as “an affective response more appropriate to another’s situation than one’s own.”²⁷⁸ The veil of empathy is designed to capture this intuition.

VI. LEGITIMIZING THE WORKPLACE: BUILDING A JUST WORKPLACE ON FOUNDATIONAL VALUES

A. *Workers’ Rights as Human Rights*²⁷⁹

1. THE NATURE OF WORKERS’ RIGHTS AS HUMAN RIGHTS: THE AUTONOMOUS DIGNIFIED WORKER

In *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, I argue that there are two foundational

²⁷⁷ See generally ROBERT COLES, *THE MORAL INTELLIGENCE OF CHILDREN: HOW TO RAISE A MORAL CHILD* 87–88 (1997); DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995).

²⁷⁸ See MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* 4 (2000).

²⁷⁹ The human rights literature is vast. There is disagreement within this literature as to the nature of human rights and the significance or priority of those rights as relative to one another as well as to other positive rights within a particular sovereign’s legal system. It is not my intention here to answer those questions in a comprehensive manner. I wish instead to focus on the idea of workers’ rights

values for establishing a just workplace: autonomy and dignity, hence the name, the autonomous dignified worker.²⁸⁰ Borrowing heavily from Professor Raz's definition of personal autonomy, I define worker autonomy as follows: "[t]he autonomous [worker] is a (part) author of [his or her work] life . . . controlling, to some degree, [his or her] own destiny . . . through successive decisions throughout [his or her life]."²⁸¹ For Raz, "[a]utonomy is opposed to a life of coerced choices[.]"²⁸²

Similarly, worker autonomy is opposed to unilateral decisions made by the employer and imposed on the worker, especially when the decisions affect the workers' wages, hours, and other terms and conditions of employment.²⁸³ It "contrasts with a [work] life of no choices, or . . . without ever exercising one's capacity to choose."²⁸⁴ To be autonomous, the following conditions must be met: (1) the worker must possess "the mental ability to identify work life influences"; (2) the worker must have "access to information sufficient to generate a range of options"; (3) the worker must be free from coercion; and (4) the worker must have access to "modes of participation that empower [him or her] to effect changes in" his or her work life.²⁸⁵ Mental capacity, information, independence, and participation are the bare minimum workplace conditions that must be met for workers to possess some degree of autonomy in the workplace.²⁸⁶

The other foundational value for establishing a just workplace is dignity.²⁸⁷ In *The Autonomous Dignified Worker*, I define dignity as

as human rights. What is the nature of those rights? What is the source of those rights? The question of what significance or priority a legitimate political system should give to workers' rights is beyond the scope of this paper. *See generally* Anne Marie Lofaso, *Civil Disobedience: Peaceful Solutions to Attaining Autonomy and Human Dignity at Work* (working paper) (on file with author) [hereinafter *Civil Disobedience*].

²⁸⁰ *Toward a Foundational Theory*, *supra* note 49, at 3.

²⁸¹ *Id.* at 39 (quoting MORALITY OF FREEDOM, *supra* note 208, at 369).

²⁸² MORALITY OF FREEDOM, *supra* note 208, at 371.

²⁸³ *Cf.* 29 U.S.C. § 158(d) (2012); *see also* N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–49 (1958).

²⁸⁴ MORALITY OF FREEDOM, *supra* note 208, at 371.

²⁸⁵ *Toward a Foundational Theory*, *supra* note 49, at 40 (citations omitted).

²⁸⁶ *See id.*

²⁸⁷ *See id.* at 49.

follows: “The ruling idea behind the ideal of dignity is that individual members of a community should treat each and every other member of that community as persons of independent moral worth.”²⁸⁸

I further note that “[a]s a right enforceable against the state, dignity signifies in part that ‘individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them.’”²⁸⁹ Moreover, “[a]s a right enforceable against other institutions, such as employers or even unions, dignity demands that these institutions, created for the benefit of *natural persons*, treat their beneficiaries with equal concern and respect.”²⁹⁰

Kant’s categorical imperative provides a more rigorous foundation on which to build a just and dignified workplace.²⁹¹ As explained above in Section IV.B.1., the categorical imperative—understood as a moral imperative, which commands us to act as if we are legal officials in a universal law-making body that always treats humans as ends and never merely as means—becomes a solid foundation for a natural law conception of a human-rights platform for workers based on dignity.²⁹² This principle essentially allows employers to employ human persons to work for them, but prohibits employers from treating those human workers merely as a means of making money.²⁹³ Instead, employers must consider the good of those humans who work for their firms.²⁹⁴

There are at least three other values that labor advocates often advance as foundational values for the workplace—participation, democracy, and justice. By participation, I mean the meaningful opportunity to participate in decisions affecting one’s work life. Such participation could be accomplished through unions, works councils, quality circles, or through significant Board-level participation by workers. In general, I am referring to the voice function of these institutions. By democracy, I intend the meaningful opportunity to have equal say in such decisions. I am not only thinking of the one-

²⁸⁸ *Id.* (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 181 (1977)).

²⁸⁹ *Id.* (quoting DWORKIN, *supra* note 288, at 180).

²⁹⁰ *Id.* (emphasis added).

²⁹¹ *See* KANT, *supra* note 190, at 38–57.

²⁹² *See id.* at 46–47, 56–57.

²⁹³ *See id.*

²⁹⁴ *See id.*

person-one-vote concept in union elections. I am also thinking of participation in other voice institutions where the workers' diverse voices are not diluted by the employer's voice or the voices of other parties. For example, Board-level participation might also be characterized as a democratic right, so long as the workers' voice is not diluted by shareholder representatives. It is thus readily observed that participation and democracy are closely related. By justice, I don't simply mean due process in disciplinary hearings—although that is an important component of a just workplace. I also mean the creation of a workplace where the fruits of one's labor are fairly distributed.

Given how I have defined these terms, autonomy and dignity are, in my view, foundational and the three other values can be derived from autonomy and dignity. In other words, participation, democracy, and justice are desirable but not foundational values. I will not, however, prove that in this Article. Instead, to avoid argument with those who champion other values as foundational, I will proceed on the assumption that all five values are desirable for building a workplace grounded in human rights, leaving the meta-question for another day.

2. THE LEGAL SOURCE OF WORKERS' RIGHTS AS HUMAN RIGHTS

As Professor James Gross correctly noted, “[t]he concept of human rights . . . has not been an important influence in the making of United States labor policy.”²⁹⁵ Yet, the U.S. Supreme Court early on recognized that workers' rights secured under the National Labor Relations Act are “fundamental,” stating:

[T]he [NLRA] . . . safeguard[s] the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a *fundamental* right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its

²⁹⁵ James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMP. L. 479, 480 (2002).

business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.²⁹⁶

The keystone of those *fundamental* rights, posited in NLRA Section 7, is that employees possess “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection”²⁹⁷ Were this a human right, then the source of that right, in my view, would not be positive legislative law, which could be enacted or repealed at the whim of the majority, but morality or some other source external to the positive law.

Accordingly, the practical import of the Court’s declaration that Section 7 rights are “fundamental”²⁹⁸ is unclear. Perhaps the Court meant that those rights are foundational, that is, grounded in some value external to the positive law. Perhaps it meant that those rights are positive rights grounded in the basic values embedded in our Constitution, such as freedom of association.²⁹⁹ Or perhaps the

²⁹⁶ N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (emphasis added) (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)).

²⁹⁷ 29 U.S.C. § 157 (2012).

²⁹⁸ Jones & Laughlin Steel Corp., 301 U.S. at 33.

²⁹⁹ See Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697 (arguing that Section 7 essentially protects rights rooted in the first

Court meant something else entirely. Unfortunately, the Court did not explain what it meant.

Notwithstanding the Supreme Court's observation that workers' freedom to associate for the purposes of collective bargaining and mutual aid or protection is "fundamental,"³⁰⁰ the Court never analyzed the constitutionality of the NLRA with respect to the constitutional right to freedom of association.³⁰¹ Instead, it based its analysis on the breadth of Congress's authority under the Commerce Clause to regulate commerce, including labor-management relations where Congress had determined that an inequality of bargaining power made illusory freedom of contract between certain forms of business organization and individual employees, which in turn caused economic disruptions to commerce.³⁰² This analysis hardly presents a moral foundation for the law of the workplace, unless freedom to engage in economic activity is once again arrogated to that level. That explanation is exceedingly unlikely in this context, where the Court is disrupting the *Lochner* paradigm.³⁰³

What we are left with are two findings. One, that Section 7 rights are fundamental. Two, that Congress has authority to enact laws to protect those rights under the Commerce Clause. The first lends moral legitimacy to the NLRA's purpose; the second lends positive legitimacy.

My point—that the validity of some laws and their basic foundations reside in morality—is not without controversy. Indeed, many of the greatest legal philosophers of the twentieth century, including Professors Hans Kelsen, H.L.A. Hart, and Joseph Raz are positivists who reject the argument that the law's validity is based on a morality that is extrinsic to the law itself.³⁰⁴ So let me make a

amendment and thus that "[c]ongress brought the first amendment to private employment").

³⁰⁰ *Jones & Laughlin Steel Corp.*, 301 U.S. at 33.

³⁰¹ See generally James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1072–78, 1089–91, 1131 (1987).

³⁰² See *Jones & Laughlin Steel Corp.*, 301 U.S. at 29–33.

³⁰³ See *supra* Section II.A.

³⁰⁴ See generally HART, *supra* note 241, at 227–29; KELSEN, *supra* note 247, at 1, 59–69; Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 44, 66–70 (1941); MORALITY OF FREEDOM, *supra* note 208, 193–216.

thin version of this argument: even if the law is positive in nature, I am interested in what the law should be and therefore seek to find values to ground labor laws. In the thick version, I claim that only those labor laws that reflect these values are legitimate because only those labor laws are morally grounded by legitimate values. The trick is to find the legitimizing values. Are they autonomy, dignity, participation, democracy, and justice or are there some other values that should govern the workplace?

I acknowledge that the legitimating source of the law will result in different policy consequences. Indeed, even the thin and thick versions of my argument will result in different policy consequences. For example, if Section 7 is legitimate only if it promotes the autonomous dignified worker then administrative and judicial constructions of Section 7 must promote those values. By contrast, if Section 7 is legitimate if it promotes values underlying the Commerce Clause then administrative and judicial constructions are much more likely to take into consideration the value of industrial peace to prevent obstructions to commerce. To tie a bow on this point, I would also have to articulate the consequences of breaking *legitimate* laws. Are citizens morally permitted to break laws not grounded in legitimate values? If so, what form of civil disobedience is permissible? By contrast, if such laws are grounded in illegitimate values, are they even laws? These questions are not answered here.³⁰⁵

B. *The Rights-Based Workplace Model from the Workers' Interests*

1. OVERVIEW

In this section, I construct a rights-based model of the workplace derived from workers' interests. To do this, I must, as a threshold matter, identify the claim-rights holders, in this case the workers; and the duty holders. For purposes of this paper, let's assume that workers can claim duties from the following stakeholders: (1) employers; (2) owners of the factors of production; (3) businesses as artificial persons; (4) managers, supervisors, and other agents of the

³⁰⁵ See generally *Civil Disobedience*, *supra* note 279 (paper presented at the Ohio State Journal of Dispute Resolution's Symposium: The Role of ADR Mechanisms in Public Sector Labor Disputes: What Is at Stake, Where We Can Improve & How We Can Learn from the Private Sector (Feb. 17, 2012)).

employers, owners, and businesses; and (5) the government (and its agents), in cases where the workers are public employees. When talking about this duty-holder in a generic matter, I will often use the shorthand term, employer. Next, assuming that rights are based on interests and are grounded in values, I must identify the interests and foundational values of the opposing parties. I have already identified the desirable/foundational values of workers—autonomy, dignity, participation, democracy, and justice. I accomplish the remaining tasks in Section V.B.2, *infra*, where I also show the extent to which those interests are in conflict. I end this section by generating a rights-based workplace model.

2. IDENTIFYING THE INTERESTS OF WORKERS AND EMPLOYERS AND THE VALUES REFLECTED IN THOSE INTERESTS

As Congress identified in the NLRA, workers have interests in “wages, hours, and other terms and conditions of employment.”³⁰⁶ Using that statutory phrase as a starting point to better understand workers’ interests, I examine the following concepts: job security, wages and benefits, hours, working conditions and work location, and training.

i. Job Security

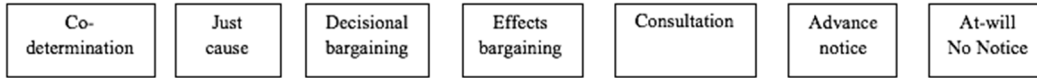
Although job security is not specifically mentioned in the NLRA as an employee interest, it is the threshold interest.³⁰⁷ Without a job, the workers’ interest in wages, hours, and other terms and conditions of employment is meaningless. Job security means different things to different people in different cultures.³⁰⁸ As I have written elsewhere, a right to job security as a procedural matter enforceable against the employer could range from at-will employment, which carries no job security and no procedures for securing or maintaining a job, to advance notice of job loss, to consultation over job loss, to bargaining over the effects of that job loss to bargaining over the

³⁰⁶ 29 U.S.C. §158(d) (2012).

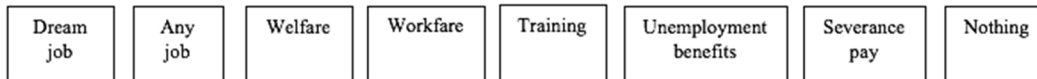
³⁰⁷ See generally *id.*

³⁰⁸ See generally Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL’Y J. 55, 88–91 (2010) [hereinafter *Talking Is Worthwhile*].

decision to terminate, to just-cause termination, to co-determination.³⁰⁹ The spectrum might look something like this:



A more substantive right to job security as enforceable against the state or an employer might mean a right to a particular job or a right to any job, but not a job of one's choice.³¹⁰ Recognizing, however, that neither governments nor employers can completely control the unemployment rate or rate of employment in a country, a particular business sector such as the industrial or manufacturing sectors, or even at a particular firm, a right to a job might have to be liquidated.³¹¹ Accordingly, it may not mean a right to a job at all but a right to income replacement in the likely event that the government or the employer cannot sustain a promise of full employment.³¹² In this case, the spectrum might look as follows:



ii. "Wages, Hours, and Other Terms and Conditions of Employment"

Over the past 75 years, the Board, with court approval, has fleshed out the statutory phrase "wages, hours, and other terms and conditions of employment."³¹³ The NLRB has broadly construed the

³⁰⁹ See *id.* at 63, 68–69.

³¹⁰ See *id.* at 66–67.

³¹¹ See *id.* at 62–63, 66 n.49, 73–75; see generally A.C.S., *Structural Unemployment: Jobs for the Long Run*, THE ECONOMIST (May 21, 2012, 9:01 PM), <http://www.economist.com/blogs/freexchange/2012/05/structural-unemployment>.

³¹² See *Talking Is Worthwhile*, *supra* note 308, at 66–68.

³¹³ 29 U.S.C. § 158(d).

statutory term “wages” to include across-the-board wage increases,³¹⁴ merit increases,³¹⁵ premium pay,³¹⁶ commissions, bonuses,³¹⁷ severance pay,³¹⁸ and benefits. Benefits include, for example, pension plans,³¹⁹ group health insurance plans,³²⁰ various fringe benefits,³²¹ and disability leave.³²² The Board has also broadly construed the statutory term “hours,” stating:

[T]he particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of ‘wages, hours, and other terms and conditions of employment’ about which employers and unions must bargain.³²³

³¹⁴ See, e.g., *N.L.R.B. v. Katz*, 369 U.S. 736, 743–45 (1962).

³¹⁵ See, e.g., *J. H. Allison & Co.*, 70 N.L.R.B. 377, 377–78 (1946), *enforced*, 165 F.2d 766, 771 (6th Cir. 1948).

³¹⁶ See, e.g., *B.P. Oil, Inc.*, 256 N.L.R.B. 1107, 1111 (1981), *enforced*, 681 F.2d 804, 804 (3d Cir. 1982); *Smith Cabinet Mfg. Co., Inc.*, 147 N.L.R.B. 1506, 1507–08 (1964) (differential shift pay); *Braswell Motor Freight Lines, Inc.*, 141 N.L.R.B. 1154, 1160–64 (1963) (overtime pay).

³¹⁷ See, e.g., *N.L.R.B. v. Niles-Bement-Pond Co.*, 199 F.2d 713, 714 (2d Cir. 1952) (Christmas bonuses); *Singer Mfg. Co.*, 24 N.L.R.B. 444, 459–60 (1940), *enforced*, 119 F.2d 131, 136 (7th Cir. 1941) (same).

³¹⁸ See, e.g., *Champion Int’l Corp.*, 339 N.L.R.B. 672, 672 (2003).

³¹⁹ See, e.g., *Inland Steel Co.*, 77 N.L.R.B. 1, 2–4 (1948), *enforced*, 170 F.2d 247, 251 (7th Cir. 1948); *N.L.R.B. v. Black-Clawson Co.*, 210 F.2d 523, 524 (6th Cir. 1954) (per curiam) (profit-sharing retirement plans).

³²⁰ See, e.g., *W.W. Cross & Co., Inc.*, 77 N.L.R.B. 1162, 1163–64 (1948), *enforced*, 174 F.2d 875, 877–78 (1st Cir. 1949) (group health and accident insurance).

³²¹ See, e.g., *N.L.R.B. v. Katz*, 369 U.S. 736, 739–744 (1962) (sick-leave policy); *Singer Mfg. Co.*, 119 F.2d at 136.

³²² See, e.g., *N.L.R.B. v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), *modified on other grounds*, 426 F.2d 791 (2d Cir. 1970).

³²³ *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676, 691 (1965).

Hours of work might include, for example, the number of hours worked per day, per week, or per pay period;³²⁴ start, quit, and break times;³²⁵ work schedules and work shifts.³²⁶

Other terms and conditions of employment range from the fundamental to the trivial. On a fundamental level, workers are interested in a workplace free from compulsory labor, free from child labor, and free from discrimination.³²⁷ As discussed above, these freedoms are so basic that the ILO has identified them as the fundamental rights, along with freedom of association.³²⁸ The next most basic term or condition of employment would concern one's position: the right to retain one's current position,³²⁹ or the right not to be transferred to a job with more onerous working conditions.³³⁰ Other vital terms and conditions of employment would also include all health and safety issues,³³¹ privacy issues, and process issues.³³² Less vital, but of basic concern to modern workers, are issues surrounding work location. This not only addresses geographical preferences and commuting costs, but also such issues as flexiplace, telecommuting, work centers, and virtual workplaces.³³³ On the other

³²⁴ See *id.* See also *George P. Pilling & Son Co.*, 16 N.L.R.B. 650, 651, 659 (1939), *enforced*, 119 F.2d 32, 39 (3rd Cir. 1941) (unilaterally shortening hours).

³²⁵ See, e.g., *Beverly Cal. Corp. v. N.L.R.B.*, 227 F.3d 817, 838 (7th Cir. 2000) (break times); *Van Dorn Plastic Mach. Co.*, 286 N.L.R.B. 1233, 1239–40 (1987), *enforced*, 881 F.2d 302, 309 (6th Cir. 1989) (paid lunch period); *Massey Gin & Mach. Works, Inc.*, 78 N.L.R.B. 189, 195, 199 (1948) (start and quit times); see also *Verizon N.Y., Inc.*, 339 N.L.R.B. 30, 30–32 (2003) (time off to give blood).

³²⁶ See, e.g., *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 515–18, 521 (1946) (Saturday and Sunday work).

³²⁷ See *supra* Section IV.A.3.

³²⁸ See *id.*

³²⁹ See, e.g., *Chambers Mfg. Corp.*, 124 N.L.R.B. 721, 723–25 (1959) (job classification—although General Counsel failed to sustain burden of showing that employer unilaterally changed job classifications).

³³⁰ See *Bonham Cotton Mills, Inc.*, 121 N.L.R.B. 1235, 1236 (1958) (workload), *enforced*, 289 F.2d 903, 904 (5th Cir. 1961) (*per curiam*).

³³¹ See, e.g., *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182 (1989) (drug and alcohol testing of current employees who required medical treatment for on-the-job injuries).

³³² See generally Charles B. Craver, *Privacy Issues Affecting Employers, Employees, and Labor Organizations*, 66 LA. L. REV. 1057, 1068–75 (2006).

³³³ See generally Alex Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143, 182–

end of the spectrum are the relatively minor working conditions such as the extent to which a worker may use the telephone or play the radio during working time.³³⁴

iii. Training

The concept of training returns us to the idea of job security. As explained above, governments are unlikely to be able to sustain a promise of full employment.³³⁵ Especially in a capitalist society, where capital is legally permitted to move around the country and even outside the country, the market plays a prominent role in the extent of employment and unemployment.³³⁶ Even in times of low unemployment rates, there is always going to be some frictional unemployment—unemployment arising from market mismatch between workers and jobs, thereby resulting in a short period of time during which a worker is transitioning from school to job, from parenthood to job, or from job to job.³³⁷ There is also likely always to be some structural unemployment—involuntary unemployment arising primarily from mismatched labor supply and demand.³³⁸ In effect, structural unemployment results from a lack of demand for the labor available.³³⁹ Structural unemployment differs from frictional unemployment insofar as structural unemployment tends not to be temporary and is much more difficult to address as a policy matter.³⁴⁰ For example, the technological displacement of workers results in structural unemployment, whereas the search time in between jobs results in frictional unemployment.³⁴¹

86 (2011) (outlining the difficulties in the application of the NLRA to modern working conditions).

³³⁴ See *Hedison Mfg. Co.*, 249 N.L.R.B. 791, 796 (1980).

³³⁵ See generally *Talking Is Worthwhile*, *supra* note 308, at 66–68.

³³⁶ See generally *A.C.S.*, *supra* note 311.

³³⁷ See Tim Worstall, *US Jobless Claims Fall to Lowest Rate Ever – At Least Since Records Began*, FORBES (Mar. 2, 2017), <https://www.forbes.com/sites/tim-worstall/2017/03/02/us-jobless-claims-fall-to-lowest-rate-ever-at-least-since-records-began/#4a5bf57d4a7d>.

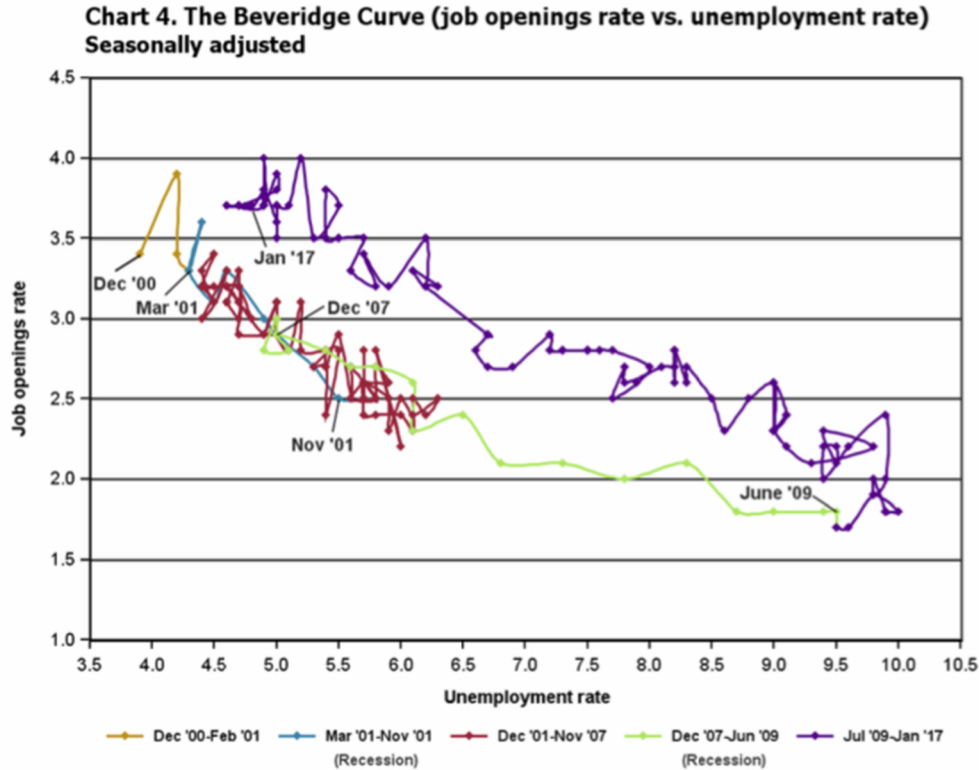
³³⁸ See *A.C.S.*, *supra* note 311.

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ For a basic explanation of structural unemployment, see *id.*

The following chart, taken from the U.S. Department of Labor's Bureau of Labor Statistics,³⁴² depicts the difference in job openings and unemployment rate in the U.S. over the past 16 years:



This chart tells us that between December 2007 and late 2009, the U.S. was in a recession because the unemployment rate is high and job openings rate is low.³⁴³ During a period of expansion the converse would be true—low unemployment rate and high job openings rate.³⁴⁴ By contrast, in 2010 and 2011, each month's point on the curved moved “up and to the left as the job openings rate

³⁴² U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER SURVEY HIGHLIGHTS 4 (2016), https://www.bls.gov/web/jolts/jlt_labstatgraphs.pdf.

³⁴³ *See id.*

³⁴⁴ *Id.*

increased and the unemployment rate decreased.”³⁴⁵ This indicates an expanding economy during that time.

The Beveridge Curve gives us insights into workers’ basic interest in job security.³⁴⁶ Hypothetical rational workers will understand that their jobs may not always be available in a capitalist economy.³⁴⁷ Accordingly, it is in their interest to receive broad training so that they can more readily find work during periods of contraction.

iv. Other Interests: The Search for Meaningful Work

Workers’ have many more interests. I think of these as the search for meaningful work. Those interests range from receiving tasks to keep busy to creating a social outlet to performing assignments that links work to personal identity.³⁴⁸

3. COMPARING WORKERS’ INTERESTS WITH EMPLOYERS’ INTERESTS

As explained above, workers have several interests. Broadly speaking, we could characterize those interests as follows: job security,³⁴⁹ living wages, good benefits, choice hours, work location flexibility, good working conditions, and generalized training. Table 1 below shows how these interests conflict fundamentally with employers’ interests:

Table 1. Comparison of Worker and Management Interests

Labor	Management
1. Job security	1. Employment at-will
2. Living wages & good benefits	2. Low costs/Profit maximization/ High production/Efficient production
3. Choice hours and work location	3. Property preservation/Monitor employees for shirking

³⁴⁵ *Id.*

³⁴⁶ *See id.*; *see also* A.C.S., *supra* note 311.

³⁴⁷ *See generally* *Talking Is Worthwhile*, *supra* note 308, at 62–63, 66–68.

³⁴⁸ *See generally* *Toward a Foundational Theory*, *supra* note 49, at 39–40.

³⁴⁹ *See Talking Is Worthwhile*, *supra* note 308, at 58.

4. Good working conditions	4. Minimize liability
5. Generalized training	5. Firm-specific training

This table shows us the extent to which workers and firms have diametrically opposed interests. For example, whereas workers want job security, employers favor employment at-will at least in part to lower the cost of terminating employment.³⁵⁰ According to Professor Richard Epstein, the at-will employment doctrine should be maintained not only as a permissible contractual term, but also “as a rule of construction in response to the perennial question of gaps in contract language: what term should be implied in the absence of explicit agreement on the question of duration or grounds for termination?”³⁵¹ Epstein defends the at-will employment doctrine on both human rights grounds—because it embodies “[f]reedom of contract [a]s an aspect of individual liberty”³⁵²—and economic grounds—because it “represents in most contexts the efficient solution to the employment relation.”³⁵³

It turns out that efficiency is often at the heart of the managerial interest.³⁵⁴ Employers prefer the at-will doctrine because it means that it can more inexpensively breach the so-called employment contract.³⁵⁵ Under the Kaldor-Hicks efficiency economic model, a transaction is more efficient if the breaching party remains better off after legally compensating the nonbreaching party.³⁵⁶

³⁵⁰ See *Toward a Foundational Theory*, *supra* note 49, at 8.

³⁵¹ Richard A. Epstein, *In Defense of the Contract at Will*, 51 UNIV. CHI. L. REV. 947, 951 (1984).

³⁵² *Id.* at 953.

³⁵³ *Id.* at 951.

³⁵⁴ See *Toward a Foundational Theory*, *supra* note 49, at 8.

³⁵⁵ See *id.*

³⁵⁶ See *id.*

4. COMPARING AND EVALUATING THE VALUES UNDERLYING WORKERS' AND EMPLOYERS' INTERESTS

Recall the five basic values underlying workers' interests:

1. Autonomy

→ . . . to become part-author of one's working life.³⁵⁷

2. Dignity

→ . . . to be treated as persons with independent moral worth.³⁵⁸

3. Participation

→ . . . to participate in decisions affecting one's work life.³⁵⁹

4. Democracy

→ . . . to have an equal or substantial say in those decisions.³⁶⁰

5. Justice

→ . . . to work in a workplace where terminations are for cause and where the fruits of one's labor are fairly distributed.

i. Autonomy or Coercion? Participation or Unilateral Decision-making? Democracy or Disloyalty?

Whereas workers value their autonomy³⁶¹—the capacity to become part-author of their work lives—employers do not value workers' autonomy because, in their view, it interferes with the em-

³⁵⁷ See *id.* at 38–49.

³⁵⁸ See *id.* at 49.

³⁵⁹ See *id.* at 40–42.

³⁶⁰ See *id.*

³⁶¹ See *id.* at 40–42.

ployer's autonomy to make unilateral decisions about the workplace.³⁶² In other words, employers value coercion of their employees—employers wish to control their employees and force them to behave in a certain manner without input for their workers.

Seeing this from a different vantage point, employers do not value employee voice, for its own sake. To be sure, employers may and often do value employee input—information solicited or received from their workers to help employers make decisions. Employers may also value worker reports—using workers as the employers' "eyes and ears" to report misconduct or poor performance. Employers are not concerned, necessarily, with how that input affects the worker's autonomy or the worker's voice. Along these lines, employers are not willing to surrender what they believe is theirs, the unilateral right to make production decisions, which by definition includes decisions that affect the worker's work life. The reluctance to surrender that authority is, in this way, analogous to the reluctance of the king to surrender his decision-making authority to his subjects in the form of parliament, which incidentally derives from the Latin word, *parlar*, meaning to speak. It takes only a small additional step to see how asking for a voice in decision-making might be viewed as disloyalty to the firm or to the king.

ii. Dignity or Factor of Production?

Whereas workers want to be treated with the dignity that every person deserves merely for being human, firms treat workers as factors of production.³⁶³ This treatment, by definition, handles workers as instruments or means rather than ends in themselves. While common in economic analysis, managing workers as mere factors of production removes the humanity from workers, thereby dehumanizing them.³⁶⁴

³⁶² See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 23 (1915).

³⁶³ See Walter Y. Oi, *Labor as a Quasi-Fixed Factor*, 70 J. OF POL. ECON. 538, 539 (1962).

³⁶⁴ See Bekah Mandell, *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*, 1 COLUM. J. RACE & L. 402, 407 (2012).

iii. Justice or Efficiency/Productivity/Wealth Maximization?

Workers want both procedural and substantive justice.³⁶⁵ For example, in the case of a discharge, they want to know that they will be treated fairly.³⁶⁶ They also want to know that the fruits of their labor are distributed fairly.³⁶⁷ This desire is at odds with the employers' desire to maximize profits, which means cutting costs and/or increasing revenues.³⁶⁸ Firms can cut costs by lowering wages, laying off workers, denying benefits, cutting hours—all actions that would negatively impact employees.³⁶⁹ Firms can also increase revenues by increasing productivity.³⁷⁰ Productivity gains might be realized through mechanization, which means labor layoffs, or it could be accomplished by making labor work harder. These are all means by which employers and employees essentially fight over the distribution of the wealth that they have jointly created. Table 2. summarizes this discussion:

Table 2. Values at Odds

Union	Management
Autonomy	Coercion
Dignity	Labor – a factor of production
Participation	Unilateral decision-making
Democracy	Loyalty to the firm
Justice	Efficiency/Productivity/Wealth Maximization

Notwithstanding these conflicts, there is one interest that both parties have in common—that is, the firm's financial well-being.³⁷¹ Workers' value the firm's financial well-being because the firm is

³⁶⁵ See generally Robert C. Dailey & Delaney J. Kirk, *Distributive and Procedural Justice as Antecedents of Job Dissatisfaction and Intent to Turnover*, 45 HUMAN RELATIONS 305, 307–08 (1992).

³⁶⁶ See *id.*

³⁶⁷ See *id.*

³⁶⁸ See Truman F. Bewley, *Why Not Cut Pay?*, 42 EUR. ECON. REV. 459, 478–79 (1998).

³⁶⁹ See *id.*

³⁷⁰ See generally George N. Root III, *Factors to Increase Productivity*, CHRON, <http://smallbusiness.chron.com/factors-improve-productivity-1229.html> (last visited Mar. 9, 2017).

³⁷¹ See generally *Talking Is Worthwhile*, *supra* note 308, at 74.

their source of job security and income. Employers value it because the firm is their source of profit and wealth. The parties disagree on one fundamental point, however; how the wealth, which is the product of labor and capital working together, should be distributed.³⁷²

VII. CONCLUSION

A. Summary

In the context of an increasingly polarized U.S. electorate, there has been a backlash against workplace regulations that had previously raised the floor of rights upon which workers engage. Clever employers have ascertained how to evade work regulations by asking courts, administrative agencies, and legislative bodies to narrow the definitions of employee and employer. This current trend toward workplace fragmentation, which is not limited to the U.S. but which has also infected other legal systems such as that of the European Union, often comes in the form of outsourcing even core jobs resulting in legal problems for fringe workers (e.g., part-time workers, independent contractors). For example, workers who are independent contractors are not statutory employees under the NLRA and therefore are not protected for purposes of that law regardless of the economic realities of the employer-employee relationship or the economic realities that make them dependent on “their” employers. This legal landscape has resulted in a workforce in which many workers are no longer tied to a particular employer. These individuals have consequently lost their statutory and other legal protections simply because they do not fit the regulatory or common law definition of employee. In effect, there is no employer on which to place a legal duty to protect.

In this Article, I argue that a human rights approach to work regulations could remedy this problem. If workers’ rights no longer depended on workers’ status as employees of a particular employer, but instead attached to workers simply because they engaged in work, this could place a duty on the state to ensure that someone is a duty holder—most likely, the business that benefits from their work, the state, or a third-party beneficiary. In such circumstances,

³⁷² See generally *Toward a Foundational Theory*, *supra* note 49, at 25–26.

a human rights approach to workers' rights would remedy the no-duty-holder problem. I call this concept "the worker as citizen.

In this Article, I have taken a six-step analytical approach to analyze the question whether a human rights approach would help solve some of these problems (in particular, the no-duty-holder problem³⁷³) and what a human rights approach might look like. In step one,³⁷⁴ I took a historical approach to understanding the labor law model that is dominant in the U.S.—a model that is filtered through a free market economic ideology. Although the New Deal Keynesian economic model temporarily disrupted this model, the free market has now returned in the form of neo-liberal law and economics. The clash of these two world views is, as Joseph Stiglitz has written, "the nightmare towards which we are slowly marching."³⁷⁵

In step two,³⁷⁶ I explored T.H. Marshall's concept of citizenship. An account of labor law where the worker is essentially a full citizen regardless of his or her legal status (e.g., statutory employee, independent contractor, migrant worker) helps combat the no-duty-holder problem (identified above). Using Marshall's framework to explain that full citizens possess political, civil, and social rights, I point out that workers' rights do not fit neatly into Marshall's rubric not only because they are socio-economic rights, but also because they cut across these and other categories. I conclude that Marshall's model is only a partial solution, albeit a step in the right direction.

In step three,³⁷⁷ building on Marshall's rubric, I created a framework for evaluating workplace laws based on the worker as a citizen of the labor force who has human rights. I do this using two methodologies: comparative legal analysis and jurisprudential analysis. First, I describe international labor standards, as articulated in basic human rights instruments, and compare them to fundamental U.S. laws. I conclude that U.S. laws fare well in such a comparison, at least at a superficial level. This analysis is essentially a comparison between the positive international law and the positive national law. Second, I deconstruct the terms "human" and "rights."³⁷⁸ Drawing

³⁷³ See *supra* Part I.

³⁷⁴ See *supra* Part II.

³⁷⁵ See STIGLITZ, *supra* note 1, at 289.

³⁷⁶ See *supra* Part III.

³⁷⁷ See *supra* Part IV.

³⁷⁸ See *supra* Part IV.B.

primarily on the philosophical theories of Immanuel Kant (dignity), Ronald Dworkin (dignity), and Raz (autonomy), and also the rights theories of Joseph Raz and Wesley Hohfeld (that rights are based on interests and grounded in values), I draw two conclusions. First, human rights must be grounded in at least two values—autonomy and dignity. Second, human rights are greater than adding what makes us human together with what makes a right.

In step four,³⁷⁹ I modify Rawls's famous thought experiment to show that a workplace grounded in autonomy and dignity is a just model. In this modified original position, which I call the empathic position, the participants remain ignorant about their own particular characteristics, but could and would be able to know what it would be like to live the life of every type of person—every race, ethnicity, gender, sexual orientation, and class—to name but a few characteristics. Accordingly, those in the modified original position could empathize with all. Using a veil of empathy rather than the veil of ignorance as the defining feature of those in the original position helps move forward the conversation regarding workers' rights because it forces us to account for all viewpoints when making policy choices.

While this paper centers on the autonomous dignified worker, it also adopts a theoretical framework that is sensitive to power: the relative power of labor and capital, and the relative power of government and capital. Such a framework, with a focus on collectives and institutions, supplements the somewhat liberal individualist values of autonomy and dignity. Recognizing this dynamic, I created a fifth step,³⁸⁰ where I apply this human rights framework to the workplace to show that employers' and employees' interests conflict at the foundational level. Accordingly, employers and employees struggle within this power-relationship. In the political arena, the resulting conflict leads to gridlock between those who believe that promoting employers' interests will result in the more liberated, and therefore better, society, and those who believe that promoting workers' interests will create a more just, and therefore better, society. I show that the point of greatest conflict is not on the financial well-being of the firm (in which both labor and management/owners have an interest), but on how the wealth created by labor and capital

³⁷⁹ See *supra* Part V.

³⁸⁰ See *supra* Part VI.

working together should be distributed. Accordingly, in a society governed by free market principles, employers are incentivized to diminish their duties to workers arising in part out of their own selfish interests. Firms are simply not internally motivated to consider the positions of others. The law, or at least something external to the firms' economic interests, must incentivize firms to view their workers not merely as factors of production, but as human beings. Modern western democracies based on liberal principles and grounded in libertarian economic theory are more likely to create grave injustices for those who possess neither economic nor political power. The empathic position resets these tendencies, showing what kind of society we should try to construct, with regard to everyone's interests.

B. *Final Thoughts*

This paper leaves open several questions. First, to what extent, if any, must the sovereign ground the workplace in worker autonomy and dignity to be legitimate? Second, to what extent, if any, may workers engage in civil disobedience to protest illegitimate work rules? Third, what is the relationship between the positive-right standard and the natural-right used for comparing and assessing U.S. labor laws?

All three questions are related and relate to one of my future research projects. In my view, if workplaces are governed by rules that drift too far from significant values, then those workplaces are illegitimate. In such cases, workers are entitled to break such rules, in much the same way that the civil disobedient is entitled to break laws to protest unjust law and to communicate those views to the public. The trick here is to understand the relationship between those rules (positive law) and what might be natural laws grounded in workplace values. Those in the modified original position will generate those natural values as autonomy, dignity, participation, democracy and justice and thus harmonize the City of God with the City of man.³⁸¹ Just how that will happen is the subject of my next article on this subject.

³⁸¹ See SAINT AUGUSTINE, *supra* note 127, at 3–5, 38–39.