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## BOOK REVIEW

### RETHINKING AUTOCRACY AT WORK

PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT). By Elizabeth Anderson. Princeton, N.J.: Princeton University Press. 2017. Pp. xxiii, 196. \$27.95.

*Reviewed by Cynthia Estlund\**

Professor Elizabeth Anderson's outstanding Tanner Lectures, recently published as *Private Government*,<sup>1</sup> aim to bring the problem of workplace governance back into the exalted domain of political theory and political discourse, where it resided a century ago. Highlighting the expansive power that employers exercise over employees at and even beyond the workplace, she asks: How is it that a democratic society devoted to individual freedom came to tolerate the private outposts of autocratic rule and unfreedom in which most citizens spend their working lives? And once we recognize the conflict between workplace autocracy and ideals of democratic accountability, what is to be done?

Anderson does not mean to preach to the choir of labor scholars and activists who share her concerns, but to a congregation of contemporary political philosophers and public intellectuals who "largely neglect the pervasiveness of authoritarian governance in our work and off-hours lives" (p. 40). That problem and workers' collective quest for greater power and protection at work "were hot topics of public discourse, academic and legal theorizing, and political agitation from the Industrial Revolution through the New Deal" (p. 40). Since then, however, they have been "the province of members of marginalized academic subfields — labor historians, labor law scholars, and some labor economists — along with a few labor lawyers and labor activists" (pp. 40–41). As a longtime denizen of one of those marginalized subfields, I warmly welcome Anderson's effort to put issues of workplace governance back at the center of public discourse about the future of democratic life.

Anderson aims to make the problem of employer autocracy more tractable and compelling for political theorists by reviving and deploying the concept of "private government." "Private government," in Anderson's account, is not government within the private sphere; it is "a particular sort of constitution of government, under which its subjects

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\* Catherine A. Rein Professor of Law, New York University School of Law. The author would like to thank William Forbath and Samuel Issacharoff for their comments on earlier drafts, and the editors of the *Harvard Law Review* for their excellent editorial work.

<sup>1</sup> The lectures were originally published as Elizabeth Anderson, *Liberty, Equality, and Private Government*, in 2015 TANNER LECTURES ON HUM. VALUES 63, <http://tannerlectures.utah.edu/Anderson%20manuscript.pdf> [<https://perma.cc/5FDR-BU7A>].

are unfree” (p. 41), and which “has arbitrary, unaccountable power over those it governs” (p. 45). “It is high time,” says Anderson, “that political theorists turned their attention to the private governments of the workplace” (p. 71). Hallelujah, I say (from my perch in the choir loft).

Perhaps the most rewarding part of Anderson’s account is her excavation of the history of ideas about freedom and unfreedom at work, and about the liberating potential of competitive markets, in the run up to the Industrial Revolution and in its wake. The apparent freedom of workers at the point of entry to and exit from employment became, for the apostles of *laissez faire*, the chief justification for the autocracy that prevailed within the employment relationship. Their neoclassical economist successors — the leading culprits in Anderson’s sermon — maintain on efficiency grounds that managers’ authority over workers should be virtually unfettered by law. And they continue to maintain that workers’ freedom to exit the employment ensures that their preferences will be reflected within the employment. In the meantime, the proposition — that workers’ ability to exit employment is the key to their freedom from employer domination — has gained adherents within the congregation of political theorists to whom Anderson appeals. The theme that “exit is enough” to ensure workers’ freedom under capitalism seems to be enduring and cross-disciplinary.

Many readers will be persuaded, however, by Anderson’s argument that exit is not enough, and that the current American law of work does too little to constrain or counter employer domination. It does do too little, in my view — though it does more than Anderson lets on. In her effort to draw well-warranted attention to the problem of employer domination, Anderson offers a rather stylized account of existing employment law<sup>2</sup> — one that tracks the economists’ idealized model of firm governance rather more closely than the actual law does. Still, “private government,” as Anderson defines it, is an apt description of the workplace governance regime that we have. Once we take its measure, what would it mean to set our sights on “public government” at work?

The answer might seem straightforward, in principle if not in practice, if Anderson were calling for democracy at work — that is, for some robust mechanism for ensuring managers’ accountability to their worker-subjects. That would require a paradigm shift in both corporate law and labor law, albeit one with no chance of adoption. But workplace democracy gets a quick brush-off — surprisingly, on efficiency grounds — in Anderson’s account (p. 69). She gestures instead toward a more modest reform agenda — some new worker rights and new mechanisms of worker participation — that requires no radical rethinking of workplace governance within a democratic and capitalist society, and that will look familiar to labor law cognoscenti. Still, Anderson’s reframing of the problem of employer domination as one of “private

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<sup>2</sup> See *infra* section II.A, pp. 802–07.

government” is compelling. If political philosophers and public intellectuals were to begin (again) to think of employer power over workers as a serious problem in a free and democratic society, they might help to reignite stalled debates over employee rights and institutions of collective voice.

Unfortunately, the reignition of those debates might come too late, given decades-long trends in the organization of work that are destabilizing the very concept of workplace governance. Increasingly, highly profitable and capable firms are putting organizational and geographic distance between themselves and the workers who supply the labor they need, foregoing autocratic managerial control in favor of outside suppliers and lower costs. Those trends threaten the entire edifice of worker rights and protections that has been built atop the employment relationship; they pose especially daunting challenges to the pursuit of meaningful worker voice at work. But that may be all the more reason to hope that Anderson succeeds in putting the problem of “private government” at work back on the public agenda, for it will take a flood of new energy and ideas, as well as a political sea change, to create an institutional infrastructure for empowering and protecting workers in the economy that is unfolding today.

Part I of this Review offers a gloss on Anderson’s illuminating history of ideas about workers’ freedom and unfreedom within the employment relationship, with a brief addendum on the rise and fall of the New Deal system of collective bargaining that was supposed to ensure workers’ freedom from employer domination. Part II turns from the shrinking domain of labor law (which regulates collective labor relations) to the expanding domain of employment law (which regulates employment generally). It sketches the rights that the law affords to workers in principle — more numerous and substantial than Anderson’s account suggests — and highlights the large gaps that remain between the law as it is and as it should be. Part III turns to Anderson’s contemporary intellectual adversaries in economics and philosophy, respectively, who still deem competitive labor markets and the right of exit to be sufficient to protect workers’ interests despite managers’ encompassing authority over them. Part IV introduces trends in the organization of work that have undermined existing models for taming employer domination, and that will pose daunting challenges to Anderson’s reform agenda as well.

## I. REMEMBERING THE PROBLEM OF UNFREEDOM AT WORK

Anderson’s first lecture recovers and illuminates a rich history of ideas about freedom and work. She reminds us of a mostly forgotten past “when the market was ‘left’” (p. 1) — that is, when free markets were thought to be the linchpin of workers’ liberation — and why that made sense at the time.

In the interlude between the crumbling of the feudal, hierarchical, status-based relations that once governed all of social life, and the full onset of the Industrial Revolution, Adam Smith could fairly see markets as guarantors of freedom and equality among citizens (and not only as engines of efficiency and economic growth) (pp. 21–22). For workers, the right and the realistic ability to exit the wage labor relationship into self-employment, as well as the reciprocal relations that prevailed within the very small workplaces of the time, sharply constrained exploitation and domination of workers (pp. 22–25). The early American republic, with no feudal legacy to overcome and with ample lands for the taking (from their native occupants) in the western frontier, came as close to those egalitarian conditions as any society in history, albeit only for its white male citizens (pp. 22–24, 27–28). The end of the Civil War brought a formal extension of the promise of freedom and mobility to the former slaves, a promise that was soon betrayed.<sup>3</sup> In the meantime, however, the economic foundations of free labor through free markets had already begun to crumble as the Industrial Revolution unfolded.

By the time that Karl Marx wrote in the mid-nineteenth century, the rise of the factory system and the rule of capital and its managers over labor had shattered the egalitarian vision of market society. Anderson quotes a revealing passage from Marx, who contrasted the apparent freedom and equality that prevailed at the moment of contracting between workers and employers with the wholesale subordination of workers that took hold once they entered the factory gates (pp. 2–3). In principle, workers could quit, but few could realistically exit the wage labor regime itself because independent artisanal production was giving way to factory production. It turned out that the economies of scale were far greater than what Adam Smith and his contemporaries foresaw, due largely to advances in the technology of production. Realizing the gains from economies of scale required large accumulations of capital and centralized managerial control. The rest is history — that is, the history of economic growth as well as the history of labor exploitation, labor organizing against exploitation, and, once workers gained the franchise, efforts to regulate markets and managerial power.

Anderson recounts how many nineteenth-century market enthusiasts, unlike Marx, remained fixated on workers' freedom to enter or exit any particular employment, and blinded themselves both to employer domination during the employment and to the economic realities that constrained workers' exit. Anderson compares this half-blindness to hemianosia, the malady that afflicts some stroke victims who lose sensation in or awareness of one side of their bodies (p. 58). Despite its abstruse name, the analogy brilliantly captures the frame of mind that allowed nineteenth-century liberals to exalt workers' apparent freedom

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<sup>3</sup> See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

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at the moment of entry into or exit from employment while ignoring the unfettered domination that employers exercised within it.

Anderson's signal contribution here is her dissection of the intellectual developments that followed, yet failed to reckon with, the earth-shattering transformation of the Industrial Revolution. She sets out to explain:

[W]hy a certain libertarian way of thinking about market society and its promise made considerable sense in its original context prior to the Industrial Revolution, and why it was reasonable for egalitarians to support it at that time. But the Industrial Revolution destroyed the context in which that vision made sense. The new context perverted what was once a liberating, egalitarian vision into support for pervasive workplace authoritarianism — arbitrary, hierarchical, private government. (pp. 61–62)

Anderson thus takes a valuable fresh look at both the “liberating, egalitarian vision” of markets and the “pervasive workplace authoritarianism” that arose under its sway once the Industrial Revolution gained steam (p. 62).

At the heart of both the liberating vision and the authoritarian reality was the then-novel principle of “employment at will” — the doctrine by which contracts of employment were presumptively terminable by either party at any time for any reason whatsoever.<sup>4</sup> Workers' freedom to quit at will was the glorious antithesis of involuntary servitude. But liberal orthodoxy held that the freedom to quit logically entailed the employer's unfettered freedom to fire the worker.<sup>5</sup> What began as a mere presumption about the duration of indefinite-term contracts grew into a central tenet of laissez-faire liberalism — one that was peculiarly resistant to refutation by contrary evidence of the parties' intentions (such as a promise of long-term job security), and constitutionally immune from state regulation (such as a law prohibiting discrimination against union members). We will return below to the modern scope of employers' freedom to hire or fire workers. First, however, it is worth dwelling on workers' freedom to enter or exit employment, for that was what was “left” about markets before the Industrial Revolution.

In principle, the freedom to enter or exit employment seemed sufficient to constrain employer domination and exploitation at work. Conceptually, that freedom put the stamp of consent on whatever happened inside the workplace. Practically, too, the freedom to exit put real constraints on employer power to whatever degree the labor market afforded alternative employments. Once the factory system took hold, however, for most workers the labor market afforded at best a choice of autocratic bosses. Anderson admirably elucidates both the profound

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<sup>4</sup> Anderson recognizes the centrality of employment at will in her story (e.g., pp. 49–50); but it is worth underscoring the inseparability, in nineteenth-century liberal imagination, between the employees' freedom to quit, or exit, and the employers' freedom to dismiss the employee.

<sup>5</sup> See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 10–11 (1915); *Adair v. United States*, 208 U.S. 161, 174–76 (1908).

liberation entailed by free markets in labor, relative to the regimes of bonded labor that they displaced, and the limits of that liberation: Workers could escape from a particular authoritarian employer, but they “had no realistic hope . . . for liberation from workplace authoritarianism” (p. 59). And where and when alternative jobs were scarce, employers’ unconstrained right to fire employees — the purportedly logical flipside of free exit by workers — reinforced their power to dictate workers’ every move not only at work but also outside of work as well (pp. 49–50).

Anderson’s account complements those of legal historians who have explored what Professor William Forbath has called “the ambiguities of free labor.”<sup>6</sup> Forbath explains how, in the lead-up to the Civil War, the republican devotion to “free labor” animated both the opposition to chattel slavery and the defense of artisanal autonomy against the ever-encroaching factory system.<sup>7</sup> After the Civil War and the abolition of slavery, the ideal of free labor served as a rhetorical touchstone both for the liberal commitment to *laissez faire* and individual freedom of contract and for the young labor movement’s efforts to construct new foundations for workers’ dignity and freedom within an industrial economy.<sup>8</sup>

Those efforts proceeded mainly along two fronts: collective self-help through craft-based, class-based, and industrial unions; and political mobilization in support of minimum labor standards.<sup>9</sup> But both fronts in labor’s collective battle against autocracy at work ran headlong into the dogma of individual liberty of contract, which nineteenth-century *laissez-faire* liberals insisted was both necessary and sufficient to ensure a just economic order.<sup>10</sup> That *laissez-faire* vision helped to underwrite the Supreme Court’s erection of constitutional and legal barriers to both legislative intervention and collective self-help.<sup>11</sup> During the early twentieth century, in defense of that paradoxical conception of freedom, the courts issued thousands of coercive injunctions, backed by a phalanx of police and private militias, against strikes, boycotts, picketing, and

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<sup>6</sup> William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 767.

<sup>7</sup> *Id.* at 773–74, 783.

<sup>8</sup> *Id.* at 773–75.

<sup>9</sup> *Id.* On those two dimensions of organized labor’s strategy for combating employer domination and their fate in the courts, see WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

<sup>10</sup> See Forbath, *supra* note 6, at 770–71.

<sup>11</sup> See *id.* at 770–71, 781. See generally FORBATH, *supra* note 9; KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991). Forbath has carried forward this history of critiques of and alternatives to classical liberal conceptions of labor freedom, and distilled their present normative and practical implications, in subsequent work. See William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115 (2011).

even union organizing;<sup>12</sup> and they struck down legislation setting maximum hours<sup>13</sup> and minimum wages<sup>14</sup> and legislation protecting workers' right to join a union from employer reprisals.<sup>15</sup> The resulting clashes made the United States the scene of the most violent struggles across the industrial world over labor's place in the new industrial order, and shook the foundations of the existing political order.<sup>16</sup>

A solution to this existential crisis of industrial unrest was found in legitimation of trade unions and collective self-help and in institutions for collective bargaining between labor organizations and employers. Congress's enactment of the National Labor Relations Act<sup>17</sup> (NLRA), which protected union organizing and promoted collective bargaining, triggered a showdown over judicial versus legislative supremacy in the economic sphere. In 1937, the Supreme Court retreated from its constitutional gospel of liberty of contract and its narrow view of congressional authority and, in upholding the NLRA, ceded the field of industrial relations to Congress.<sup>18</sup> That turned out to be a half-Pyrrhic victory when the political winds shifted just ten years later, and Congress enacted sharp restrictions on unions and collective action in the Taft-Hartley Act of 1947.<sup>19</sup> The basic legislation, thus amended, has remained in place with only minor changes since 1947.<sup>20</sup>

The resulting labor relations regime is decidedly double-edged: The law empowers unions to act as the exclusive representatives of workers within narrowly defined, enterprise-based bargaining units if and only if they can gain and maintain majority support, often and increasingly against aggressive employer opposition.<sup>21</sup> And the law harshly restricts

<sup>12</sup> See FORBATH, *supra* note 9, at 59–127.

<sup>13</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 64–65 (1905).

<sup>14</sup> See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 561–62 (1923).

<sup>15</sup> See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915); *Adair v. United States*, 208 U.S. 161, 180 (1908).

<sup>16</sup> Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *VIOLENCE IN AMERICA* 221, 221 (Hugh Davis Graham & Ted Robert Gurr eds., 1969). Contemporary critics recognized that the promiscuous use of the labor injunction was undermining the legitimacy of the federal courts. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 205–06 (1930). On the politicization and radicalization of labor conflict, see MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865–1965*, at 115–16, 141–47, 172 (1970).

<sup>17</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

<sup>18</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29–49 (1937).

<sup>19</sup> Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187).

<sup>20</sup> James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 942 & n.7 (1996); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1534–35 (2002).

<sup>21</sup> See, e.g., Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664–67 (2010); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1774–86, 1820–21 (1983).

unions' efforts to leverage collective power, even by entirely peaceful means, beyond those bargaining units.<sup>22</sup> Partly due to those structural features, the collective bargaining regime never reached even half of private sector workers (Anderson's focus as well as mine here), and now covers fewer than seven percent of them.<sup>23</sup>

I rehearse this history of the making and unmaking of the New Deal labor regime, however briefly, because it gets rather short shrift in Anderson's account.<sup>24</sup> By and large her account jumps from the heyday of laissez faire to the present day, and skips over the rise of organized labor, its pitched struggle against employer autocracy at work, the New Deal settlement of that struggle, and the subsequent rise and fall of the collective bargaining model for empowering workers in workplace governance. Labor unions were supposed to be the vehicles for workers' struggle against employer domination, and collective bargaining was to be the answer to the "labor question" that Anderson seeks to reframe. Yet unions and collective bargaining are barely more than historical footnotes in her account.

To be sure, the story of the rise and fall of the New Deal system of collective bargaining may be too familiar to need retelling. Now that the twentieth-century solution of collective bargaining has well and truly failed, perhaps it is best to look with fresh eyes at the problem of employer domination and of employee unfreedom, as Anderson asks us to do. But it will be hard to escape the shadow of the collective bargaining regime, as we will see below.

## II. THE REAL SHAPE OF "PRIVATE GOVERNMENT" AT WORK

Anderson's account gives rather short shrift not only to the rise and fall of collective bargaining but also to the collection of employee rights and labor standards that was constructed alongside that system beginning in the New Deal. The growth of "employment law" has created an alternative regime of workplace governance, rambling and disjointed yet substantial. So let us come to grips with the reality of the "private governments" that Anderson, like others, seeks to reform.

### A. *Employment Law as a Constitution of Workplace Governance*

Recall that organized labor since the mid-nineteenth century pursued two strategies for constraining employer domination at work: collective

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<sup>22</sup> For a recent, concise critique of this double-edged regime, see James Gray Pope et al., *The Right to Strike*, BOS. REVIEW (May 22, 2017), <http://bostonreview.net/forum/james-gray-pope-ed-bruno-peter-kellman-right-strike> [https://perma.cc/YMA3-4DSM].

<sup>23</sup> Only 6.4% of private sector workers were union members in 2016. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members Summary (Jan. 26, 2017), <https://www.bls.gov/news.release/pdf/union2.pdf> [https://perma.cc/gB7X-2EKV].

<sup>24</sup> This omission and others may reflect the inherent space (and time) constraints of the book's original form as a pair of lectures.

self-help and government regulation. Once the New Deal settlement cleared the constitutional decks, Congress moved forward on both fronts. The forms of collective self-help that were institutionalized in the New Deal might have run their course, but the regulatory strategy has yielded a growing array of constraints on employer power. Already by 1940, Congress had enacted both a modest charter of employee rights to engage in certain concerted activities, including union activity, in the NLRA, and a set of minimum labor standards in the Fair Labor Standards Act<sup>25</sup> (FLSA). Title VII of the Civil Rights Act of 1964<sup>26</sup> launched the protean antidiscrimination project beginning with discrimination because of race, sex, color, religion, and national origin. Then came the Occupational Safety and Health Act of 1970,<sup>27</sup> the Employee Retirement Income Security Act of 1974,<sup>28</sup> the Family and Medical Leave Act of 1993,<sup>29</sup> and a litany of additional prohibitions against discrimination and retaliation.<sup>30</sup> Many state and local rights and regulations followed.<sup>31</sup>

Much of this now sprawling body of employment law takes the form of exceptions to employment at will. It remains true that employers in the United States — unlike their counterparts in nearly all industrial democracies of the world — can generally fire employees without a good reason. Anderson is quite right to say that “[u]nder the employment-at-will baseline, workers, in effect, cede *all* of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship” (pp. 53–54). She mentions the existence of “a few exceptions” to employment at will, “notably concerning discrimination, family and medical leave, and labor union activity” (p. 53). But that seriously understates the formal legal constraints on employer power.

There is now a long list of exceptions to employment at will — unlawful reasons for dismissal — and many of them are backed up with the threat of costly litigation. Those wrongful dismissal laws generally

<sup>25</sup> Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

<sup>26</sup> Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

<sup>27</sup> Pub. L. No. 91-956, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678).

<sup>28</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

<sup>29</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

<sup>30</sup> Those include, for example, the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634); the employment provisions of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.); and scores of provisions protecting employee complaints or whistleblowing against reprisals. For an overview of the latter, see Richard Moberly, *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975, 981–83 (2008).

<sup>31</sup> See Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253 (2010).

fall into two buckets: laws against *discrimination* based on certain traits or facets of individual identity (such as race, sex, religion, age, disability, and sexual orientation), and laws against *retaliation* based on a range of protected activities (such as union organizing, or disclosing or complaining about unlawful activity by or within the employing organization). Those laws typically bar not only dismissal but also suspension, demotion, and other adverse actions whose cause or motive is unlawful.<sup>32</sup> Beyond the many statutory constraints on employer discretion in discharge and discipline, the common law of most states recognizes “public policy” as a source of restrictions on employment at will and a font of potential tort liability for wrongful dismissal.<sup>33</sup>

The resulting body of legal restrictions on employer power leaves much to be desired, and legions of labor law scholars, worker advocates and activists, policymakers, and judges have criticized its inadequacy.<sup>34</sup> It remains true, and appalling, that most workers have no legal recourse, as Anderson says, “when their boss fires them for being too attractive, for failing to show up at a political rally in support of the boss’s favored political candidate, [or] even because their daughter was raped by a friend of the boss” (p. 53).<sup>35</sup> Or because a photograph of them extending an expressive middle finger while bicycling alongside the presidential motorcade went viral on the internet.<sup>36</sup> But those cases are rare. For many more common sorts of unjust dismissal, the law does supply a remedy in principle. In other words, the existing patchwork quilt of

<sup>32</sup> See, e.g., 29 U.S.C. § 1140.

<sup>33</sup> For a recent summary of the law of the tort of wrongful discharge in violation of public policy, and an argument for its extension to protect personal autonomy, see Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223.

<sup>34</sup> See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410–13 (1967); Bodie, *supra* note 33, at 258; Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1656–57 (1996); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4–10 (1979); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 84–86 (2000); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519–24 (1976).

<sup>35</sup> Footnotes have been omitted.

<sup>36</sup> See Christine Hauser, *Cyclist Lost Her Job After Raising Middle Finger at Trump’s Motorcade*, N.Y. TIMES (Nov. 6, 2017), <https://nyti.ms/2j65bBA> [<https://perma.cc/JTM9-MLAT>]. This last incident drew renewed attention to a frequently taught but rarely followed decision, *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983). *Novosel*, purporting to apply Pennsylvania common law, held that the discharge of an employee for refusing to lobby on the employer’s behalf violated the public policy, embodied in the First Amendment, favoring free speech and condemning compelled speech. *Id.* at 900. For Professor Benjamin Sachs, for example, the bicyclist’s case illustrated the virtues of *Novosel*’s fulsome version of the public policy constraints on employer discretion. See Benjamin Sachs, *It Should Be Illegal to Fire the Cyclist Who Gave Trump the Finger*, WASH. POST (Nov. 8, 2017), <http://wapo.st/2yIKnag> [<https://perma.cc/N5JF-JDTZ>].

employment law has a lot of holes, but it is quite a bit larger and weightier than Anderson suggests. I wholeheartedly agree with Anderson that the problem of employer domination is serious, not only for workers but for the whole society; yet it is important to accurately gauge the size and shape of the problem.

For now, let us consider just one example of how current law (in principle) constrains employer power over employees. The NLRA — the same law that created the now-crumbling collective bargaining regime — prohibits employers from interfering with or retaliating against employees not only for “labor union activity” (p. 53) but also for “other concerted activities for . . . mutual aid or protection.”<sup>37</sup> That means that, even with no union in sight, employers violate federal law if they fire or reprimand employees for protesting uncomfortable working conditions or unfair employer actions, even if they protest by walking off the job.<sup>38</sup> Similarly, employers generally violate the NLRA if they prohibit employees from discussing their salaries with each other,<sup>39</sup> or from airing shared work-related complaints publicly or on social media.<sup>40</sup> Moreover, employees have the right to communicate with their co-workers about these matters during non-work time at the workplace — that is, on the employer’s property.<sup>41</sup> One might see in the NLRA a rudimentary analogue to the First Amendment for the private sector workplace, complete with its own “public forum” doctrine.<sup>42</sup>

The protection of union activity, one specific kind of protected “concerted activity,” is itself an extraordinary constraint on employer authority. Union representation enables workers to contest the employer’s unilateral authority, to demand a greater share of the firm’s revenues, and to back up their demands by threatening or inflicting serious economic harm on the enterprise in the form of strikes, boycotts, and negative publicity. From the employer’s standpoint, union organizing is an effort to overturn the autocratic regime that employers cherish, and that Anderson criticizes, in favor of one of limited co-governance through

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<sup>37</sup> 29 U.S.C. § 157.

<sup>38</sup> See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 13–15 (1962).

<sup>39</sup> See, e.g., *Banner Health Sys. v. NLRB*, 851 F.3d 35, 41–42 (D.C. Cir. 2017); *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548 (D.C. Cir. 2016).

<sup>40</sup> See, e.g., *Three D, LLC (Triple Play)*, 361 N.L.R.B. No. 31, at 1 (Aug. 22, 2014), *enforced*, 629 F. App’x 33 (2d Cir. 2015). For an overview of the NLRB’s treatment of social media policies and communications under the NLRA, see *The NLRB and Social Media*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> [https://perma.cc/DTC2-E39A].

<sup>41</sup> See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570–72 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795, 803 (1945).

<sup>42</sup> CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 27–29 (2010).

collective bargaining.<sup>43</sup> Yet the employer is legally required to tolerate such activity on its own property by those it has hired to serve its interests. Not many autocrats face those kinds of restrictions on their power.

To be sure, any student of labor law could recite several debilitating qualifications to these protections.<sup>44</sup> In particular, unlike many legal restrictions on employer power, this one is not backed by a private right of action for the aggrieved employee, only by administrative enforcement, and remedies are sharply limited.<sup>45</sup> Employee rights under the NLRA are surely among the most underenforced of all the many employee rights on the books. Yet the NLRA puts considerable formal restraints on employer power, and it does so in the service of employee voice — not only through the ailing and aging institutions of collective bargaining or union organizing, but by other peaceful means by which two or more workers see fit to contest employer power.

My point here is that a fair description of the current U.S. regime of workplace governance includes not just “a few exceptions” to dictatorial employer control, but a veritable litany of exceptions. Those exceptions reflect a variety of employee rights, including a right (in principle) to opt into an alternative regime in which workers have a collective voice in decisionmaking. This grab bag of rights and labor standards amounts in principle to a quasi-constitution of the workplace, with guarantees of equal protection and of freedom of association and expression (though not much by way of privacy or due process), and a majoritarian process for opting into a co-governance regime in which workers participate.<sup>46</sup> In practice that body of law has transformed the internal governance structures of large firms.<sup>47</sup> Aiming to avoid unionization, litigation, and regulatory scrutiny, firms institute grievance and reporting procedures and rules that constrain line supervisors and middle managers.<sup>48</sup> The law has also reshaped organizational and societal norms, perhaps most clearly with regard to equal opportunity and the value of diversity.<sup>49</sup>

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<sup>43</sup> Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 922 (1993).

<sup>44</sup> For a magisterial critique of the law governing union representation campaigns, see Weiler, *supra* note 21.

<sup>45</sup> See, e.g., RICHARD D. KAHLBERG & MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT 39–44 (2012); Estlund, *supra* note 20, at 1551–58.

<sup>46</sup> See ESTLUND, *supra* note 42, at 27–29.

<sup>47</sup> See generally *id.* at 75–92.

<sup>48</sup> See *id.* at 83–86. Firms also institute mandatory arbitration procedures that muffle or silence the threat of litigation. *Id.* at 88–92; see also *infra* note 50 (discussing employers’ efforts to ban aggregate litigation through arbitration clauses).

<sup>49</sup> For contrasting views of how and how much the law has shaped equal opportunity within organizations, see FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 1–21 (2009); and LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL

### B. Reforming the “Private Governments” of the Workplace

Let us be clear: there are serious flaws and much room for improvement in the existing constitution of the workplace, and Anderson is right to draw attention to those flaws. One large but prosaic flaw in the current regime is what we can call the “compliance gap” between the law on the books and the law on the ground. Some improvements in enforcement and compliance could be achieved by tweaking the procedural and remedial provisions of existing substantive legal protections, or in some cases by fairly interpreting existing legislation.<sup>50</sup> But improving the enforcement of existing employee rights is largely an engineering problem rather than an architectural problem of the kind that Anderson seeks to address.

Anderson highlights a second major shortcoming, which we can call a “rights gap.” She argues that a “workers’ bill of rights could be strengthened by the addition of more robust protections of workers’ freedom to engage in off-duty activities, such as exercising their political rights, free speech, and sexual choices,” as well as a measure of privacy and freedom “in the workplace during work breaks” (p. 68). Such protections are indeed too few and too narrow, and their expansion would help to address some egregious abuses of employer power. But existing employment law provides the scaffolding for such rights; their expansion would require no paradigm shift in our system of workplace governance.

The biggest flaw in the current constitution of the workplace is the lack of any institutionalized vehicles for worker voice, or collective participation, in workplace governance outside the shrinking union sector. Where workers do have an effective voice at work — as many workers once had, and as a few still have, through union representation — they can both ensure better compliance with external law and secure additional rights for themselves within the workplace. The “participation gap”<sup>51</sup> is thus a major factor in both the “compliance gap” and the

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RIGHTS 3–11 (2016). While Professor Frank Dobbin emphasizes how and how much equal opportunity norms and laws transformed firms, Professor Lauren Edelman emphasizes how and how much firms and managers effectively transformed equal opportunity norms and laws.

<sup>50</sup> Consider, for example, the current controversy over the legality of employer efforts to ban collective and class-wide adjudication through mandatory arbitration agreements imposed as a condition of employment. Employers claim that the Federal Arbitration Act compels enforcement of anti-aggregation provisions, while the NLRB has held that those provisions violate employees’ right under the NLRA to engage in “concerted activities for . . . mutual aid or protection,” 29 U.S.C. § 157 (2012). See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (mem.); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (mem.); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017) (mem.). The right to pursue collective adjudication is granted by many employment statutes, and is especially critical to claims under the FLSA, most of which are not economically viable as individual actions.

<sup>51</sup> A more common term is “representation gap,” see RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 4, 47–53 (2d ed. 2006), but that term often refers more narrowly to the

“rights gap.” This does qualify as an architectural problem, for it is far beyond fixing through tweaks to the existing system of exclusive union representation and collective bargaining.<sup>52</sup> Workers’ lack of collective voice at work has been a central preoccupation of labor and employment law scholars for decades,<sup>53</sup> but it remains a worthy focus of attention for Anderson and her fellow political philosophers.

Once upon a time, this might have been the prelude to a call for workplace democracy.<sup>54</sup> At least since the New Deal, however, mainstream aspirations for workers’ participation in workplace governance have fallen far short of anything we would ordinarily call “democracy.” The right to elect or depose one’s rulers is a right that we take as given in the polity, but that is not a right that the mainstream labor movement seeks in the workplace, nor is it one that Anderson proposes to extend to workers. She concedes the need for “government” of some kind in the workplace; and she concedes as well the legitimacy of both much of the power that managers exercise over workers and (implicitly) the power of firms’ owners to select managers (pp. 64–65, 69). Anderson thus dispenses with the idea of “workplace democracy,” as embodied in the marginal domain of “worker-owned and -managed firms,” in two short sentences based on its costs and inefficiencies (p. 69).<sup>55</sup> Anderson sets her sights not on democratic government but on what she calls “public government” in the workplace.

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gap between the number of workers who want *union* representation and those who have it. *See, e.g.,* BRIAN TOWERS, *THE REPRESENTATION GAP* 1–3 (1997). To avoid begging the question of what form representation should take, I use the term “participation gap.”

<sup>52</sup> Decades ago, when the existing system seemed reparable, Professor Paul Weiler proposed a litany of reforms in this *Review*. *See* Weiler, *supra* note 21, at 1804–21; Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 360–61 (1984); *see also* Sachs, *supra* note 21, at 664–72. Notably, it was clear to Weiler already in 1990 that more fundamental reforms were also in order; he was thus among the early proponents of German-style “works councils” in the United States. *See* PAUL C. WEILER, *GOVERNING THE WORKPLACE* 284–90 (1990). We will return to the works council concept below, *infra* pp. 823–24.

<sup>53</sup> This is the central concern of those who have called for loosening the ban on employer-initiated forms of worker participation, *see infra* note 118, and of those who advocate importation of European-style works councils, *see infra* note 119. Other contributions on alternative institutions of worker voice include Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 93–99 (2016); David J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, 38 QUEEN’S L.J. 511, 527–34 (2013); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 112–19 (1993); and Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 182–97 (2013).

<sup>54</sup> *See, e.g.,* DERBER, *supra* note 16; SYDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 808–50 (Longmans, Green & Co. 2d ed. 1920) (1897). *See generally* *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* (Nelson Lichtenstein & Howell John Harris eds., 1993).

<sup>55</sup> She holds out little hope of expanding that model: “While much could be done to devise laws more accommodating of this structure, some of its costs may be difficult to surmount. In particular, the costs of negotiation among workers with asymmetrical interests . . . appear to be high” (p. 69).

The programmatic piece of Anderson's analysis is deliberately spare. Her goal is not "to defend any particular model of worker participation in firm governance"; it is rather "to expose a deep failure in current ways of thinking about how government fits into Americans' lives," particularly their working lives (p. 70). Still, one does wonder what "public government" entails if not democracy. Anderson holds that, "if government is necessary, it must be made a public thing to all the governed — accountable to them, responsive to their interests, and open to their participation" (p. 71; see also p. 65). "Accountability" here requires more than workers' freedom to speak without fear of reprisals, but less than a right to have their demands met, or to depose rulers who reject those demands. It would seem to require some mechanism to ensure that workers' views will be fairly considered.

Of course, that is exactly what collective bargaining was supposed to do. It was supposed to enable workers not only to speak up freely but also to put collective economic power behind their demands. It is no accident that twentieth-century activists and reformers — those who sought to empower workers within the privately owned and managed enterprises of industrial capitalism rather than to overturn capitalism — settled on structures of collective bargaining.<sup>56</sup> By contrast, most alternatives to collective bargaining, including those that Anderson mentions, give workers "voice" without power — the ability to speak without any mechanism to ensure that demands are heard and heeded.

For example, Anderson takes note of most workers' expressed preference for a less adversarial organ of representation that is "run jointly" by management and workers (p. 70).<sup>57</sup> That less adversarial alternative to independent union representation was ruled out by the NLRA in 1935 — precisely because of the problem of employer domination — and is still unlawful today.<sup>58</sup> The extremely broad "company union"

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<sup>56</sup> To be sure, collective bargaining takes a variety of forms across the industrial democracies of the world. A central teaching of the "varieties of capitalism" school of thought is that industrial relations institutions within the "coordinated market economies" of Germany and Scandinavia differ from those of the "liberal market economies" of the Anglo-American world, and that the differences reflect complementarities within their respective capitalist systems. See Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1* (Peter A. Hall & David Soskice eds., 2001).

<sup>57</sup> Anderson cites FREEMAN & ROGERS, *supra* note 51, at 84.

<sup>58</sup> That is the upshot of section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) (2012), which makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it," together with section 2(5), 29 U.S.C. § 152(5), which defines "labor organization" to include "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers" on terms and conditions of employment.

prohibition is widely criticized,<sup>59</sup> and is widely if quietly ignored by employers.<sup>60</sup> Such structures might enable employers to find out what their worker-subjects want (as any benevolent and rational dictator might wish to do) or to preempt pro-union sentiment or both. Given their bosses' vehement opposition to and ability to frustrate genuine union representation, it may not be surprising that workers themselves say that they prefer such alternative structures of representation despite the problem of employer domination.<sup>61</sup> They are probably better for workers than no representation at all.<sup>62</sup> But those structures fall well short of what collective bargaining aspired to accomplish for workers, for they do not enable workers to put economic power behind demands that management rejects. It is hard to see how these employer-dominated representation structures could combat employer domination at work, or meet Anderson's aspiration to accountable "public government" of the workplace.

As another alternative vehicle of worker voice, Anderson points to "works councils" of the European variety (p. 165 n.55),<sup>63</sup> as Professor Paul Weiler did over twenty-five years ago.<sup>64</sup> At least German works councils, highly regulated and vested with a range of legal entitlements,

<sup>59</sup> Among many critiques of this part of the NLRA, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 879–928 (1994); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 430–31 (1992); Cynthia Estlund, *Citizens of the Corporation? Workplace Democracy in a Post-Union Era*, in CORPORATIONS AND CITIZENSHIP 165, 167–69 (Greg Urban ed., 2014); Samuel Estreicher, Essay, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 149–55 (1994); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 187–90 (1993); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 141–48 (1993); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 198–200 (2001).

<sup>60</sup> See John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces*, 66 INDUS. & LAB. REL. REV. 142, 151–55, 164–65 (2013).

<sup>61</sup> Professors Richard Freeman and Joel Rogers suggest the potential role of "adaptive preferences" in workers' survey responses: workers may suppress preferences that seem unrealistic given external constraints such as those imposed by anti-union employers. FREEMAN & ROGERS, *supra* note 51, at 86–87.

<sup>62</sup> Indeed, workers assess those structures quite favorably. See Godard & Frege, *supra* note 60, at 153–54.

<sup>63</sup> For an overview of European works councils, see Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 313, 313–33 (Joel Rogers & Wolfgang Streeck eds., 1995) [hereinafter WORKS COUNCILS].

<sup>64</sup> WEILER, *supra* note 52, at 284–90. For more circumspect analysis of the virtues of works councils — positive in principle but more skeptical of their compatibility with U.S. industrial relations structures — see Joel Rogers, *United States: Lessons from Abroad and Home*, in WORKS COUNCILS, *supra* note 63, at 375; and Clyde W. Summers, *Works Councils in the American System*, 49 INDUS. REL. RES. ASS'N PROC. 106, 111–12 (1997).

often do give workers an effective voice that employers cannot easily ignore.<sup>65</sup> But even if works councils could be transplanted from their native territory to the United States, it is far from clear that they are *alternatives* to union representation. Works councils within the enterprise are meant to complement sectoral forms of collective bargaining, and even at the enterprise level they appear to work best in conjunction with active trade unions.<sup>66</sup>

In short, even after the near-demise of collective bargaining, it is not so easy to escape its shadow or to devise a comparably ambitious and effective structure for amplifying workers' voices and compelling managers to listen to them. I will return to this problem below. In the meantime, however, there are those who still believe, like Adam Smith and his progeny, that workers need little more than the right to exit employment and to choose among autocratic bosses in order to protect their freedom and their interests. In short, "private government" at work has its contemporary intellectual defenders, and Anderson rightly confronts some of them. Let us briefly take their measure here.

### III. WHAT'S THE THEORY BEHIND "PRIVATE GOVERNMENT" AT WORK?

Anderson devotes much of her second chapter to the most formidable bastion of intellectual opposition to her project — neoclassical economic theory. What she finds there helps to explain both her overly stark description of the modern American law of work and her relatively modest prescriptions for its reform. The economists' touchstones are efficiency and utility maximization, not freedom and equality. As it happens, however, a recent foray from within Anderson's own field of political philosophy poses a more direct challenge to her project, for it echoes the economists' argument that markets and exit rights, not legal protections and participatory institutions, are the best guarantors of workers' freedom from employer domination.<sup>67</sup>

#### A. *The Economists' Apologia for Employer Autocracy*

Anderson's second chapter begins with an evocative account of the modern workplace as a "communist dictatorship": "The government owns all the nonlabor means of production in the society it governs. It organizes production by means of central planning. The form of the government is a dictatorship," and the dictator is either "appointed by an oligarchy" or "self-appointed" (p. 38). She then asks: "Why are workers subject to dictatorship? Within economics, the theory of the firm is

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<sup>65</sup> See Walther Müller-Jentsch, *Germany: From Collective Voice to Co-Management*, in WORKS COUNCILS, *supra* note 63, at 53, 58–60.

<sup>66</sup> *Id.* at 61–63.

<sup>67</sup> See generally ROBERT S. TAYLOR, EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT (2017); *infra* pp. 815–16.

supposed to answer this question. It purports to offer politically neutral, technical, economic reasons why most production is undertaken by hierarchical organizations, with workers subordinate to bosses, rather than by autonomous individual workers” (p. 50).

It is fitting for Anderson to turn to the modern economists, for they are the intellectual progeny of Adam Smith — or rather of the half of Adam Smith that they choose to embrace. (Hemiagnosia again (pp. 57–58).) The progeny largely ignore the progenitor’s humanistic aspirations for freedom and equality through markets, and they ignore the obliteration (by the Industrial Revolution) of the idealized eighteenth-century conditions that underwrote those aspirations. They seek to identify the conditions for promoting not human freedom but allocative efficiency and overall social utility or wealth; and on that basis they generally resist collective and governmental incursions on managerial authority within the employment relationship.

The “theory of the firm” sets out to explain in the first instance why firms exist at all.<sup>68</sup> Even given the economies of scale from pooling labor and capital, why don’t individual holders of those assets simply formalize their respective rights, powers, and duties by contract? More practically, when a firm needs labor to produce and distribute the goods and services that it brings to market, what determines its choice between “making” those labor inputs internally — that is, by hiring employees — versus “buying” those inputs on the external market by contracting with other firms or individuals?<sup>69</sup>

In the theory of the firm, the answer to both questions lies in transaction costs — the cost of determining and specifying what is needed in advance, of negotiating the requisite contracts, and of monitoring performance and enforcing those contracts.<sup>70</sup> Sometimes it makes sense for the firm to pay those contracting costs — say, to secure specialized labor inputs that are outside the firm’s core competencies.<sup>71</sup> But sometimes what the firm needs is too difficult to specify in advance, or has to be supervised directly; it wants to be able to assign tasks or projects as they arise and to oversee the work or alter its direction on demand.<sup>72</sup> In that case the firm will “make” the inputs internally through its own employees. The resulting employment relationships are contractual, but the contracts are highly “incomplete”; they leave most terms to managerial

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<sup>68</sup> See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386, 390 (1937); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 307 (1976).

<sup>69</sup> See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 44, 54–58 (2014).

<sup>70</sup> See Coase, *supra* note 68, at 390–92.

<sup>71</sup> See WEIL, *supra* note 69, at 54–58.

<sup>72</sup> See Coase, *supra* note 68, at 392.

discretion and modification along the way.<sup>73</sup> That wide managerial latitude is, after all, what motivated the firm to hire employees rather than contract with outsiders.

The theory of the firm thus helps to explain why many economists believe that more or less unfettered hierarchical managerial control, backed by employment at will, makes good economic sense within the employment relationship, and why they are skeptical of legal interventions into the employment relationship. In particular, they resist efforts to formalize the terms and enforcement of employment contracts, for that would reintroduce some of the transaction costs that led firms to hire workers in the first place.<sup>74</sup> Workers' interests are not ignored, but it is through competitive labor markets, and workers' freedom to quit and to shop around among potential employers, that those interests are supposed to be reflected in the terms of employment.<sup>75</sup> Those basic precepts have generated economically inspired defenses of employment at will,<sup>76</sup> as well as critiques of minimum wage laws,<sup>77</sup> discrimination laws,<sup>78</sup> workplace safety laws,<sup>79</sup> and laws protecting the right to form unions.<sup>80</sup>

At the same time, many labor economists recognize a range of market imperfections that may justify public interventions in the employment relationship on efficiency grounds.<sup>81</sup> They recognize asymmetries of information, bilateral monopolies, hold-up opportunities, or collective action problems,<sup>82</sup> not to mention behavioral deviations from the

<sup>73</sup> Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1933–34 (1996).

<sup>74</sup> See *id.* at 1935 (explaining that more complete contracts are costlier).

<sup>75</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 438–39 (9th ed. 2014); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954–55, 982 (1984); Rock & Wachter, *supra* note 73, at 1917, 1926–27, 1950–52.

<sup>76</sup> See Rock & Wachter, *supra* note 73, at 1917, 1932–38; see also Epstein, *supra* note 75, at 951.

<sup>77</sup> See, e.g., POSNER, *supra* note 75, at 443–47; Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 405–11 (1997).

<sup>78</sup> See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 108–11 (1962).

<sup>79</sup> See POSNER, *supra* note 75, at 447–49; Ann P. Bartel & Lacy Glenn Thomas, *Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact*, 28 J.L. & ECON. 1 (1985).

<sup>80</sup> See, e.g., BARRY T. HIRSCH, *LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS* 113–22 (1991) (presenting a qualified critique of unions and their effect on economic growth); POSNER, *supra* note 75, at 431–35.

<sup>81</sup> See ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* 3–11 (2003); Bruce E. Kaufman, *Economic Analysis of Labor Markets and Labor Law: An Institutional/Industrial Relations Perspective*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW* 52, 63–66 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) [hereinafter *RESEARCH HANDBOOK*].

<sup>82</sup> See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 162–90 (1984); Kaufman, *supra* note 81, at 65–66; Rock & Wachter, *supra* note 73, at 1934; Stewart J. Schwab, *The Union as Broker of Employment Rights*, in *RESEARCH HANDBOOK*, *supra* note 81,

“rational actor” of the economists’ models,<sup>83</sup> some of which might justify regulation. For example, employment discrimination may discourage members of subordinated groups from investing in their human capital,<sup>84</sup> and reprisals against employees who disclose or refuse to engage in unlawful or dangerous activities can create negative public externalities.<sup>85</sup> Coase’s theory of the firm is not the last word on how economists view the ideal legal regime for regulation of employment.

It is still fair to say that economists tend to favor more discretionary managerial authority and less legal intervention on behalf of employees than both Anderson and most labor law scholars do. Economists are especially skeptical of legal constraints — procedural or substantive — on discipline and dismissal. On one thoughtful account, the cost of enforcing legal or contractual guarantees of fairness is high, and will be borne mainly by employees through lower wages; by contrast, *norms* of fairness, backed by market signals such as worker exit and reputational sanctions for unfair treatment, can promote fairness at a much lower cost.<sup>86</sup> The account illustrates how modern labor economics, informed by the theory of the firm, regards the ideal nature of workplace governance: a private government (in Anderson’s terms) in which employer authority is tempered by norms and market forces, including workers’ own preferences and their freedom to exit, rather than by formal law.

“Ideal” is the key, however. Neoclassical labor economists — especially any who buy the unreconstructed theory of the firm, as it were, hook, line, and sinker — would be critical of many aspects of the modern law of employment. To be sure, American employment law concedes more room for managerial discretion than do its European counterparts, especially in regard to job security and privacy rights; and economic theory has supplied intellectual ballast for political opposition to additional worker protections. But if the economists’ aim was to defend unfettered managerial authority within the workplace, they have lost a lot of ground along the way. The theory of the firm is not so much an

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at 248, 251–54; Michael L. Wachter, *Neoclassical Labor Economics: Its Implications for Labor and Employment Law*, in RESEARCH HANDBOOK, *supra* note 81, at 20, 33–38; *cf.* David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294, 294–96 (1991) (arguing that the labor market is not conducive to bargaining for an “efficient level of employment security,” *id.* at 295, because workers are heterogeneous).

<sup>83</sup> See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998); Bruce E. Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 INDUS. & LAB. REL. REV. 361, 361–62 (1999).

<sup>84</sup> See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1626–27 (1991); *cf.* John J. Donohue III, *Essay, Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that antidiscrimination law can accelerate a shift toward more efficient nondiscriminatory equilibrium).

<sup>85</sup> See Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1950 (1996).

<sup>86</sup> See Rock & Wachter, *supra* note 73, at 1984.

explanation for the modern law of workplace governance as it is an idealized model whose realization would require rolling back a good deal of that law.

Economic theory shapes not only Anderson's overly stark description of the American law of work, but also her relatively modest aspirations for reform. Anderson concedes that "the productive advantages of large-scale production" require managers to have "[s]ome kind of incompletely specified authority over groups of workers" (p. 64). In short, economic theory "explains the necessity of hierarchy" within the collective forms of production that are manifestly here to stay (p. 64). She maintains, however, that the efficiency of hierarchy is compatible with both more worker rights and better institutions of voice (pp. 68–69).

I wholeheartedly agree with Anderson that a better balance between managerial discretion and worker freedom is possible, and that the economists' view of the adequacy of market constraints on employer power is too sanguine. But that is partly because real labor markets are so far from the idealized markets of economic theory. In a world of perfectly competitive markets, by contrast, Anderson's plea to restrain employer domination at work would face a challenge not only from the field of economics but also from her own field of political theory.

*B. Is the Market Still Left? The Contemporary Republican Case for Exit as the Linchpin of Employee Freedom*

Anderson appeals to her fellow political theorists to join her in contesting the economically inspired justification of employer domination at work. We should not imagine, however, that it is just a matter of connecting the dots between robust commitments to rights and freedom in general and the problem of "private government" in the workplace. A frontal challenge to Anderson's thesis comes from political theorist Professor Robert S. Taylor, who argues in his recent book, *Exit Left*, that what was "left" about free labor markets before the Industrial Revolution — most importantly, the ability to exit employment — is still "left" today, though it requires some new provisos.<sup>87</sup> Taylor's policy prescriptions echo those of many modern economists, but his normative touchstone, like Anderson's, is human freedom rather than economic efficiency.

Taylor aligns himself with republican theory, which holds that citizens in a free self-governing society must be free from domination, or

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<sup>87</sup> TAYLOR, *supra* note 67. The book postdates Anderson's 2015 lectures, though its argument was previewed in Robert S. Taylor, *Market Freedom as Antipower*, 107 AM. POL. SCI. REV. 593 (2013).

the power of arbitrary interference, by others.<sup>88</sup> In some hands, including Professor Phillip Pettit's as well as Anderson's, the republican commitment to ensuring freedom from private domination underwrites prescriptions for fulsome employee rights and participatory mechanisms at work (p. 40).<sup>89</sup> In Taylor's hands, however, that republican commitment militates against both, and counsels a near-solitary focus on ensuring the availability of exit from employer domination.<sup>90</sup> Taylor holds that workers who are genuinely free to quit their employment will enjoy greater freedom from employer domination than they can secure through any combination of institutions for worker power or legal constraints on employer power.<sup>91</sup>

Some of Taylor's policy prescriptions would stand him in good stead with the last century's laissez-faire proponents and some big-R Republicans today, as well as many modern economists.<sup>92</sup> Taylor would focus on improving the competitiveness of markets; he would combat monopoly and monopsony power at every turn, including that of labor unions; and he would ease regulation of employment, especially regulation of dismissals, to the extent it impedes labor mobility.<sup>93</sup> He deviates from the laissez-faire program, however, by insisting on the need for redistributive government support in the form of an universal basic income, as well as educational vouchers and other programs to promote worker mobility.<sup>94</sup> In short, Taylor recognizes that, for workers to be able to resist arbitrary employer rule through a right of exit, that right has to be real and adequately resourced; workers have to be able to get another job, go into business for themselves, or fall back on a guaranteed basic income.<sup>95</sup>

Taylor's case for the primacy of exit cannot be easily refuted by encomia to the virtues of "voice." For while voice within organizations is

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<sup>88</sup> See Taylor, *supra* note 87, at 593–94.

<sup>89</sup> See *id.* at 599; PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 110–15 (2012); Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, SOC. PHIL. & POL'Y, Spring 2015, at 48, 66–69.

<sup>90</sup> Taylor's is not the only republican account that emphasizes the centrality of workers' exit rights. See FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE 53–54 (2010). For a brief critical assessment of exit-oriented republicanism, especially of Taylor, see Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (Hugh Collins et al. eds., forthcoming 2018).

<sup>91</sup> Taylor, *supra* note 87, at 599–601.

<sup>92</sup> Taylor is hardly alone in arguing that both unionization and labor regulations have harmed some workers, and that *Lochner*-era laissez-faire principles were genuinely liberating, especially for immigrant and minority workers. See generally DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

<sup>93</sup> TAYLOR, *supra* note 67, at 52.

<sup>94</sup> *Id.* at 54. The idea of a universal basic income has famous support from the right. See FRIEDMAN, *supra* note 78, at 191–94 (describing the benefits of a "negative income tax," equivalent to a guaranteed basic income).

<sup>95</sup> TAYLOR, *supra* note 67, at 54.

often counterposed to exit from them as a response to discontentment, the relationship between voice and exit is more complicated.<sup>96</sup> A credible threat of exit may well be the best way for a worker to make her voice heard. In particular, workers with scarce skills in favorable market conditions can leverage potential exit into voice, and induce employers to meet their demands or address their complaints. For most workers most of the time, however, an individual threat of exit is not much of a threat at all.<sup>97</sup> (And for Taylor, a collective threat of exit, or a strike, poses its own peril of domination by monopolistic labor organizations.<sup>98</sup>) But a decent guaranteed basic income would make exit a more realistic possibility for workers, and would accordingly reduce employers' power over them.

So while Taylor shares Anderson's concern with potential employer domination of employees, his solution is virtually the antithesis of hers. He has no objection to "private government" at work so long as workers truly can escape it. His view recalls the sanguine preindustrial depictions of market freedom that Anderson recapitulates, albeit with a crucial redistributive addendum that is intended to make exit viable, much as it seemed to be before the Industrial Revolution. Taylor's view is a direct challenge not only to Anderson's account of unfreedom at work but also to the historically dominant strategies of organized labor, which have centered for well over a century on constraining employer power and putting a floor on labor market competition through regulation and countervailing collective power. For Taylor, those strategies are not just unnecessary; they are profoundly problematic, for they empower either monopolistic unions or the government to exercise power over individual workers, employers, or consumers.<sup>99</sup> Moreover, they encumber the labor mobility that is, for Taylor, workers' best defense against domination. Rather than "fighting fire with fire," or combatting employer power with countervailing collective or state power, Taylor calls for measures to reduce employers' power by improving the competitiveness and fluidity of labor markets.<sup>100</sup>

If we put together Taylor's argument with the economists' theory of the firm, the challenge to Anderson (and others who are committed to workers' rights and voice within the workplace) is formidable. If "private government" of the firm is the most efficient way of producing goods and services, as the economists generally believe, *and* if society were organized so that workers had a genuine choice whether to submit to one or another of those "private governments," or even to opt out of

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<sup>96</sup> As Professor Albert Hirschman recognized in his iconic exegesis of exit, voice, and loyalty, ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 44–54 (1970).

<sup>97</sup> Bogg & Estlund, *supra* note 90 (manuscript at 9).

<sup>98</sup> TAYLOR, *supra* note 67, at 59–60.

<sup>99</sup> *Id.* at 58–60.

<sup>100</sup> *Id.* at 24–25.

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employment altogether, as Taylor would prescribe, why would that offend any basic normative principles to which we should be committed?

We can anticipate a partial response to that challenge from Anderson: A society in which most citizens are free only to switch from one workplace dictatorship to another is not a society of free and equal citizens. For Anderson, even if workers could freely escape any particular workplace dictatorship, that is no justification for employer domination within the employment. And even if hierarchy and managerial power over workers are largely unavoidable features of modern production, employer domination can and should be restrained by law. Anderson would demand that workers have the capacity — as an incident of equal citizenship — to look their employers in the eye and contest their authority, and to get a fair hearing of their own views.<sup>101</sup> For that to be possible, workers need both rights, in the form of legal protection from reprisals, and a collective voice in workplace governance.<sup>102</sup> I generally agree with those propositions.

But Taylor's insistence on the economic feasibility as well as the bare right of exit give him a ready reply: If the ultimate employer reprisal of dismissal merely sent the employee into a frictionless search for comparable employment, with a backstop of a guaranteed basic income, that would be at least as liberating to the would-be dissenter as legal protections against dismissal or union support. Moreover, he would argue, if workers' ability to exit voluntarily were secured by ready access to comparable work and basic income support, employers would not feel free to oppress their workers or ignore their interests, preferences, and demands. In other words, if the idealized conditions for Adam Smith's vision of freedom through markets were reproduced through affirmative and redistributive government support, employers would be economically compelled, even though not legally compelled, to make themselves accountable and responsive to workers.

Against Taylor's exit-oriented republicanism, one might mount a realist response: Actual labor markets are far from perfectly competitive; exit from and reentry into jobs is fraught with frictions, especially for workers without special skills; self-employment is not a realistic option for the vast majority of workers; and so far the idea of a decent guaranteed basic income is political science fiction. But appeals to realism and empiricism dodge Taylor's theoretical claim about the liberating potential of genuinely competitive markets, if coupled with his program for reform. If Taylor is right, then workers and their clear-headed allies should be exploring strategic alliances with their historic adversaries who call for deregulating labor markets and further weakening labor

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<sup>101</sup> See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 313 (1999).

<sup>102</sup> See Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, in VOICES AT WORK 141, 143 (Alan Bogg & Tonia Novitz eds., 2014); Bogg & Estlund, *supra* note 90 (manuscript at 28).

unions; they should accept those policy goals in exchange for a decent guaranteed basic income and other programs to support job mobility, entrepreneurship, and self-employment. (Indeed, if the idea of a universal basic income continues to gain traction in public discourse, Taylor's vision might start to look less fantastical.)

Another response might appeal to the political morality, social psychology, and constitutional status of solidarity and collective action. Common work tends to foster feelings of solidarity, or reciprocal loyalty, that have long impelled many workers to form associations, and to take a stand together and press for better conditions where they are, rather than simply quitting and seeking better conditions elsewhere.<sup>103</sup> Those basic human impulses, and the social and communal ties that people form through associations and collective action, are social virtues to be cultivated as well as facts of human nature to be reckoned with. And in part because of those intertwined normative and positive propositions, workers' associations and their peaceful collective action enjoy a measure of constitutional protection.<sup>104</sup> The century or so of vigorous judicial intervention in defense of individual market liberty and labor competition, and against unions and workers' concerted activity, was a low point for civil liberties in the United States as well as a frequent trigger for violent industrial conflict.<sup>105</sup>

I find these counterarguments to Taylor's exit-oriented republicanism persuasive, though it is not clear that they meet Taylor on the battleground of political theory. Anderson herself — as a fellow political theorist in the republican tradition — is ideally equipped to address Taylor's challenge, and I hope she will do so in future work.

#### IV. IS IT TOO LATE? GOVERNANCE OF THE FISSURED WORKPLACE

To sum up the argument thus far: the employment relationship as it actually exists in the United States does not comport with the neoclassical economists' models, nor with Taylor's stark vision, nor with Anderson's stylized account. Employment is regulated by an amalgam

<sup>103</sup> For my own extended take on the significance of co-worker bonds and associations, see CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

<sup>104</sup> On the ambiguous constitutional status of workers' collective self-help efforts, see William E. Forbath, *The New Deal Constitution in Exile*, 51 *DUKE L.J.* 165 (2001), and the work of James Gray Pope, including *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 *YALE L.J.* 1474, 1540–62 (2010); *How American Workers Lost the Right to Strike, and Other Tales*, 103 *MICH. L. REV.* 518 (2004); and *Labor's Constitution of Freedom*, 106 *YALE L.J.* 941 (1997). For a contrasting take on this constitutional history, see Forbath, *supra*. For an inquiry into why unions and collective labor activity enjoy more limited constitutional protection than other associations and activity, see Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 *MICH. L. REV.* 169 (2015).

<sup>105</sup> See generally FORBATH, *supra* note 9; LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016).

of minimum labor standards and employee rights, including the right to form unions and bargain collectively. There are crucial gaps in the existing legal regime: a yawning “compliance gap” between the law on the books and the law in action, especially at the low end of the labor market; a sizable “rights gap” in the content of the quasi constitution of the U.S. workplace; and a large “participation gap” between workers’ need and desire for a collective voice at work and the existing institutional vehicles of voice. The multifaceted project of narrowing those gaps has occupied legions of labor and employment law scholars for decades; it can only be aided by Anderson’s elucidation of its profound implications for civic life.

In the meantime, however, that project has been greatly complicated by recent developments in the organization of work. The theory of the firm, in which Anderson finds an explanation and justification for hierarchical control of employees, also begins to explain why firms are choosing to trade off that hierarchical control in favor of outside contracts. Nowadays, firms increasingly choose to “buy” from outside contractors much of what they used to “make” internally through their own employees. This is what Dean David Weil calls the “fissuring” of work, and it includes everything from the McDonald’s franchise model, to Uber’s “we’re just the platform” model, to Apple’s outsourcing of iPhone and iPad production to Foxconn and its Chinese employees.<sup>106</sup>

Varied forms of fissuring have proliferated partly because the transaction costs associated with making and enforcing outside contracts have fallen dramatically. Technology, including faster and cheaper ways to reliably transport and monitor goods, services, and information, has diminished the operational advantages of direct hierarchical control over employees.<sup>107</sup> Those innovations have also allowed firms to realize large cost savings because labor is often much cheaper in the highly competitive and concentrated low-wage labor markets in which many suppliers operate than within the comparatively well-appointed internal labor markets of the lead firms.<sup>108</sup> Labor is cheaper in part because suppliers often evade or avoid costs associated with regulation — that is, some suppliers cheat or cut corners on labor standards with less risk of legal or reputational sanctions, while others are simply not subject to those labor standards (as in the case of independent contractors or overseas suppliers).<sup>109</sup> By replacing their own employees with outside contractors, lead firms also insulate themselves from many of the regulatory costs and risks of misconduct, scandal, and litigation that are associated with direct employment of people.

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<sup>106</sup> See WEIL, *supra* note 69, at 127, 173–74.

<sup>107</sup> *Id.* at 54–58, 60–63, 167–74.

<sup>108</sup> *Id.* at 55–58, 88–89.

<sup>109</sup> *Id.* at 78, 129–33, 139–42, 154–58, 167–77.

Ironically, then, employers are increasingly choosing to forego their dictatorial power over workers in favor of more indirect but cost-effective means of getting the labor inputs they need. For their part, many workers today find themselves plagued less by employer domination than by the insecurity of having no employer at all.<sup>110</sup> Cut loose from the relative security of employment, they are “free” to cobble together a living from whatever paying gigs they can find in an internet-mediated marketplace. Although some of those workers value the greater flexibility and freedom from employer domination, many others would gladly trade that freedom for the modicum of security that employment, as regulated by existing law, entails.<sup>111</sup>

These developments do not eliminate the problem of employer domination. Far from it. The lower-profile, less capitalized supplier firms in which a growing share of workers are employed often exercise more brutal forms of control over their workers — more brutal partly because they are less regulated — in their own effort to compete by driving down labor costs.<sup>112</sup> And some of the lead firms themselves, like Uber, manage to escape the costs and responsibilities of “employment” — or will do so if they have their way in the courts — without actually sacrificing much in terms of control over labor.<sup>113</sup> Algorithms can be very effective means of exercising the control that matters to firms in a guise that courts, armed with conventional metrics for employment versus independent contracting, may not recognize.<sup>114</sup>

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<sup>110</sup> See Tyler Cowen, *Work Isn't So Bad After All*, in ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 108, 116 (2017).

<sup>111</sup> See JAMES MANYIKA ET AL., MCKINSEY GLOB. INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 41 (2016), <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy> [https://perma.cc/HQS9-X7AQ].

<sup>112</sup> WEIL, *supra* note 69, at 100–01, 112–13, 142.

<sup>113</sup> Tribunals have reached contrasting conclusions on the question of whether Uber drivers are employees. Compare, e.g., *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017) (finding that a former Uber driver was not an “employee” of Uber), with *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying summary judgment on ground that material facts supported a reasonable inference that drivers were employed by Uber). See also *Phillips v. Uber Techs., Inc.*, No. 16 Civ. 295, 2017 WL 2782036, at \*5 (S.D.N.Y. June 14, 2017) (rejecting Uber's contention that its drivers were independent contractors as a matter of law); *In re [Redacted]*, ALJ Case No. 016-23858, at 19 (N.Y. Unemployment Insurance App. Board June 9, 2017) (finding that Uber drivers were employees of Uber and eligible to collect unemployment benefits).

<sup>114</sup> See Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 54–55 (2016); see also Robert L. Redfearn III, Note, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1036–50 (2016) (discussing Uber's control of drivers through data analytics); Tim Hwang & Madeleine Clare Elish, *The Mirage of the Marketplace: The Disingenuous Way Uber Hides Behind Its Algorithm*, SLATE (July 27, 2015, 6:00 AM), [http://www.slate.com/articles/technology/future\\_tense/2015/07/uber\\_s\\_algorithm\\_and\\_](http://www.slate.com/articles/technology/future_tense/2015/07/uber_s_algorithm_and_)

Major firms are engaged in a near-feverish search for ways to avoid employing people. As one investment banker put it recently, “some CEOs . . . will do anything possible, they’ll explore all other alternatives, so as not to hire another full-time employee.”<sup>115</sup> They ask: “Can I automate it? If not, can I outsource it? If not, can I give it to an independent contractor?” Hiring an employee is the last resort.<sup>116</sup> Hence the growing reliance on temps and outside contractors, domestic or overseas, and on machines and software that can perform a growing array of heretofore human tasks more cheaply and efficiently than humans can. Technology is making it easier for firms not only to avoid direct employment but to avoid the use of human labor altogether.<sup>117</sup>

Putting aside the still-underexplored issue of automation, the various developments that fall under the rubric of fissuring have gripped the labor and employment law world in recent years.<sup>118</sup> The growing distance, geographic and organizational, between workers and the large, resourceful, and reputation-conscious firms at the commanding heights of the economy is eroding the foundations of the edifice of employee rights and benefits that was built during the twentieth century. It means that a growing number of workers are not covered by employment laws at all, and that others who suffer violations of minimum labor standards cannot recover against the firms whose contracting practices make those violations nearly inevitable. It means that workers who might wish to bargain collectively over their terms and conditions of employment often cannot bargain with the firms that hold the purse strings. And it means that fewer workers have access to the employment-based benefit structure that makes up much of the “social safety net” in the United States.

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[the\\_mirage\\_of\\_the\\_marketplace.html \[https://perma.cc/N9FG-9NWQ\]](https://perma.cc/N9FG-9NWQ) (discussing Uber’s use of algorithms to control drivers).

<sup>115</sup> Steven Berkenfeld, Managing Dir., Barclays Capital, Opportunities and Challenges, Remarks at the U.S. Department of Labor’s Conference on the Future of Work (Dec. 10, 2015) (on file with the Harvard Law School Library).

<sup>116</sup> Stephen McBride, *How the Coming Wave of Job Automation Will Affect You and the U.S.*, FORBES (Feb. 23, 2017, 7:30 PM), <https://www.forbes.com/sites/oliviergarret/2017/02/23/how-the-coming-wave-of-job-automation-will-affect-you-and-the-us/#29bebb963fd7> [https://perma.cc/AH77-Y4C8] (quoting Steven Berkenfeld).

<sup>117</sup> I take up the automation issue in Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law* (N.Y.U. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17–28, 2017), <https://ssrn.com/abstract=3007972> [https://perma.cc/W86D-LZQN].

<sup>118</sup> See e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67–68 (2004); WEIL, *supra* note 69; see also Andrias, *supra* note 53, at 31; Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609, 616 (2006); K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL’Y REV. 321, 329 (2016); Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge, in* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 1 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

The fissuring of work also scrambles the equation for those who are concerned about workers' lack of a voice in workplace governance. While fissuring is making some low-wage workplaces look more like the dictatorships that Anderson depicts, it is erasing the very notion of a workplace for some workers who are left to piece together gigs outside the employment nexus, and it is separating many workers from those with economic power over their work lives. So while the collapse of the NLRA's model of collective bargaining has left a representation gap that labor law scholars have long urged policymakers to address, fissuring has opened up yet another gap that challenges both the collective bargaining model and other enterprise-based forms of voice: the gap between workers and the firms with the economic power to determine their wages and working conditions.

Take, for example, European-style works councils, which Anderson suggests as a possible model for "public government" of the workplace (p. 70).<sup>119</sup> Works councils are often touted as alternatives to unions and collective bargaining: they allow employees to deal with their employer, but in less adversarial ways (and with less economic power behind workers) than unions do (p. 70).<sup>120</sup> In many fissured workplaces, however, works councils would give workers little real voice in their wages or conditions of work. The combined constraints of a lead firm's detailed standards of performance and cutthroat cost-based competition with other potential suppliers may leave the immediate employer with almost no room to negotiate with workers, whatever their representative institutions.

All of this points to the dispiriting possibility that Anderson may be sounding the alarm about "private government" in the workplace too late — just at the moment when the very concept of a "workplace" is acquiring a quaint ring in some quarters, and when gaining a voice within the workplace is looking ever more futile in others. But that is too bleak. What is needed is a serious rethinking of what kind of voice workers actually need, and whom their voices need to reach.

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<sup>119</sup> Leading labor law scholars have written favorably about the idea of a "works council"-like mechanism in the United States. See, e.g., WEILER, *supra* note 52, at 282–95; Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 641–46 (2004); Charles B. Craver, Essay, *Mandatory Worker Participation Is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 159–64 (1997); Summers, *supra* note 64, at 106–112.

<sup>120</sup> The relationship between works councils and unions is not quite so simple, however, as noted above. See pp. 810–11. Works councils appear to work best — at least in their stronghold in Germany — where they enjoy the backing of independent trade unions at the workplace, and where the union deals with major distributional issues like wages at the sectoral level, leaving the works council to deal with enterprise-specific issues on which cooperation may be possible. See Walther Müller-Jentsch, *Germany: From Collective Voice to Co-Management*, in WORKS COUNCILS, *supra* note 63, at 53, 61–65.

At a minimum, workers' voices need to reach the firms that call the economic shots. A logical response to the problem of fissuring, and a hot topic in labor and employment law, thus lies in holding the lead firm responsible as the "joint employer" of the employees of their contractor (or franchisee). That can make the lead firm not only jointly responsible for compliance with labor standards, but in some cases jointly obligated to bargain with a union representing the contractor's employees.<sup>121</sup> The expansion of lead firm responsibility for their contractors' employees is meeting strong political headwinds and legal pushback.<sup>122</sup> But something along these lines will be needed to enable workers not just to speak, but to speak to someone with the power to address their concerns.

For some labor and employment law scholars, however, the voice that workers need today is not within the particular workplace, and it is not directed chiefly toward the particular autocratic employer. Their focus is less on the problem of employee freedom that Anderson targets, and more on the distributional concerns that have always been central to workers' struggles within industrial capitalism.<sup>123</sup> Workers need a stronger voice within the polity at all levels of government so that they can press for a higher floor on the basic economic terms of work, and perhaps for a reconfigured social safety net that is more secure, more universal, and less tied to particular jobs than the one we have.

Ironically, some of what workers might press for in the political process — in particular, the expansion of universal social entitlements — resembles Taylor's prescribed antidote to employer domination. That is no coincidence. Policies that reduce workers' dependence on any single employer, or on employment generally, might be exactly what is needed in a "gig economy" in which workers can no longer count on steady employment as the source of their livelihoods. Those policies might become essential, and perhaps even politically possible, if the future of work lies increasingly beyond the sphere of employment.<sup>124</sup>

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<sup>121</sup> *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015). The case is currently under review in the D.C. Circuit Court. *NLRB v. Browning-Ferris*, No. 16-1064 (D.C. Cir. Feb. 17, 2016).

<sup>122</sup> See Stacy Cowley, *Labor Board Ruling on Joint Employers Leaves Some Companies Scratching Their Heads*, N.Y. TIMES (Aug. 28, 2015), <https://nyti.ms/2z2t15r> [<https://perma.cc/742F-MFGN>].

<sup>123</sup> Among recent efforts to map this new frontier, see Andrias, *supra* note 53; Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597 (2016); and Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623 (2016). These build on earlier work by labor law scholars, for example, STONE, *supra* note 118; and Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375 (2007), and they draw on ideas and activities of worker advocates, for example, David Rolf, *Toward a 21st-Century Labor Movement*, AM. PROSPECT (Apr. 18, 2016), <http://prospect.org/article/toward-21st-century-labor-movement> [<https://perma.cc/HCQ9-X8BD>]; and Lawrence Mishel, President, Econ. Policy Ins. Policy Ctr., *Raise America's Pay*, Testimony delivered at the Democratic National Convention (June 9, 2016), <http://www.epi.org/files/pdf/108654.pdf> [<http://perma.cc/5R7V-NMP6>]. For a novel proposal to retool twentieth-century institutions to enhance workers' political voice, see Sachs, *supra* note 53.

<sup>124</sup> See generally Estlund, *supra* note 117.

## CONCLUSION

The hardy fraternity of labor and employment law scholars will surely join with me in cheering on Anderson's effort to reawaken the interest of other scholars and public intellectuals in the problems of employer power and worker powerlessness in the modern workplace. But those who are persuaded by her argument, and who arrive with her at the question of what is to be done, will find daunting challenges ahead. Ironically, many of those challenges stem not from employers' assertion of their ample and inadequately regulated power over employees' lives, but from their growing proclivity to forego that power in favor of alternative means of buying labor inputs that are less encumbered by legal, organizational, and social obligations toward workers.

As firms dissolve the ambiguous ties that used to bind them and their workers together in long-term employment relationships, and replace them with high-tech, low-cost supply chain solutions (or with robots), rights and voice within the workplace might matter much less, and a stronger social safety net, public job creation, training programs, and transitional support might matter more. The problem of "private government" at work persists, but solutions to that problem must take into account the centrifugal forces that are pushing workers further away from powerful and resourceful firms. They must also meet the needs of the many workers who are spun off, no longer tethered to the relatively secure and regulated domain of employment even if they remain in the orbit of those same powerful firms.

One wonders, however, where the political pressure for those solutions will come from in the wake of union decline. Labor unions have long been the main vehicles for workers' demands for voice, dignity, and decent rewards at work and in the polity. But unions — especially in their role as exclusive collective bargaining agents — have largely lost workers' allegiance and confidence. That is due partly (though not wholly) to intense employer resistance to union organizing, and to a relentless political and legal campaign to defund and delegitimize unions as political actors.<sup>125</sup> Unions are shadows of their former selves, yet they are still the most powerful advocates that workers have, and they

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<sup>125</sup> See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 432–38 (2015). The so-called "right-to-work" movement was launched in something like its modern form not long after the enactment of the NLRA. See SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 11 (2014). It has only intensified in the past decade. In the past seven years, six states have passed "right-to-work" legislation: Indiana (2012), Michigan (2013), Wisconsin (2015), West Virginia (2016), Missouri (2017), and Kentucky (2017). See *Right to Work States Timeline*, NAT'L RIGHT TO WORK COMM., <http://www.nrtwc.org/facts/state-right-to-work-timeline-2016/> [<https://perma.cc/8STE-ZDRY>]. In the meantime, litigation that aims to invalidate all mandatory union fees in the public sector on First Amendment grounds is pending before the Supreme Court in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 851 F.3d 746 (7th Cir. 2017), cert. granted, 86 U.S.L.W. 3148 (U.S. Sept. 28, 2017) (No. 16-1466).

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are practically the only worker advocates with a presence in national politics.

Any campaign to curb employer autocracy at work will be doomed if it is entirely about unions and their agenda for labor law reform. But it will also be doomed if it ignores unions and is not championed by them. Unions in the twentieth century succeeded in crafting a solution to the problem of employer autocracy that worked reasonably well for millions of workers for a few decades. Their twenty-first century successors — both the traditional unions that have survived with their mission if not their membership intact and new worker organizations that have never engaged in collective bargaining — will have to play a leading role in finding new solutions to that old problem in a changing economy.