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## COMMENTS

### ANTIDEMOCRACY

*Nikolas Bowie\**

Democracy can take root anywhere, from community gardens to the most toxic workplace environments. It's planted whenever people treat one another as political equals, allowing everyone in the community, or *demos*, to share in exercising power, or *kratos*.<sup>1</sup> Where democracy is allowed to blossom, it can undermine social hierarchies that have long seemed like natural features of the landscape.<sup>2</sup> And it's perhaps for this reason that when property owners see democracy growing where they don't want it, they often suppress it like a weed.

Generations of farmworkers have confronted this problem while trying to cultivate democracy in American soil. A group of wealthy planters seeded a perennial ideal when they first proclaimed that "all men are created equal."<sup>3</sup> Yet they faced the violent resistance of a British monarch whose supporters claimed that sovereignty was an inherited part of his estate.<sup>4</sup> The farmers who fought the American Revolution nurtured the ideal of political equality in the name of "Democracy in America."<sup>5</sup> Yet they were fenced in by constitutional barriers designed to protect property from their rule.<sup>6</sup> Enslaved field hands waged a civil war and a general strike to graft "abolition" onto American democracy.<sup>7</sup> Yet a counterrevolution of property lynched the victors, disenfranchised them, and codified their inferior status for the next hundred years.<sup>8</sup>

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\* Assistant Professor of Law, Harvard Law School. I am very grateful to Kate Andrias, Molly Brady, Dan Farberman, Aziz Huq, David Pozen, Daphna Renan, Ben Sachs, and Laura Weinrib for their incisive feedback and criticism on short notice. I am equally grateful for the excellent research assistance of Jackson Beard, Zachary Cohen, Connor Haaland, Devon Himelman, and Emma Leibowitz, as well as for the enormously helpful contributions of Brian Highsmith. I would also like to thank the student workers of the *Harvard Law Review* for their many hours of uncompensated labor in bringing this piece to print.

<sup>1</sup> PAUL CARTLEDGE, *DEMOCRACY* 3–4 (2016); JOSIAH OBER, *POLITICAL DISSENT IN DEMOCRATIC ATHENS* 29, 71 (1998); see also ROBERT A. DAHL, *ON DEMOCRACY* 10–11 (Veritas paperback ed. 2020); DAVID GRAEBER, *THE DEMOCRACY PROJECT* 183–84 (2013); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 289 (1999).

<sup>2</sup> See Anderson, *supra* note 1, at 312–13.

<sup>3</sup> See DANIELLE ALLEN, *OUR DECLARATION* 178–82 (2014).

<sup>4</sup> See BRENDAN MCCONVILLE, *THE KING'S THREE FACES* 209–17, 290–91 (2006).

<sup>5</sup> See GRAEBER, *supra* note 1, at 171; 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 49–63 (Henry Reeve trans., London, Saunders & Otley 1835).

<sup>6</sup> See ADAM PRZEWORSKI, *WHY BOTHER WITH ELECTIONS?* 8–9 (2018).

<sup>7</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION* 83 (1935).

<sup>8</sup> See *id.* at 630–34.

In each case, like an herbicide to protect property from the “excess of democracy,”<sup>9</sup> *antidemocracy* has sustained social hierarchies from the spread of political equality. Whether it comes in the form of violent repression, vetoes of legislation by unelected officials, or practically unamendable constitutional restrictions, antidemocracy has had a long half-life.<sup>10</sup>

Even in the middle of the twentieth century, when women and people of color successfully expanded the right to vote, Cesar Chavez, Dolores Huerta, and farmworkers in California learned that democracy on Election Day means very little when antidemocracy suppresses political equality elsewhere. Then as now, immigrant farmworkers were disenfranchised, and even citizen farmworkers spent their waking hours dominated by employers who could fire them for any reason.<sup>11</sup> When farmworkers acted collectively to resist workplace oppression, employers and their political allies used violence, arrests, and injunctions to disrupt farmworker organizing.<sup>12</sup> When farmworkers used their numbers to elect their own political allies, employers took advantage of antidemocratic checks in the political process to cement their own power.<sup>13</sup> And when farmworkers succeeded in winning compromises with employers — in the form of contracts, legislation, and constitutional changes — these successes entrenched whatever antidemocratic practices were allowed to fester, even, most harmfully, within Chavez and Huerta’s own union, the United Farm Workers.<sup>14</sup>

In a recent case involving the United Farm Workers, the Supreme Court gave property owners yet another tool to suppress democracy. In *Cedar Point Nursery v. Hassid*,<sup>15</sup> the Court held that the U.S. Constitution requires the government to compensate property owners whenever a law interferes with their “right to exclude.”<sup>16</sup> The decision immediately endangered one of Chavez and Huerta’s political successes: a California regulation that required employers to admit union organizers on company property.<sup>17</sup> But the principle of the decision could also

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<sup>9</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., 1911).

<sup>10</sup> See PRZEWORSKI, *supra* note 6, at 9.

<sup>11</sup> See PHILIP L. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS 3 (2018); *infra* pp. 175–76.

<sup>12</sup> MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 35–41 (2009).

<sup>13</sup> *Id.* at 33, 41.

<sup>14</sup> See *id.* at 242–48; MARTIN, *supra* note 11, at 75–77; MIRIAM PAWEL, THE CRUSADES OF CESAR CHAVEZ 416–28 (2014).

<sup>15</sup> 141 S. Ct. 2063 (2021).

<sup>16</sup> *Id.* at 2072.

<sup>17</sup> *Id.* at 2069, 2080.

endanger all the other laws that mitigate the harms of workplace hierarchies, making it far more difficult for organizers to build democracy in the workplace.

From farms and factories to Fortune 500 companies, the vast majority of American workplaces function not as democracies, but as dictatorships.<sup>18</sup> The typical employer can wield the threat of firing workers to force them to take virtually any action.<sup>19</sup> The only restraints on this discretion are special contract provisions or laws that nominally prohibit employers from firing workers for specific reasons, such as their race, sex, or interest in collective bargaining.<sup>20</sup> Although these contract provisions and laws alone do not make workplaces democratic, they do make it easier for workers to build solidarity, to organize, and to collectively demand more power over company decisions.

But legal protections of workers — such as antidiscrimination or antiretaliation laws — undoubtedly interfere with employers’ “right to exclude” the workers they want to fire. The very point of these legal protections is to prevent employers from excluding Black workers, pregnant workers, or union-affiliated workers from company property. Indeed, when Congress enacted the Civil Rights Act of 1964, a White property owner challenged the law before the Supreme Court by alleging that the federal government owed him one million dollars for taking away his right to exclude Black people from his motel.<sup>21</sup> Although the justices in 1964 summarily dismissed this argument, the justices in 2021 embraced a version of it for property owners who want to exclude people from places the owners consider accessible only to currently employed workers.<sup>22</sup> With some ad hoc exceptions, *Cedar Point* requires the government to provide compensation every time the government tells an employer that it cannot exclude certain people from entering the workplace. Applied to antidiscrimination laws, antiretaliation laws, and other labor protections, this holding could make it financially impossible for governments to protect people who want to democratize their workplaces by organizing workers who are vulnerable to being fired.

It’s possible that the Supreme Court will exercise its own discretion and moderate the terms of its new rule. Or it could do the opposite and take its new rule to the logical limit. Either way, *Cedar Point* illustrates how the Supreme Court today is the ultimate supplier of antidemocracy in this country. The Court controls how much democracy is allowed to exist everywhere in the United States, from Congress to the states, inside

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<sup>18</sup> ELIZABETH ANDERSON, *PRIVATE GOVERNMENT* 37–41 (2017).

<sup>19</sup> Alex Gourevitch, *Liberty and Democratic Insurgency: The Republican Case for the Right to Strike*, in *REPUBLICANISM AND THE FUTURE OF DEMOCRACY* 173, 175–76 (Yiftah Elazar & Geneviève Rousselière eds., 2019).

<sup>20</sup> Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 803 (2018) (book review).

<sup>21</sup> See *infra* p. 190.

<sup>22</sup> See *infra* pp. 192–98.

the workplace and outside. Yet the Court itself is currently undisciplined by any democratic procedure. In recent years, Congress has had little appetite to act as a coequal branch of government with the legislative power to disarm the Court and enforce its own interpretations of the Constitution — a power it once exercised to protect Black farmworkers with the same statute and constitutional provision at issue in *Cedar Point*. Instead, the American people have acted as if the Court's antidemocratic interpretations of the Constitution can be overturned only by amending one of the most difficult-to-amend constitutions in the world.

If the United States is ever going to become a democracy — one in which political equality brings down its remaining dominating hierarchies — we must learn from people who have successfully cultivated democracy as an “insurgent exercise of power against uncontrolled rule.”<sup>23</sup> Well-written bills and creative litigation strategies alone will not build democracy amid judges whose uncontrolled discretion and hostility to worker power are illustrated by *Cedar Point*.<sup>24</sup> What the successes and failures of the United Farm Workers can teach us is that organizing workers democratically — whether or not the law is currently on their side — must play a central role in growing the power necessary to democratize our institutions.<sup>25</sup>

I begin by defining democracy and antidemocracy. I then describe the farmworkers' difficulty in cultivating democracy, the antidemocratic potential of *Cedar Point*, and the longstanding sources of antidemocracy that protect the Supreme Court's discretion. I then draw a lesson from the farmworkers' story for how this antidemocracy can be overcome. In short, for democracy to exist anywhere, it must exist everywhere: in our workplaces, our communities, our courts, and our constitutions.<sup>26</sup>

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<sup>23</sup> Gourevitch, *supra* note 19, at 174; JANE MCALEVEY, A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY 9–10, 238–39 (2020).

<sup>24</sup> Sarita Gupta, Stephen Lerner & Joseph A. McCartin, *Democracy, Equality, and the Future of Workers*, in WE OWN THE FUTURE 150, 154 (Kate Aronoff, Peter Dreier & Michael Kazin eds., 2020).

<sup>25</sup> See GANZ, *supra* note 12, at 251–54; MARTIN, *supra* note 11, at 4; JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 2–6, 182 (2016).

<sup>26</sup> See JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 171 (Melvin L. Rogers ed., 2016 ed.); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 94 (2011 ed.).

## I. WHAT IS DEMOCRACY?

Americans take pride in calling the United States the oldest existing democracy.<sup>27</sup> But what exactly that means has never been clear.<sup>28</sup> Most people around the world appear to admire democracy, yet they also use the term to describe wherever they happen to live.<sup>29</sup> North Koreans call their hereditary dictatorship the Democratic People's Republic of Korea.<sup>30</sup> And three decades after the Chinese government suppressed the 1989 Tiananmen Square protests, Chinese residents are more likely than Americans to call their own government democratic.<sup>31</sup>

Even among theorists whose profession requires them to define democracy, there are competing definitions.<sup>32</sup> One group of theorists defines democracy descriptively to mean the practices of countries that call themselves democratic.<sup>33</sup> So if the United Kingdom says it's a democracy yet gives each college graduate two votes instead of one, then a descriptive definition of democracy might be OK with someone getting an extra vote as a graduation present.<sup>34</sup>

In 1942, the economist Joseph Schumpeter offered an influential version of this sort of descriptive definition.<sup>35</sup> Looking around at the handful of countries that then called themselves democratic, he didn't see any in which the people themselves ruled much of anything.<sup>36</sup> Instead, he thought the people in most countries were idiots — or at least incapable of forming rational opinions about governing in their long-term interest.<sup>37</sup> Yet in every self-described democracy, he did see at least some

<sup>27</sup> See, e.g., Sarah Hauer, *Paul Ryan Claims the US Is the "Oldest Democracy" in the World. Is He Right?*, POLITIFACT (July 11, 2016), <https://www.politifact.com/factchecks/2016/jul/11/paul-ryan/paul-ryan-claims-us-oldest-democracy-world-he-righ> [https://perma.cc/FM62-FUTQ] ("We rate the claim True.")

<sup>28</sup> See ASTRA TAYLOR, *DEMOCRACY MAY NOT EXIST, BUT WE'LL MISS IT WHEN IT'S GONE* 1 (2019).

<sup>29</sup> CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 5 (2016).

<sup>30</sup> TAYLOR, *supra* note 28, at 1.

<sup>31</sup> WORLD VALUES SURV. ASS'N, *WORLD VALUES SURVEY WAVE 7 (2017–2020)* 502 (2021), <https://www.worldvaluessurvey.org/WVSDocumentationWV7.jsp> [https://perma.cc/4X7W-GZCU].

<sup>32</sup> Jeremy Waldron, *Essay, Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 680 (2009); see Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in *DIFFERENCE WITHOUT DOMINATION* 27, 27 (Danielle Allen & Rohini Somanathan eds., 2020); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 1 (1956); Geneviève Rousselière & Yiftah Elazar, *Introduction: Republicanizing Democracy, Democratizing the Republic*, in *REPUBLICANISM AND THE FUTURE OF DEMOCRACY*, *supra* note 19, at 1, 4.

<sup>33</sup> See Philip Pettit, *The General Will, the Common Good, and a Democracy of Standards*, in *REPUBLICANISM AND THE FUTURE OF DEMOCRACY*, *supra* note 19, at 13, 13.

<sup>34</sup> See ALBERT WEALE, *DEMOCRACY* 19–20 (2d ed. 2007).

<sup>35</sup> See Rousselière & Elazar, *supra* note 32, at 4 (describing Schumpeter's influence).

<sup>36</sup> JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 250 (3d ed. 1942).

<sup>37</sup> *Id.* at 250, 259–62. See generally TAYLOR, *supra* note 28, at 195 (describing the Greek etymology of the term *idiot* as coming from *idiotis*, meaning a private person who focused on their own needs rather than those of the community).

politicians elected by at least some voters.<sup>38</sup> So he concluded that democracy must be synonymous with competitive elections. He defined democracy as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”<sup>39</sup>

The Democratic People’s Republic of Korea didn’t exist when Schumpeter wrote, but it reveals the problem of defining democracy by looking at places that call themselves democratic: it’s circular. Such an approach leaves no method for contrasting existing practices to any ideal, even if those practices seem intuitively antidemocratic.<sup>40</sup> To pick on Schumpeter’s definition, if democracy requires nothing more than competitive elections, then it was democratic for the United States to reserve those elections for White voters.<sup>41</sup> His definition also offers no basis for objecting to an election in which one person has 300 votes more than others, or to a dictatorship in which representatives are elected to carry out the leader’s agenda.<sup>42</sup>

To address all these problems, another group of theorists defines democracy by considering what it would look like in its ideal form. These theorists typically construct their definitions by asking not only what practices are traditionally associated with democracy but also what justifies those practices’ departures from alternative arrangements.<sup>43</sup> These ideal definitions are often criticized by the first group of theorists as unrealistic; few existing practices live up to them.<sup>44</sup> But that’s the point: by identifying why democracy is valuable, it becomes possible to critique existing practices for departing from the ideal.<sup>45</sup>

Applying this idealized approach, *democracy* has traditionally been defined in contrast with at least two alternative forms of government: *aristocracy* and *monarchy*.<sup>46</sup> In the most literal sense, the difference between these three is who has *power* (*kratos*): the capacity or freedom

<sup>38</sup> SCHUMPETER, *supra* note 36, at 269–70.

<sup>39</sup> *Id.* at 269; see also Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY’S VALUE 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (defending the normative value of Schumpeter’s definition).

<sup>40</sup> See Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 445 (2013).

<sup>41</sup> See DAHL, *supra* note 1, at 130–35 (arguing that such a definition would violate the democratic principle of political equality).

<sup>42</sup> *Id.*; see also DANIEL CARPENTER, DEMOCRACY BY PETITION 24–25 (2021) (“[E]lections are insufficient for democracy, as they can coexist with, even enable, authoritarian, monarchical, and tyrannical governments.”); Jennifer Gandhi & Ellen Lust-Okar, *Elections Under Authoritarianism*, 12 ANN. REV. POL. SCI. 403, 404 (2009) (“[A]uthoritarian elections are neither rare nor . . . inevitably undermining to autocrats.”).

<sup>43</sup> See, e.g., WEALE, *supra* note 34, at 50–51.

<sup>44</sup> See, e.g., ACHEN & BARTELS, *supra* note 29, at 7.

<sup>45</sup> See *id.*

<sup>46</sup> See, e.g., GRAEBER, *supra* note 1, at 158; OBER, *supra* note 1, at 310; Waldron, *supra* note 32, at 690.

to do things that affect one's life and the lives of others.<sup>47</sup> In an aristocracy, power is concentrated in the hands of only the best people (*aristoi*); in a monarchy, power is concentrated in the hands of only one person (*monos*); and in a democracy, power is in the hands of the entire community (*demos*).<sup>48</sup> This is how ancient Athenians defined the terms, anyway, while adding that the distinction between these governments is not just a question of numbers but also which social hierarchies will produce these numbers.<sup>49</sup> That is, in an aristocratic community, some people are able to exercise power by virtue of their assets — whether that's merit, virtue, wealth, intelligence, expertise, or disproportionate control over valuable resources.<sup>50</sup> And in a monarchical community, a single family often rules because of something that happened in the past, like a conquest, whose legacy has been inherited through custom.<sup>51</sup> By contrast, a democratic community exists only when no one can exercise power asymmetrically without everyone else being able to reciprocate on equal terms.<sup>52</sup>

Accordingly, Greek advocates of an empowered *demos* maintained that the only way for an entire community to have the positive freedom to do things was under conditions of political equality (*isokratia*) — specifically, conditions in which everyone was treated as an equal with respect to participating in political assemblies (*isegoria*), making decisions (*isopsephos*), and applying the law (*isonomia*).<sup>53</sup> Giving ordinary people equal access to these forms of political power protected them from domination by elites, who would otherwise use their assets or inheritance to accumulate power in their own hands.<sup>54</sup> Meanwhile, Greek critics of democracy disparaged democratic justice as “based on numerical equality, not on merit.”<sup>55</sup> Plato, for example, argued that democracy assigned

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<sup>47</sup> See Josiah Ober, *The Original Meaning of “Democracy”: Capacity to Do Things, Not Majority Rule*, 15 CONSTELLATIONS 3, 3–4 (2008); see also *id.* at 5 (defining *archai* similarly with respect to officeholding). For examples of similar contemporary definitions of power, see JULIE BATTILANA & TIZIANA CASCIARO, *POWER, FOR ALL* 1–2, 199–202 (2021); ALICIA GARZA, *THE PURPOSE OF POWER* 186–87 (2020); and FRANCES FOX PIVEN, *CHALLENGING AUTHORITY: HOW ORDINARY PEOPLE CHANGE AMERICA* 19–21 (2006).

<sup>48</sup> Ober, *supra* note 47, at 3–8.

<sup>49</sup> *Id.* at 7; see, e.g., ARISTOTLE, *POLITICS* bk. III, ch. 7, 1279b, at 78–79 (C.D.C. Reeve trans., Hackett Publishing Co. 1998); PLATO, *REPUBLIC* bk. VIII, 544c, at 239 (C.D.C. Reeve trans., Hackett Publishing Co. 2004).

<sup>50</sup> ARISTOTLE, *supra* note 49, bk. IV, chs. 7–8, 1293b–1294b, at 114–15.

<sup>51</sup> See *id.* bk. III, ch. 14, 1285a–1285b, at 91–93.

<sup>52</sup> See OBER, *supra* note 1, at 31; Nadia Urbinati, *Competing for Liberty: The Republican Critique of Democracy*, 106 AM. POL. SCI. REV. 607, 616–17 (2012).

<sup>53</sup> MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 81–85 (J.A. Crook trans., 1991); Ober, *supra* note 47, at 6–7; Saffon & Urbinati, *supra* note 40, at 458–59.

<sup>54</sup> See DANIELLE S. ALLEN, *WHY PLATO WROTE* 109–15 (2013); OBER, *supra* note 1, at 29–30.

<sup>55</sup> ARISTOTLE, *supra* note 49, bk. VI, ch. 2, 1317b, at 176.

“a sort of equality to equals and unequals alike,” treating the ignorant masses as if they were as capable of leadership as the well-educated few.<sup>56</sup> In a famous metaphor, he analogized democracy to a group of sailors who ridiculed and outvoted their expert navigator as a useless “stargazer.”<sup>57</sup> He and his most famous student, Aristotle, added that a democratic regime of political equals would deteriorate into rule by the poor, as majorities would improperly take property from wealthy minorities through redistribution.<sup>58</sup> For centuries afterward, the lesson wealthy readers drew from Plato and Aristotle was that aristocracy or monarchy was necessary to protect property from the leveling tyranny of mob rule.<sup>59</sup>

This distinction between a community of political equals on one hand, and a hierarchy of assets or inheritance on the other, has continued to provide democracy with its definition.<sup>60</sup> To put the point clearly, what has historically distinguished democracy as a unique form of government is its pursuit of *political equality*.<sup>61</sup> This ideal of political equality is a relational theory of equality, one that views everyone as social equals who should have the same power to control community decisions as everyone else.<sup>62</sup> In the words of philosopher Elizabeth Anderson, it “regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted.”<sup>63</sup> The opposite of political equality is a social hierarchy, like aristocracy or monarchy, in which one person can *dominate* another — that is, a superior has the discretion and authority to control an inferior’s choices without the inferior being able to reciprocate.<sup>64</sup> Democracy therefore

<sup>56</sup> PLATO, *supra* note 49, 558c–562a, at 255–59.

<sup>57</sup> *Id.* 488a–489a, at 181–82.

<sup>58</sup> *See id.* 557a, at 253; ARISTOTLE, *supra* note 49, bk. VI, ch. 5, 1320a–1321a, at 182–85; *see also* CARTLEDGE, *supra* note 1, at 17, 99–100; OBER, *supra* note 1, at 317–19, 330–32.

<sup>59</sup> CARTLEDGE, *supra* note 1, at 257–58, 293–95; Annelien de Dijn, *Republicanism and Democracy: The Tyranny of the Majority in Eighteenth-Century Political Debate*, in REPUBLICANISM AND THE FUTURE OF DEMOCRACY, *supra* note 19, at 59, 62; *see also* Urbinati, *supra* note 52, at 608–09.

<sup>60</sup> *See* sources cited *supra* note 1.

<sup>61</sup> *Id.*; *see, e.g.*, WEALE, *supra* note 34, at 50, 62; Rousselière & Elazar, *supra* note 32, at 4; Saffon & Urbinati, *supra* note 40, at 445, 458–60.

<sup>62</sup> *See* DAHL, *supra* note 1, at 37; Anderson, *supra* note 1, at 313–14; Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 287, 294–96 (2014).

<sup>63</sup> Anderson, *supra* note 1, at 313.

<sup>64</sup> ANDERSON, *supra* note 18, at 3–4; *see* Allen, *supra* note 32, at 38–41; Niko Kolodny, *Being Under the Power of Others*, in REPUBLICANISM AND THE FUTURE OF DEMOCRACY, *supra* note 19, at 94, 107–09; *see also* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 40–41, 79–80 (Myra Bergman Ramos trans., 1970) (describing dominating hierarchies as a form of oppression in contrast with a more democratic form of reciprocal dialogue); YOUNG, *supra* note 26, at 48–63 (describing

demands the elimination of economic and social inequalities to the extent that no one can dominate anyone else and everyone can equally exercise power.<sup>65</sup> In sum, democracy “is just the belief that humans are fundamentally equal and ought to be allowed to manage their collective affairs in an egalitarian fashion, using whatever means appear most conducive.”<sup>66</sup>

The deeply egalitarian and participatory implications of democracy might be unsettling to anyone who thinks of democracy as nothing more than voting every November.<sup>67</sup> But these implications have also been intuitive among democratic communities well beyond ancient Greece.<sup>68</sup> The reason why democracy is commonly associated with particular practices — including competitive elections, consensus, majority rule, universal enfranchisement, deliberation, sortition, political pay, and rotation in office — is because these procedures for making decisions can be justified as pursuing political equality.<sup>69</sup> For example, if a community has to decide between two options, then giving everyone one vote and going with the majority’s decision is a prominent solution that formally treats everyone as equals.<sup>70</sup> Just as important, these procedures can also be justified as giving later generations the same political equality as earlier generations to reimagine and reevaluate how institutions can allow everyone to flourish. In the words of the philosopher Roberto Unger: “Democracy is also about the permanent creation of the new.”<sup>71</sup>

It is important here to emphasize that democracy is not synonymous with majority rule or any other procedure. Rather, such procedures are

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the five faces of oppression as exploitation, marginalization, powerlessness, cultural imperialism, and violence).

<sup>65</sup> ACHEN & BARTELS, *supra* note 29, at 325 (“[M]ore effective democracy would require a greater degree of *economic and social equality*.”); Anderson, *supra* note 1, at 314; *see also* PRZEWORSKI, *supra* note 6, at 126 (“Economic inequality generates political inequality, political inequality reproduces economic inequality: getting out of this vicious circle is difficult.”).

<sup>66</sup> GRAEBER, *supra* note 1, at 183–84.

<sup>67</sup> *See* MARINA SITRIN & DARIO AZZELLINI, THEY CAN’T REPRESENT US! 46–51 (2014) (discussing the changing conception of democracy since the 1980s); *see, e.g.*, CARPENTER, *supra* note 42, at 24–25.

<sup>68</sup> *See* David Trend, *Democracy’s Crisis of Meaning*, in RADICAL DEMOCRACY: IDENTITY, CITIZENSHIP, AND THE STATE 7, 9–11 (David Trend ed., 1996); Amartya Sen, *Democracy and Its Global Roots*, NEW REPUBLIC, Oct. 6, 2003, at 28, 30–31 (describing “an extensive history of the cultivation of tolerance, pluralism, and public deliberation,” *id.* at 30, in civilizations worldwide).

<sup>69</sup> CARTLEDGE, *supra* note 1, at 310; Thomas Christiano, *The Authority of Democracy*, 12 J. POL. PHIL. 266, 275–77 (2004); *see, e.g.*, GANZ, *supra* note 12, at 184–87; Urbinati, *supra* note 52, at 617.

<sup>70</sup> *See* Albert Weale, *Three Types of Majority Rule*, in RETHINKING DEMOCRACY 62, 65 (Andrew Gamble & Tony Wright eds., 2019).

<sup>71</sup> ROBERTO MANGABEIRA UNGER, THE LEFT ALTERNATIVE 156 (2009); *see also* ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 79 (1991) (“The essential feature of democracy is that nothing is decided definitively.”).

democratic only to the extent that they pursue political equality.<sup>72</sup> To complicate the previous example, majoritarian elections without a universal franchise, power sharing, or attempts at fostering consensus can create dominating hierarchies between permanent winners and losers.<sup>73</sup> By the same token, the mere existence of hierarchies does not alone make a community undemocratic.<sup>74</sup> Hierarchies built on reciprocity and mutual consultation — like the selection of a discussion facilitator — can provide essential structure for making decisions while pursuing political equality.<sup>75</sup>

Classical Athens illustrates what the pursuit of political equality can look like.<sup>76</sup> Rejecting aristocratic hierarchies of assets and monarchical hierarchies of inheritance, the citizens of democratic Athens argued that they all were equally qualified to exercise power.<sup>77</sup> Rather than hold elections to select all representatives on the basis of their qualifications, the Athenians filled most positions by sortition, or lottery.<sup>78</sup> To further reduce the threat of an asset-based hierarchy, the Athenians typically paid poor citizens to participate in government.<sup>79</sup> To neutralize the development of hierarchies of inheritance, the Athenians also imposed term limits that encouraged citizens to switch places as often as possible — serving as a juror one year or as a legislator the next.<sup>80</sup> When combined with the practice of majority rule, these procedures of sortition, remuneration, and rotation in office attempted to give each citizen an equal chance to participate in making and applying the law.<sup>81</sup>

Yet just because it called itself a democracy didn't mean that Athens actually achieved political equality. Even as Athenian citizens treated each other as political equals, they sat as a group atop a social hierarchy

<sup>72</sup> See CORNEL WEST, *DEMOCRACY MATTERS* 69 (2004) (“In this sense, democracy is more a verb than a noun — it is more a dynamic striving and collective movement than a static order or stationary status quo.”).

<sup>73</sup> See GRAEBER, *supra* note 1, at 210–15; LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 1–6 (1994).

<sup>74</sup> See Allen, *supra* note 32, at 38.

<sup>75</sup> See GRAEBER, *supra* note 1, at 221; Jo Freeman, *The Tyranny of Structurelessness*, 17 *BERKELEY J. SOCIO.* 151, 152–53 (1972) (describing the inevitability of hierarchies even in egalitarian spaces).

<sup>76</sup> See generally CARTLEDGE, *supra* note 1, at 112–22 (describing Athenian democracy in practice circa 450–335 B.C.E.).

<sup>77</sup> See sources cited *supra* note 53.

<sup>78</sup> See CARTLEDGE, *supra* note 1, at 86–87, 116–21; HANSEN, *supra* note 53, at 230–31, 236–37.

<sup>79</sup> See CARTLEDGE, *supra* note 1, at 117–18, 169–70; HANSEN, *supra* note 53, at 54, 131, 240–42.

<sup>80</sup> See CARTLEDGE, *supra* note 1, at 110–11; HANSEN, *supra* note 53, at 313–14.

<sup>81</sup> See HANSEN, *supra* note 53, at 81–84; DAVID VAN REYBROUCK, *AGAINST ELECTIONS: THE CASE FOR DEMOCRACY* 59–62 (Liz Waters trans., Seven Stories Press 2018).

from which they enslaved noncitizens, disenfranchised women, and established an overseas empire.<sup>82</sup> Similar hierarchies have plagued other self-described democracies founded on an ideal of political equality, including the United States.<sup>83</sup> The authors of the Declaration of Independence were no democrats.<sup>84</sup> Most of them enslaved Black people and preferred rule by a “natural aristocracy” of property-owning White men.<sup>85</sup> The governments they established after independence reflected their aristocratic preferences. To locate the *best* rulers, they provided for competitive elections of representatives by a restricted franchise.<sup>86</sup> And to ensure that “democratic licentiousness” would not persuade these representatives to disrupt existing hierarchies of wealth and race by taxing slaveowners or enacting debt-relief laws, they entrenched these hierarchies with difficult-to-amend constitutional obstacles, like the Senate and Electoral College.<sup>87</sup>

In other words, where political equality ends, so does democratic decisionmaking. To the extent a self-described constitutional democracy defends dominating social hierarchies, it is not acting democratically. Instead, it is vulnerable to traditional arguments for why democracy is superior to monarchy and aristocracy.

These arguments are powerful. Since 1776, advocates of democracy have argued for the capacity and moral entitlement of all people to make political judgments — rejecting Plato’s argument that the ship of state belongs in the hands of expert guardians.<sup>88</sup> As Moses Finley wrote: “When I charter a vessel or buy passage on one, I leave it to the captain, the expert, to navigate it — but *I* decide where I want to go, not the captain.”<sup>89</sup> These advocates argue that the collective supply of knowledge in a community is improved by the contributions of everyone, not just the wisest or the best educated.<sup>90</sup> As H el ene Landemore

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<sup>82</sup> See CARTLEDGE, *supra* note 1, at 137–39; HANSEN, *supra* note 53, at 62; ADRIAAN LANNI, *LAW AND ORDER IN ANCIENT ATHENS* 7–10 (2016).

<sup>83</sup> See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 96–97 (2010); TAYLOR, *supra* note 28, at 21–22.

<sup>84</sup> See Aziz Rana, *It Would Be Great if the United States Were Actually a Democracy*, JACOBIN (Feb. 16, 2021), <https://www.jacobinmag.com/2021/02/us-constitution-interview-aziz-rana> [https://perma.cc/3PVY-M8K8].

<sup>85</sup> See VAN REYBROUCK, *supra* note 81, at 82–87.

<sup>86</sup> See GRAEBER, *supra* note 1, at 154–64.

<sup>87</sup> WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 5–10 (2007); see MICHAEL J. KLARMAN, *THE FRAMERS’ COUP* 301 (2016) (describing ways in which the Constitution protected slavery).

<sup>88</sup> See, e.g., DAHL, *supra* note 1, at 69–73; Allen, *supra* note 32, at 39.

<sup>89</sup> M. I. FINLEY, *ASPECTS OF ANTIQUITY* 88 (1968).

<sup>90</sup> See, e.g., Allen, *supra* note 32, at 39.

writes, the knowledge required to make a modern ship function “is distributed across more people than just the leaders.”<sup>91</sup> These advocates argue against the profound lack of freedom someone experiences when they’re subject to the domination of a superior in a social hierarchy — even if that superior acts humanely.<sup>92</sup> As Frederick Douglass said of disenfranchised Black people before the Civil War: “In the Northern states, we are not slaves to individuals, not personal slaves, yet in many respects we are the slaves of the community.”<sup>93</sup> They argue that only relationships characterized by reciprocity can secure the conditions in which no one dominates anyone else.<sup>94</sup> As Danielle Allen writes: “Justice in human relationships requires the kind of equality . . . in which when one person does injury to another, the other person can push back and achieve redress so that there can be a balancing of agency in their relations.”<sup>95</sup> And they argue that such relationships are themselves secure only when everyone can participate equally in creating their community together.<sup>96</sup> As W.E.B. Du Bois wrote: “[N]o social class [is] so good, so true, and so disinterested as to be trusted wholly with the political destiny of its neighbors; . . . it is only by arming every hand with a ballot, — with the right to have a voice in the policy of the state, — that the greatest good to the greatest number [can] be attained.”<sup>97</sup>

To observe that the United States has become more democratic since its founding is to observe that these arguments have, historically, been somewhat successful. In forcefully arguing that “all men are created equal,” the authors of the United States’s founding documents made a persuasive case for political equality over “aristocracy, oligarchy, or monarchy.”<sup>98</sup> Future democrats seized on this argument, reasonably claiming that democracy was a founding ideal of the United States despite the country’s perpetuation of slavery and conquest.<sup>99</sup> Since independence, as advocates of democracy have campaigned to eliminate

<sup>91</sup> HÉLÈNE LANDEMORE, *DEMOCRATIC REASON* 21 n.19 (2013); see also DEWEY, *supra* note 26, at 223–24, 233; DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY* 8 (2008); HÉLÈNE LANDEMORE, *OPEN DEMOCRACY* 5–7 (2020).

<sup>92</sup> See, e.g., Allen, *supra* note 32, at 38.

<sup>93</sup> FREDERICK DOUGLASS, *An Address to the Colored People of the United States* (Sept. 29, 1848), reprinted in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* 117, 119 (Philip S. Foner ed., Lawrence Hill Books 1999) (1950); see Melvin Rogers, *Race, Domination, and Republicanism*, in *DIFFERENCE WITHOUT DOMINATION*, *supra* note 32, at 59, 79.

<sup>94</sup> See, e.g., Allen, *supra* note 32, at 41–42.

<sup>95</sup> *Id.* at 41.

<sup>96</sup> See, e.g., *id.* at 42.

<sup>97</sup> W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 173 (3d ed. 1903).

<sup>98</sup> JAMES MADISON, *Letter on Majority Governments* (1833), reprinted in 9 *THE WRITINGS OF JAMES MADISON* 520, 526 (Gaillard Hunt ed., 1910); see ALLEN, *supra* note 3, at 183–88.

<sup>99</sup> See, e.g., CARPENTER, *supra* note 42, at 65–66, 468–70; FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro* (July 5, 1852), reprinted in *FREDERICK DOUGLASS:*

America's restrictions on the franchise, its racial caste system, and other hierarchies of assets and inheritance, they have, by definition, campaigned to expand political equality.

## II. WHAT IS ANTIDEMOCRACY?

Just as Aristotle feared that Athenian democracy would inevitably lead to rule by the poor, modern defenders of social hierarchy have historically resisted the expansion of political equality on the ground that popular majorities will use their power to tyrannize political minorities — particularly the minority of the population that owns more property than anyone else. This protection of property-based social hierarchies can take the form of democratic attempts to reason with others. But it often relies on defenses that are themselves incompatible with political equality. I call these defenses *antidemocracy*. And in the United States, antidemocracy is everywhere.

To illustrate what antidemocracy looks like, consider a moment when the United States is at its most democratic: Election Day. There, indeed, is a limited form of political equality. All adults who are legally eligible to vote, who have registered to vote, who have successfully cast a lawful ballot, and whose ballots are actually counted are treated as political equals with other voters in their electoral district. Although American jurisdictions typically provide that a mere plurality of votes will decide a ballot question — allowing even a small minority of the total population to make the decision — there is a reasonable argument that all voters are still treated as equals when the final decision commands more support than any of its competitors.<sup>100</sup> Consistent with this political equality, government officials are typically responsive to the outcomes of American elections, including by leaving office.<sup>101</sup> Recent attempts by political minorities to bring about alternative outcomes through intrigue and violence — treating their own preferences as superior to those of a majority of voters — have usually been unsuccessful.<sup>102</sup>

The political equality on display on Election Day is worth celebrating. Extending the right to vote in federal, state, and local elections to poor people, Black people, women, Native Americans, people who can't read English, and other formerly disenfranchised groups required decades of organizing in favor of democracy.

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SELECTED SPEECHES AND WRITINGS, *supra* note 93, at 188, 204; KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 217 (2021); Rogers, *supra* note 93, at 71–72.

<sup>100</sup> See SCHUMPETER, *supra* note 36, at 273. *But see* GUINIER, *supra* note 73, at 1–6.

<sup>101</sup> See PRZEWORSKI, *supra* note 6, at 118 (calling this the “miracle of democracy”).

<sup>102</sup> See Christiano, *supra* note 69, at 276–77 (discussing the injustice of expressing the superiority of one's interests over others).

Yet it's also worth acknowledging how limited this democracy is. Every Election Day, there are still millions of people who are disenfranchised, including immigrants, children, incarcerated people, and unregistered people.<sup>103</sup> Millions more live in the many territories and parts of Indian Country that remain in a colonial relationship with Congress.<sup>104</sup> Among people eligible to vote in federal elections, access to the ballot is suppressed, gerrymandered, and distributed unequally to favor certain constituents.<sup>105</sup> And even universal ballot access wouldn't level the persistent hierarchies of assets and inheritance that give a few people extraordinary influence over both the electorate and the politicians who must raise upwards of \$18,000 per day to compete for reelection.<sup>106</sup>

These hierarchies are all reinforced by the legal structure of the U.S. Congress, which contains more “vetogates” to kill legislation — like the Senate, its committees, and its filibuster — than exist in any other industrialized country.<sup>107</sup> Each of these vetogates gives people who favor

<sup>103</sup> See LEAH GREENBERG & EZRA LEVIN, WE ARE INDIVISIBLE 280–84 (2019); LAURA WILLIAMSON & AMSHULA JAYARAM, DEMOS, UNIVERSAL VOTER REGISTRATION 2 (2020), <https://www.demos.org/sites/default/files/2020-12/Universal%20Voter%20Registration%20-%20Eliminating%20One%20of%20the%20Biggest%20Barriers%20to%20Voting.pdf> [https://perma.cc/D5ZK-PJRU].

<sup>104</sup> See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1737–38 (2021); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 558–60 (2021); see, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1800 (2019) (“Forcing colonized peoples to engage in our democratic process to avoid subordination only furthers the colonial project.”); Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65, 68 (2018) (“The United States cannot continue its state of denial by failing to accept that its relationship with its citizens who reside in Puerto Rico is an egregious violation of their civil rights. The democratic deficits inherent in this relationship cast doubt on its legitimacy . . .”).

<sup>105</sup> See *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [https://perma.cc/Q9R2-5PXA] (“Between January 1 and July 14, 2021, at least 18 states enacted 30 laws that restrict access to the vote.” (emphasis omitted)).

<sup>106</sup> J. Mijin Cha, *We the People: Voting Rights, Campaign Finance, and Election Reform*, in WE OWN THE FUTURE, *supra* note 24, at 107, 108–13 (describing the “[s]ubstantial research [that] reveals the outside influence that affluent and corporate interests have over policy decisions” because “the wealthy [are] far more likely to contact their elected representatives, donate to political campaigns, and vote,” *id.* at 108); see JANE MAYER, DARK MONEY 333–71 (2016); MCALEVEY, *supra* note 23, at 3–8 (“Income inequality is directly linked to political inequality.” *Id.* at 3).

<sup>107</sup> William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 756–60 (2015); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (manuscript at 25) (on file with the Harvard Law School Library) (quoting David Karol, *American Political Parties: Exceptional No More*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 208, 212 (Nathaniel Persily ed., 2015)).

the status quo more political power than people who favor new legislation.<sup>108</sup> These vetogates are reinforced by the fact that both houses of Congress, but particularly the Senate, are unrepresentative by population, giving people who live in less populous areas more political power than people who live elsewhere.<sup>109</sup> Partisan gerrymandering, the Electoral College, and the nation's exclusive reliance on single-member, first-past-the-post elections also give people who live in competitive areas more political power than people who live elsewhere.<sup>110</sup> State legislatures, meanwhile, provide little refuge from this national problem. Most of them contain identical vetogates and award similar political advantages to certain residents on the basis of their geography, assets, and inheritance.<sup>111</sup>

Even if all these issues could be resolved immediately — a daunting task — the primary source of antidemocracy in the United States looms on the horizon: judicial supremacy. That is, even if the national legislature suddenly became a perfect democracy, and even if its members unanimously joined broad majorities of the American people in agreeing that a law was both constitutional and badly needed, the law would not be enforceable if five justices on the Supreme Court disagreed.<sup>112</sup> Yet these judicial members of what Alexis de Tocqueville called “the American aristocracy” are unelected, unrepresentative, and unaccountable — sitting atop a hierarchy of assets based on their educational background and relationship to the governing elite.<sup>113</sup> And while the Supreme Court has the power to overrule any of its decisions by a majority vote, the rest of us can formally reverse its constitutional interpretations only by packing the Court, by disarming it, or by amending the most difficult-to-change national constitution of any self-described

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<sup>108</sup> See ADAM JENTLESON, *KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY* 4–21 (2021).

<sup>109</sup> See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 158–222 (1999); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 25–78 (2006).

<sup>110</sup> See LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP* 107–72 (2020); GREENBERG & LEVIN, *supra* note 103, at 247–80; PIVEN, *supra* note 47, at 2–7.

<sup>111</sup> See JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 184–86 (2019); Miriam Seifter, *Countermajoritarian Legislatures*, 122 COLUM. L. REV. (forthcoming 2022) (manuscript at 26–31) (on file with the Harvard Law School Library).

<sup>112</sup> See Nikolas Bowie, *Perspective, How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy> [<https://perma.cc/G2ZY-K6NF>].

<sup>113</sup> TOCQUEVILLE, *supra* note 5, at 185; see C. WRIGHT MILLS, *THE POWER ELITE* 278–79 (1956) (describing the leadership of the federal government, the military, and large corporations as a “power elite” cultivated from the same education, social, and economic backgrounds).

democracy in the world.<sup>114</sup> Because the Constitution is effectively inalterable, supporters of the status quo therefore sit atop a hierarchy of inheritance that allows generations from the eighteenth and nineteenth centuries to rule from the grave.<sup>115</sup>

These various forms of antidemocracy protect dominating social hierarchies, particularly those based on property. The most oppressive of these hierarchies are the ones that prohibit most of us from avoiding insecure access to housing, food, and healthcare unless we submit to the domination of an employer.<sup>116</sup> In the case of America's farmworkers, these hierarchies are additionally enforced by immigration laws and racial discrimination that have "worked to push Latinx and African American workers into an exploitative domestic migrant stream."<sup>117</sup> This compounding situation is the main reason why, in 2021, farmworkers in Oregon found themselves wearing diapers or picking grapes in deadly 104 degree heat for hours without a break.<sup>118</sup> Why some ten-year-olds in North Carolina routinely pick tobacco for multinational companies.<sup>119</sup> Why poultry workers in Alabama recently described a "climate of fear . . . where employees are fired for work-related injuries or even for seeking medical treatment from someone other than the company nurse or doctor."<sup>120</sup> And why strawberry trimmers at the Cedar Point Nursery in California walked out after complaining of low wages, unclean bathrooms, harassment, and intimidation.<sup>121</sup>

<sup>114</sup> STEVEN L. TAYLOR, MATTHEW S. SHUGART, AREND LIJPHART & BERNARD GROFMAN, *A DIFFERENT DEMOCRACY* 78–81 (2014).

<sup>115</sup> See LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 57–62 (2012) (calling a difficult-to-amend constitution "intergenerational imperialism," *id.* at 57).

<sup>116</sup> See Gourevitch, *supra* note 19, at 176–77 (defining this insecurity as "structural domination"); ASTRA TAYLOR, *REMAKE THE WORLD* 174–77 (2021).

<sup>117</sup> Emily Prifogle, *Rural Social Safety Nets for Migrant Farmworkers in Michigan, 1942–1971*, *LAW & SOC. INQUIRY, FIRST VIEW* 5–6 (2021), <https://doi.org/10.1017/lsi.2021.6> [<https://perma.cc/8R43-ZNDT>]; see LORI A. FLORES, *GROUNDWORKS FOR DREAMING: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE CALIFORNIA FARMWORKER MOVEMENT* 20–24, 38–39, 55, 164–65 (2016).

<sup>118</sup> Gourevitch, *supra* note 19, at 175; Kate Aronoff, *Work Really Sucks When It's Hot*, *NEW REPUBLIC* (July 1, 2021), <https://newrepublic.com/article/162896/pacific-northwest-heat-wave-workers> [<https://perma.cc/MM4H-HPG4>]; see also KRISTINA DAHL & RACHEL LICKER, *UNION OF CONCERNED SCIENTISTS, TOO HOT TO WORK: ASSESSING THE THREATS CLIMATE CHANGE POSES TO OUTDOOR WORKERS* 3 (2021), [https://www.ucsusa.org/sites/default/files/2021-09/Too-Hot-to-Work\\_9-7.pdf](https://www.ucsusa.org/sites/default/files/2021-09/Too-Hot-to-Work_9-7.pdf) [<https://perma.cc/X7QB-A6FM>] (observing that forty-eight states and the federal government have no enforceable laws to protect outdoor workers from deadly heat exposure).

<sup>119</sup> Ariel Ramchandani, *The Overlooked Children Working America's Tobacco Fields*, *THE ATLANTIC* (June 21, 2018), <https://www.theatlantic.com/family/archive/2018/06/child-labor-tobacco/562964> [<https://perma.cc/28AL-HF6R>].

<sup>120</sup> S. POVERTY L. CTR. & ALA. APPLESEED, *UNSAFE AT THESE SPEEDS: ALABAMA'S POULTRY INDUSTRY AND ITS DISPOSABLE WORKERS* 4 (2013).

<sup>121</sup> David Bacon, *The Real Target in the Supreme Court's "Cedar Point" Decision*, *THE NATION* (July 2, 2021), <https://www.thenation.com/article/activism/cedar-point-organizing-labor> [<https://>

The experience of the farmworkers who work at Cedar Point and other agricultural workplaces are extreme, but not unique. Like canaries in the coal mine, they are the most vulnerable members of a toxic atmosphere that harms everyone at the bottom of the typical workplace hierarchy.<sup>122</sup> A recent Supreme Court case, *Cedar Point v. Hassid*, illustrates how supporters of these hierarchies use antidemocracy to maintain them. Not only does the decision make it easier to suppress the expansion of democracy beyond its limited Election Day form, but the decision itself is also insulated from any democratic procedure.

### III. HOW DOES ANTIDEMOCRACY SUPPRESS DEMOCRACY?

#### A. *The Absence of Democracy in the Workplace*

If you're like most Americans, you probably spend most of your waking hours in a profoundly undemocratic place: work. Whether or not you work from home, you likely wake up each workday to sort yourself into a hierarchy in which you'll be subject to the domination of an employer.<sup>123</sup> This domination extends well beyond orders about how to carry on a specific task. Unless you have a very unusual protection — like the tenure of a law professor — an employer can legally discipline you for almost any reason at all.<sup>124</sup> As employment scholar Samuel Bagenstos observes:

“[O]n pain of being fired,” workers “can be commanded to pee or forbidden to pee”; can be “forbidden to wear what they want, say what they want (and at what decibel), and associate with whom they want”; and “can be fired for donating a kidney to their boss (fired by the same boss, that is), refusing to have their person or effects searched, calling the boss a ‘cheapskate’ in a personal letter, and more.” . . . [P]ractices like these demonstrate — and enact — social status hierarchies within the workplace.<sup>125</sup>

perma.cc/XAS5-C9QS]; Meagan Day, *The Supreme Court Just Dealt a Blow to Farmworkers — And All Other Workers, Too*, JACOBIN (July 3, 2021), <https://jacobinmag.com/2021/07/cedar-point-nursery-v-hassid-ufw-california-labor-relations-act-migrant-labor-farmworkers-agriculture> [<https://perma.cc/LR6P-97MP>].

<sup>122</sup> See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11–16, 150–56 (2002); Lani Guinier & Gerald Torres, Essay, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2803 (2014) (describing how the United Farm Workers also exemplifies how a social movement can redefine successful democratic action).

<sup>123</sup> See ANDERSON, *supra* note 18, at 48–54.

<sup>124</sup> *Id.*; Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 245 (2013).

<sup>125</sup> Bagenstos, *supra* note 124, at 245 (first quoting Chris Bertram, Corey Robin & Alex Gourevitch, *Let It Bleed: Libertarianism and the Workplace*, CROOKED TIMBER (July 1, 2012), <https://crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace> [<https://perma.cc/M5CY-W4YR>] (alteration in original); and then citing Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 591).

This form of employer “sovereignty” draws its strength from property law.<sup>126</sup> “The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it,” labor scholar Clyde W. Summers explained.<sup>127</sup> “That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.”<sup>128</sup> Bagenstos adds that the result of this property right “is to entrench a hierarchy within the workplace, in which a boss’s dominion over the worker goes beyond what simply serves the productive mission of the workplace and potentially extends to any aspect of the worker’s life.”<sup>129</sup>

Statutes enacted since the 1930s, and particularly since the 1960s, provide some limits on this property right. Racial and sexual harassment is illegal in most workplaces.<sup>130</sup> An employer is also not supposed to fire you for raising safety concerns, for trying to unionize, or for being elderly, Black, Muslim, or a lesbian.<sup>131</sup> But these limits are easily transgressed. For one thing, your employer can simply compel you to give up your right to sue them.<sup>132</sup> Even if you can afford the money, time, and stress it takes to enforce your legal rights, odds are the employer will simply treat any penalty as an acceptable cost of doing business.<sup>133</sup> Worst of all, these limits don’t even apply everywhere. When legislatures first enacted many of them in the early twentieth century, they often excluded categories of workers who were predominantly women and people of color, like farmworkers.<sup>134</sup>

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<sup>126</sup> See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1927) (“[W]e must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings.”).

<sup>127</sup> Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

<sup>128</sup> *Id.*

<sup>129</sup> Bagenstos, *supra* note 124, at 246.

<sup>130</sup> ANDERSON, *supra* note 18, at 68–69.

<sup>131</sup> See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1658–61 (1996); Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, But a New Law in New York Could Change That*, BLOOMBERG BUSINESSWEEK (June 21, 2021, 4:00 AM), <https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire> [<https://perma.cc/RS9M-U3F2>].

<sup>132</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

<sup>133</sup> See ANDERSON, *supra* note 18, at 40 (discussing the chilling effect of litigation costs on workers).

<sup>134</sup> See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 29 (2007); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 59 (2005); Ellen Casper Flood, Book Section, *A Social History of Farm Labor in California with Special Emphasis on the United Farm Workers Union and California Rural Legal Assistance*, 15 CAL. LEGAL HIST. 293, 326 (2020); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104–18 (2011).

For over a century, observers of the American workplace have described it as “an awful tyranny.”<sup>135</sup> In the contemporary words of the philosopher Elizabeth Anderson: “The government of workers is dictatorial under laissez-faire capitalism. Its core principle is that private property in capital confers the right to govern employees by fiat. Nonexecutive workers have no voice in the governance of the firm, but must follow their bosses’ orders, on pain of demotion or discharge.”<sup>136</sup> This is true of not only agricultural workplaces but also high-tech workplaces that ingratiate workers with ping-pong tables and smoothies.<sup>137</sup> Employers generally sit atop a hierarchy of assets and inheritance from which they have the unfettered discretion to control workers’ choices without workers being able to reciprocate or even speak up about mistreatment absent “the ‘bowing and scraping, fawning and toadying’ that is the *bête noire* of social equality.”<sup>138</sup>

Given Americans’ commitment to democracy, few would likely want to *live* in such a dictatorship, even one that made ping-pong available for all. Yet many must *work* in such a dictatorship every day. The United States is exceptional in this respect. As the scholars Kate Andrias and Alexander Hertel-Fernandez observe: “In no other rich democracy do private-sector businesses have as much latitude to dismiss workers without justification as in the US.”<sup>139</sup>

Because American workers must agree to work for a particular employer, some observers argue that the American workplace is not a dictatorship at all, but really a *consumers’ democracy*.<sup>140</sup> On this view, no hierarchy exists between workers and employers that the workers did not voluntarily consent to when they signed an employment contract.<sup>141</sup> More importantly, if an employer attempts to abuse their position atop the hierarchy, then any worker can reciprocate by “voting with their

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<sup>135</sup> WILLIAM D. HAYWOOD & FRANK BOHN, *INDUSTRIAL SOCIALISM* 37 (1911); see also ANDERSON, *supra* note 18, at 38–39; Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2030 (2019) (book review).

<sup>136</sup> Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, 31 SOC. PHIL. & POL’Y 48, 59 (2015).

<sup>137</sup> SARAH JAFFE, *WORK WON’T LOVE YOU BACK: HOW DEVOTION TO OUR JOBS KEEPS US EXPLOITED, EXHAUSTED, AND ALONE* 265–66 (2021).

<sup>138</sup> Bagenstos, *supra* note 124, at 245 (footnote omitted) (quoting MICHAEL WALZER, *SPHERES OF JUSTICE*, at xiii (1983)).

<sup>139</sup> KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., *ENDING AT-WILL EMPLOYMENT* 4 (2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform> [<https://perma.cc/FT5D-YSR9>].

<sup>140</sup> LUDWIG VON MISES, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* 442–444 (J. Kahane trans., Liberty Fund 2012) (1951).

<sup>141</sup> Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 963 (1984).

feet” and working somewhere else.<sup>142</sup> Because of this reciprocal bargaining power, consumer democrats consider workers and employers political equals, particularly when workers have choices about where to work.<sup>143</sup>

But it is a mistake to call an employment contract democratic simply because a worker can consent to enter or leave it.<sup>144</sup> As Anderson responds: “This is like saying that Mussolini was not a dictator, because Italians could emigrate. While emigration rights may give governors an interest in voluntarily restraining their power, such rights hardly dissolve it.”<sup>145</sup>

One flaw in the consumer democrat’s perspective is that the worker’s power to respond to an employer’s abuse is inherently asymmetrical. When a worker “votes with their feet,” they don’t remove their employer from their position atop the hierarchy. Instead, the result is precisely the same as getting punished: the worker loses their job, along with all their affective ties to their workplace. Yet it’s even worse than that for the worker because most states withhold unemployment insurance from people who quit their jobs.<sup>146</sup> “It is an odd kind of countervailing power that workers supposedly have to check their bosses’ power, when they typically suffer more from imposing it than they would suffer from the worst sanction bosses can impose on them,” Anderson writes.<sup>147</sup> “Threats, to be effective, need to be credible.”<sup>148</sup>

More generally, the consumer-democratic perspective also ignores the forms of structural domination that make “exit” an extremely unattractive option for most workers.<sup>149</sup> The United States has no programs

<sup>142</sup> See ILYA SOMIN, *FREE TO MOVE* 30 (2020); Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1349 (2020) (critically describing the theory).

<sup>143</sup> See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 65–66 (1990); cf. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956) (discussing a similar argument in the local-government setting).

<sup>144</sup> See Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 452–53 (2020); Bagenstos, *supra* note 124, at 244–45; 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, 235–37.

<sup>145</sup> ANDERSON, *supra* note 18, at 55.

<sup>146</sup> See Charisse Jones, *Ready to Quit Because You’re Scared of the Coronavirus? Some Things You Need to Know*, USA TODAY (June 8, 2020, 2:51 PM), <https://www.usatoday.com/story/money/2020/05/29/can-you-still-get-unemployment-if-you-quit-because-coronavirus/5258438002> [<https://perma.cc/W9XY-6HX8>].

<sup>147</sup> ANDERSON, *supra* note 18, at 56.

<sup>148</sup> *Id.*

<sup>149</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 21–29 (1970) (discussing the conditions in which “exit” is an effective strategy for achieving change); Marinescu & Posner, *supra* note 142, at 1358 (describing empirical evidence of “labor monopsony” in which employers harm workers by taking advantage of the real-life difficulties workers face in switching jobs); *supra* note 116 and accompanying text.

that provide people with enough food, housing, healthcare, debt relief, and childcare such that everyone could live comfortably without seeking a wage.<sup>150</sup> The United States also doesn't guarantee employment with any democratically accountable employers, such as the government itself.<sup>151</sup> So unless you've already made or inherited enough money that you don't need to work, there is simply no way to maintain access to the necessities of life except by finding a job.<sup>152</sup> This creates a social hierarchy: most people are compelled to submit themselves to others who already have more assets than they do.<sup>153</sup> And this hierarchy is reinforced by persistent racial hierarchies that have withheld wealth and credit from people of color, gender hierarchies that have withheld compensation for reproductive labor and elder care, status hierarchies that have withheld economic security from immigrants and formerly incarcerated people, and other social hierarchies that make it difficult for most people to protect themselves from domination.<sup>154</sup> In this respect, having a choice about which employer will dominate you does not mean you have a choice about whether to be dominated in the first place.<sup>155</sup>

This antidemocratic hierarchy also explains why it is a mistake to call the typical American workplace a *corporate democracy*. Advocates of corporate democracy observe that managers in the typical business corporation are not completely unaccountable.<sup>156</sup> Rather, they usually report to a board of directors, which in turn is usually elected by invest-

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<sup>150</sup> See DAVID GRAEBER, DEBT 350–53 (10th Anniversary ed. 2021) (“It is the secret scandal of capitalism that at no point has it been organized primarily around free labor.” *Id.* at 350.); Jennifer Klein, *The Politics of Economic Security: Employee Benefits and the Privatization of New Deal Liberalism*, 16 J. POL’Y HIST. 34, 36 (2004) (discussing the history of employer efforts to defeat the growth of social welfare benefits by providing “an increasingly insular, private, firm-centered definition of security”).

<sup>151</sup> KATE ARONOFF, OVERHEATED 283–96 (2021) (discussing the history of efforts to defeat “a full employment economy, where the federal government was willing to serve as an employer of last resort,” *id.* at 283).

<sup>152</sup> Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 472 (1923); see also Bagenstos, *supra* note 144, at 423 (discussing Hale’s conclusions).

<sup>153</sup> Gourevitch, *supra* note 19, at 176–77; see Anderson, *supra* note 136, at 60.

<sup>154</sup> See TAYLOR, *supra* note 116, at 206–09 (“Every bridge, every factory, every Silicon Valley app is merely the visible tip of a hidden iceberg of reproductive labor.” *Id.* at 208.); KARLA CORNEJO VILLAVICENCIO, THE UNDOCUMENTED AMERICANS 9–28 (2020); KEEANGA-YAMAHTA TAYLOR, RACE FOR PROFIT 3–23 (2019); KATHI WEEKS, THE PROBLEM WITH WORK 8–11 (2011); GABRIEL WINANT, THE NEXT SHIFT 16–19 (2021); Andrea Flynn, Susan Holmberg, Dorian Warren & Felicia Wong, *Toward a Third Reconstruction, in WE OWN THE FUTURE*, *supra* note 24, at 46, 46, 58–62.

<sup>155</sup> ANDERSON, *supra* note 18, at 61.

<sup>156</sup> See, e.g., Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 716 (2007) (discussing the argument that “shareholders dissatisfied with incumbent directors can “vote with their feet” by selling the company’s stock”); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1777 (2006).

ors. Because workers often own stakes in corporations through pension plans and other institutionalized forms of investing, workers can, in theory, influence board decisions indirectly.<sup>157</sup>

But even though corporate democracy remains a dominant theory of the corporation, it has long been seen as a “myth” or a “fairy tale” in practice.<sup>158</sup> For over a century, scholars have observed that corporate managers generally operate with little functional oversight from less-interested boards, which in turn typically structure shareholder elections to practically guarantee their own reelection.<sup>159</sup> Moreover, the very theory of corporate democracy is fundamentally aristocratic. It suggests that voters should have a say in a community only to the extent they own property in the community — a suggestion Americans rejected in other governments when they abolished property qualifications in favor of one person, one vote.<sup>160</sup>

### B. Democratizing the Workplace

Since the nineteenth century, waves of organizers have attempted to remedy the oppression most American workers face by democratizing the workplace.<sup>161</sup> In the early 1900s, for example, the Industrial Workers of the World formed for the purpose of replacing dominating workplace hierarchies with *industrial democracy*, or “the democratic control of industry by labor and for labor, instead of private capitalists, as at present.”<sup>162</sup> The Industrial Workers sought to achieve this aim by

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<sup>157</sup> See John G. Matsusaka, Oguzhan Ozbas & Irene Yi, *Opportunistic Proposals by Union Shareholders*, 32 REV. FIN. STUD. 3215, 3222–24 (2019); see, e.g., Matt Phillips, *Exxon’s Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html> [https://perma.cc/DQ8E-LLNG].

<sup>158</sup> Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 967–68, 987 (2018); see GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION 43–44 (2020); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 856–61 (2005).

<sup>159</sup> See Robert J. Klein, Note, *The Case for Heightened Scrutiny in Defense of the Shareholders’ Franchise Right*, 44 STAN. L. REV. 129, 130 (1991).

<sup>160</sup> See Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 907 (2005).

<sup>161</sup> See generally ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 1–8 (2015); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925, at 370–410 (1987); Bowie, *supra* note 135, at 2029–33.

<sup>162</sup> JUSTUS EBERT, THE TRIAL OF A NEW SOCIETY 34 (1913).

encouraging all workers within an industry — of all races, sexes, nationalities, and occupations — to collectively go on strike.<sup>163</sup> They recognized that if workers could prevent employers from making money without their cooperation, then they could force employers to respect workers as equals entitled to share in making decisions.<sup>164</sup> Accordingly, the Industrial Workers demanded not only improvements in working conditions but also worker control over the industries themselves.<sup>165</sup>

For a short period, it appeared that the Industrial Workers might succeed everywhere — including in California agribusinesses.<sup>166</sup> Then as now, most farmworkers were disenfranchised people of color who were structurally dominated into working for poverty wages in transitory and oppressive jobs.<sup>167</sup> Farmworkers have long been excluded not only from many federal labor, wage, and overtime laws but also from state unemployment insurance and workers' compensation guarantees.<sup>168</sup> And immigrant farmworkers face the additional threat of being deported — regardless of whether they're documented — because federal immigration law has long allowed migrant farmworkers to remain in the country only with the consent of specific employers.<sup>169</sup>

Nevertheless, organizers affiliated with the Industrial Workers recognized that California's major agricultural employers couldn't make money unless they could coordinate large numbers of seasonal workers to cultivate crops intensively at specific times of year in specific places.<sup>170</sup> By organizing workers to act collectively, they could stop the crops from being shipped before they spoiled — forcing employers to the bargaining table.<sup>171</sup> Applying this strategy alongside independent organizers from local Japanese, Filipino, and Mexican American communities, the Industrial Workers won some of the first contracts in California farm labor history.<sup>172</sup>

But agricultural employers recognized their own vulnerability. To frighten workers from even considering whether to form a union, agricultural employers typically beat, intimidated, and replaced workers

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<sup>163</sup> See Bowie, *supra* note 135, at 2031–33; see, e.g., WILLIAM D. HAYWOOD, *THE GENERAL STRIKE* 2–3, 9–11 (1911); Ray Stannard Baker, *The Revolutionary Strike: A New Form of Industrial Struggle as Exemplified at Lawrence, Massachusetts*, *AM. MAG.*, May–Nov. 1912, at 19, 19–20, 30B.

<sup>164</sup> See Bowie, *supra* note 135, at 2031.

<sup>165</sup> See *id.*

<sup>166</sup> See GANZ, *supra* note 12, at 5.

<sup>167</sup> See *id.*; TRISH HERNANDEZ & SUSAN GABBARD, *JBS INT'L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016*, at 2–5 (2018) (discussing farmworkers today); MARTIN, *supra* note 11, at 2–6.

<sup>168</sup> See Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at 2–3, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

<sup>169</sup> See *id.* at 3–4.

<sup>170</sup> See GANZ, *supra* note 12, at 5.

<sup>171</sup> See *id.* at 5, 26.

<sup>172</sup> See *id.* at 25–44; FLORES, *supra* note 117, at 32.

whom they suspected of being sympathetic to unionization.<sup>173</sup> Hostile judges issued so many orders banning union activity that one of the leaders of the Industrial Workers bragged: “I have been plastered up with injunctions until I do not need a suit of clothes.”<sup>174</sup> Even when legislatures banned these sorts of injunctions, courts either evaded the anti-injunction laws or declared them unconstitutional.<sup>175</sup> And with their allies in the courts supporting their efforts to physically isolate workers from union organizers, employers housed workers in squalid, inhumane conditions on their property so that they could arrest and prosecute union organizers for trespassing.<sup>176</sup> As World War I began and the federal government treated agricultural strikes as a threat to national security, the government assisted employers in persecuting and deporting the Industrial Workers’ leadership.<sup>177</sup> Even as the national consciousness empathized with the plight of White farmworkers in Dorothea Lange’s *Migrant Mother* or John Steinbeck’s *Grapes of Wrath*, legalized violence and an exploitative immigration regime kept California’s farms unorganized through the 1950s.<sup>178</sup>

In the meantime, the Industrial Workers’ call for industrial democracy was carried on by new waves of radical organizing alongside more moderate advocates, including Louis Brandeis and Robert Wagner.<sup>179</sup> Brandeis and Wagner sought to codify the Industrial Workers’ strategy

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<sup>173</sup> See GANZ, *supra* note 12, at 35–41.

<sup>174</sup> WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 143 (1991) (quoting COMM’N ON INDUS. RELS., 11 INDUSTRIAL RELATIONS FINAL REPORT AND TESTIMONY, S. DOC. NO. 415-64, at 10,580 (1916) (statement of William D. Haywood)); see, e.g., BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., LABOR UNIONISM IN AMERICAN AGRICULTURE 65 (1945) (describing additional legal action against the Industrial Workers).

<sup>175</sup> See FORBATH, *supra* note 174, at 151–52.

<sup>176</sup> MARTIN, *supra* note 11, at 101; see, e.g., FLORES, *supra* note 117, at 49–55 (describing the neglect and dehumanization of labor camps); GANZ, *supra* note 12, at 71 (discussing how this tactic was used in the 1950s); Prifogle, *supra* note 117, at 7 (describing how physical isolation contributes to migrant workers’ “exploitation and exclusion”).

<sup>177</sup> See PETER CARLSON, ROUGHNECK: THE LIFE AND TIMES OF BIG BILL HAYWOOD 255–330 (1983); SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES 23–71 (1990); Patrick Renshaw, *The IWW and the Red Scare 1917–24*, J. CONTEMP. HIST., Oct. 1968, at 63, 65–69.

<sup>178</sup> GANZ, *supra* note 12, at 35–41, 51–52; PAWEL, *supra* note 14, at 102; see FLORES, *supra* note 117, at 52–55, 129–31 (describing how the federal Bracero Program was used to break unionization efforts by providing employers with “a seemingly endless army of cheap, unorganized workers,” *id.* at 52, who were disenfranchised, barred from joining unions, and deportable if they complained of inhumane treatment).

<sup>179</sup> See NELSON LICHTENSTEIN, THE STATE OF THE UNION 44–46 (rev. ed. 2013); DAVID MONTGOMERY, WORKERS’ CONTROL IN AMERICA 105–08 (1979); Bowie, *supra* note 135, at 2036–39; David Montgomery, *Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870–1925*, in INDUSTRIAL DEMOCRACY IN AMERICA 20, 37, 41–42 (Nelson Lichtenstein & Howell John Harris eds., 1993); Clyde W. Summers, *Industrial Democracy: America’s Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 32–34 (1979).

of using strikes and collective bargaining to increase workers' power to reciprocate against employer abuses.<sup>180</sup> Accordingly, the National Labor Relations Act of 1935<sup>181</sup> imposed penalties on employers who interfered with the right of workers to organize themselves, bargain collectively, and strike.<sup>182</sup> But the Act's version of industrial democracy was modest. For one thing, it exempted farmworkers.<sup>183</sup> And even in the industries where the Act did apply, the Supreme Court interpreted the Act with the expectation that the role of unions was to serve as focus groups for workers, not "to foreshadow the organizational form of a democratic workplace."<sup>184</sup> Adopting a "narrowly restricted vision of legitimate union activity,"<sup>185</sup> the Court principally enforced the Act to protect the right of unions to "bargain" over limited issues like "wages, hours of employment, or other conditions of employment."<sup>186</sup> And after a major legislative amendment in 1947 made it easier for employers to resist unionization, the Act provided that a union would exist only after an election in which employers could campaign against unionization by legal methods (such as propaganda, bribery, and captive audience meetings) and minimally sanctioned illegal methods (such as intimidation, firing workers, and fraud).<sup>187</sup>

<sup>180</sup> See MONTGOMERY, *supra* note 179, at 164–65; Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 896–97, 902–04 (1994); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1482–84 (1993); Bowie, *supra* note 135, at 2038–39; Summers, *supra* note 179, at 33–34.

<sup>181</sup> 29 U.S.C. §§ 151–169.

<sup>182</sup> See *id.* § 158.

<sup>183</sup> See sources cited *supra* note 134.

<sup>184</sup> Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 321 (1978); see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 230 (1993); Cynthia Estlund, *Citizens of the Corporation? Workplace Democracy in a Post-union Era*, in CORPORATIONS AND CITIZENSHIP 165, 167–69 (Greg Urban ed., 2014); Gourevitch, *supra* note 19, at 177–78.

<sup>185</sup> Klare, *supra* note 184, at 321; see *id.* at 318–21.

<sup>186</sup> 29 U.S.C. §§ 157, 159; see LICHTENSTEIN, *supra* note 179, at 122–25; Klare, *supra* note 184, at 318–21. For discussions of the Act's deficiencies — particularly with respect to its failure to protect strikers — see CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 317–28 (1985); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 25–28 (2016); and Benjamin I. Sachs, Essay, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 193 (2013).

<sup>187</sup> KATE BRONFENBRENNER, ECON. POL'Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 24–25 (2009), <https://files.epi.org/page/-/pdf/bp235.pdf> [<https://perma.cc/Y6PW-JSU3>] (“[T]he overwhelming majority of U.S. employers are willing to use a broad arsenal of legal and illegal tactics to interfere with the rights of workers . . .” *Id.* at 24.); WEILER, *supra* note 184, at 39–40 (“The one fact about which there is little dispute . . . is that the current legal framework now generates very few new union members.” *Id.* at 40.); see GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE

Advocates of unionization nevertheless won enough strikes in the four decades after 1935 to transform unions into a major source of political power at the state and national levels.<sup>188</sup> At the peak of union density in 1954, unions existed in a third of private-sector workplaces, where they wielded the threat of further strikes to hold leverage over not only employers but also politicians.<sup>189</sup> As a result, even though the number of unionized workers soon entered a decades-long freefall from which it has still not recovered,<sup>190</sup> unions remained able to elect political allies and financially support complementary social movements for democracy and civil rights.<sup>191</sup> Under pressure from organized labor, politicians at the state and national levels began enacting a new wave of antidiscrimination laws, antiretaliation laws, and other workplace laws that protected unionized and nonunionized workers alike.<sup>192</sup>

Unions covered under the Act also financially supported campaigns to organize farmworkers — whose conditions were regarded by the United Auto Workers' leadership as “the one remaining blot on American democracy in an economy of abundance.”<sup>193</sup> By the 1960s, organizers affiliated with the American Federation of Labor and Congress of Industrial Organizations, the Teamsters, and smaller organizations of Filipino and Mexican American workers were all active among California farmworkers.<sup>194</sup> The most successful of these organizers was Cesar Chavez, an occasional farmworker who began his organizing career working with Dolores Huerta and others to register Mexican Americans to vote.<sup>195</sup> As Black residents of Montgomery,

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BARGAINING 4–8 (2020), <https://files.epi.org/pdf/202305.pdf> [<https://perma.cc/JW76-H6LT>]; CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDAN LAFER & LOLA LOUSTANAU, ECON. POL'Y INST., UNLAWFUL: U.S. EMPLOYERS ARE CHARGED WITH VIOLATING FEDERAL LAW IN 41.5% OF ALL UNION ELECTION CAMPAIGNS 2–4 (2019); David Dayen, *Anatomy of an Anti-union Meeting*, AM. PROSPECT (Aug. 2, 2021), <https://prospect.org/labor/anatomy-of-an-anti-union-meeting> [<https://perma.cc/XN2W-J6Q7>].

<sup>188</sup> LICHTENSTEIN, *supra* note 179, at 136–37, 146; *see also* NELSON LICHTENSTEIN, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT 425 (1995); DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY 49–52, 65 (2015); Vernon Coleman, *Labor Power and Social Equality: Union Politics in a Changing Economy*, 103 POL. SCI. Q. 687, 689–90 (1988); Gupta, Lerner & McCartin, *supra* note 24, at 153. For additional resources on the labor movement, *see* RALPH E. MCCOY, HISTORY OF LABOR AND UNIONISM IN THE UNITED STATES (1953).

<sup>189</sup> *See* Gupta, Lerner & McCartin, *supra* note 24, at 152–53.

<sup>190</sup> *See id.* at 153.

<sup>191</sup> *See, e.g.*, LICHTENSTEIN, *supra* note 179, at 191–94; LICHTENSTEIN, *supra* note 188, at 409–11, 424–25; William P. Jones, *The Unknown Origins of the March on Washington: Civil Rights Politics and the Black Working Class*, LABOR, Fall 2010, at 33, 34–35, 47–48.

<sup>192</sup> *See, e.g.*, TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 884–86 (1988) (discussing labor leader Walter Reuther's support for civil rights legislation).

<sup>193</sup> PAWEL, *supra* note 14, at 68; *see* GANZ, *supra* note 12, at 143–46.

<sup>194</sup> *See* GANZ, *supra* note 12, at 61–92.

<sup>195</sup> *Id.* at 58; *see* PAWEL, *supra* note 14, at 22–23, 32–39.

Alabama, demonstrated the power of boycotts and social movements to promote democracy, Chavez and Huerta transitioned into organizing farmworkers after recognizing that voting alone was far less effective at restraining the daily domination of employers than were forms of economic leverage that required organizing entire communities.<sup>196</sup> As Huerta observed, “organized labor is a necessary part of democracy” because it is “the only way to have a fair distribution of the wealth.”<sup>197</sup>

Chavez and Huerta’s National Farm Workers Association not only organized farmworkers in California to strike on a multiracial basis but also organized church leaders, college students, and urban residents across the country to boycott food grown by employers who hired strike-breakers.<sup>198</sup> This organizing took place on what historian Lori Flores calls the “extraordinary groundwork” laid by “a vibrant movement [that] had already blossomed”: a movement led by Mexican Americans and immigrant Mexicans who “came to realize that it was only by acting together that they could effect change in their laboring lives.”<sup>199</sup> With marches, rallies, and other tactics borrowed from the Black freedom movement of the same era, the NFWA transformed the call for workplace democracy into *La Causa*, a “farm worker movement.”<sup>200</sup> This experimental “cross between being a movement and being a union” dramatically increased the leverage of farmworkers relative to their employers.<sup>201</sup> By 1966, the NFWA translated the support of urban boycotters into so much economic power that it could compel the chief executives of national corporations to recognize farmworkers as equals in determining working conditions for the first time.<sup>202</sup>

Ironically, when California employers looked for new ways to defeat these tactics, they called for union-recognition elections that were typical of nonagricultural industries.<sup>203</sup> These employers recognized that the NFWA’s boycotts turned on public opinion, and that people far removed

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<sup>196</sup> See GANZ, *supra* note 12, at 84–85; PAWEL, *supra* note 14, at 58–59, 69–90; Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California*, 32 POL. & SOC’Y 291, 294 (2004); cf. LAUREN ARAIZA, TO MARCH FOR OTHERS: THE BLACK FREEDOM STRUGGLE AND THE UNITED FARM WORKERS 12, 28–29 (2014) (discussing the coalition and complex interrelationships between the California farmworkers and the Student Nonviolent Coordinating Committee, each of which “challenged America’s economic caste system, which it saw as antithetical to a democratic society,” *id.* at 12).

<sup>197</sup> A DOLORES HUERTA READER 156 (Mario T. García ed., 2008).

<sup>198</sup> See GANZ, *supra* note 12, at 6, 141–42, 145, 163–66; Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 12–13 (2005); Wells & Villarejo, *supra* note 196, at 304.

<sup>199</sup> FLORES, *supra* note 117, at 166–67.

<sup>200</sup> GANZ, *supra* note 12, at 105; see FLORES, *supra* note 117, at 168–69.

<sup>201</sup> PAWEL, *supra* note 14, at 116; see GANZ, *supra* note 12, at 165–66.

<sup>202</sup> See GANZ, *supra* note 12, at 157–60.

<sup>203</sup> See *id.* at 160–61, 168.

from farmworkers would likely be unsympathetic if the NFWA couldn't win elections.<sup>204</sup> The employers also recognized that union-recognition elections were far from fair campaigns between political equals. Taking advantage of their hierarchical positions within the workplace, employers could compel workers to listen to their own propaganda, harass and fire workers who appeared to favor the NFWA, and limit the access of NFWA organizers to the fields.<sup>205</sup> When the first such election was held at the DiGiorgio Grape Corporation in 1966, the employer further insulated its workplace hierarchy by collaborating with a conservative union, the Teamsters, whose predominantly White leadership agreed to make few demands if they won the election.<sup>206</sup> With employers supporting the Teamsters while actively suppressing the NFWA's access to workers, the NFWA lost the election.<sup>207</sup>

This defeat would have been calamitous for the NFWA if not for its success at building coalitions outside the workplace. Rallying religious leaders, the Mexican American community, and national political allies, the NFWA convinced Governor Pat Brown to investigate the fairness of the recognition election.<sup>208</sup> Facing a difficult gubernatorial election of his own against Ronald Reagan, Brown agreed to intervene, spurring the American Arbitration Association to recommend a new election.<sup>209</sup> Within a few months, the NFWA decisively won this new election at DiGiorgio — the first successful union-recognition election in the history of California agriculture.<sup>210</sup>

Yet the DiGiorgio election proved to agricultural employers that they could undermine a national boycott and shape public opinion by cynically calling for nominally democratic elections in which the odds were stacked in their favor.<sup>211</sup> And even when DiGiorgio lost its election, it did not give up its exclusive power to set workplace or investment policy, but merely agreed to bargain with the workers over wages and benefits. Employers therefore called for state legislation to codify union elections — particularly after the NFWA reorganized as the United Farm Workers and launched a successful nationwide boycott to unionize the entire California grape industry.<sup>212</sup> Cesar Chavez was ambivalent

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<sup>204</sup> *Id.* at 168.

<sup>205</sup> *See id.* at 172–73, 177.

<sup>206</sup> *See id.* at 173–77; David Willhoite, Note, *The Story of the California Agricultural Labor Relations Act: How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union*, 7 CAL. LEGAL HIST. 409, 422–23 (2012).

<sup>207</sup> *See GANZ, supra* note 12, at 181–83.

<sup>208</sup> *Id.* at 184.

<sup>209</sup> *Id.* at 184–85.

<sup>210</sup> *See id.* at 196–98; MARTIN, *supra* note 11, at 68; Willhoite, *supra* note 206, at 423.

<sup>211</sup> *See* Elizabeth Lamoree, *Gambling on Grapes: Management, Marketing, and Labor in California Agribusiness*, AGRIC. HIST., Summer 2012, at 104, 118–20.

<sup>212</sup> *See GANZ, supra* note 12, at 234–35; PAWEL, *supra* note 14, at 302–03; Gordon, *supra* note 198, at 31–32.

about a law that he feared would compromise the farmworkers' ability to boycott by forcing them to compete in firm-by-firm elections against employers unafraid to harass and intimidate workers on company property.<sup>213</sup> But in 1975, he joined employers in reluctantly supporting a California Agricultural Labor Relations Act<sup>214</sup> that "gave something to everyone."<sup>215</sup>

On one hand, the California labor law represented the pinnacle of the modest form of industrial democracy pioneered by the National Labor Relations Act in the 1930s.<sup>216</sup> Although employers vehemently fought to prohibit union organizers from talking to workers on company property, the law created a labor board that, in 1976, itself promulgated the sort of "access rule" that employers had been fighting.<sup>217</sup> Many observers predicted that California agriculture would soon become a heavily unionized industry, with the UFW emerging as one of the nation's largest unions.<sup>218</sup>

But on the other hand, the California law, like the NLRA before it, failed to make workplaces democratic — at least if democracy means political equality and not merely the existence of elections. The law didn't allow workers to elect employers. It didn't give workers seats on company boards. Instead, it authorized the sort of Potemkin elections familiar in authoritarian countries, in which "what is captured in the snapshot of the ballot is not preference but despair."<sup>219</sup> The law also deprived workers of their right to boycott if they lost one of these elections, seizing one of the few tools farmworkers possessed to replace dominating workplace hierarchies with a more democratic relationship.<sup>220</sup>

The law also didn't require unions to structure themselves democratically, enabling a problem that emerged within a few years of the law's passage.<sup>221</sup> When Chavez and Huerta began organizing farm-

<sup>213</sup> MATT GARCIA, FROM THE JAWS OF VICTORY: THE TRIUMPH AND TRAGEDY OF CESAR CHAVEZ AND THE FARM WORKER MOVEMENT 146–48, 213–14 (2012); see PAWEL, *supra* note 14, at 302–08.

<sup>214</sup> CAL. LAB. CODE §§ 1140–1166 (West 2021).

<sup>215</sup> GARCIA, *supra* note 213, at 149; see *id.* at 146, 148–49.

<sup>216</sup> See MARTIN, *supra* note 11, at 72; Gordon, *supra* note 198, at 8; Herman M. Levy, *The Agricultural Labor Relations Act of 1975 — La Esperanza de California para el Futuro*, 15 SANTA CLARA LAW. 783, 785 (1975).

<sup>217</sup> See CAL. CODE REGS. tit. 8, § 20900(e)(3)(A)–(B) (2021); GARCIA, *supra* note 213, at 156.

<sup>218</sup> MARTIN, *supra* note 11, at 4, 72.

<sup>219</sup> LAFER & LOUSTAUNAU, *supra* note 187, at 8; see *id.* at 5–8 (describing the "anti-democratic dynamics of NLRB elections," *id.* at 8).

<sup>220</sup> GARCIA, *supra* note 213, at 149; see Levy, *supra* note 216, at 789–90.

<sup>221</sup> See GANZ, *supra* note 12, at 243–48; MARTIN, *supra* note 11, at 75–77; PAWEL, *supra* note 14, at 416–28.

workers, they operated democratically — treating workers and organizers as equals in decisionmaking.<sup>222</sup> But after formally becoming a traditional labor union, the UFW gave way to what one sociologist has called the “iron law of oligarchy”: the pattern where the leaders of mass organizations often structure themselves hierarchically, supplanting members’ goals with their own.<sup>223</sup> Shortly after the law took effect, Chavez’s interests changed and he unilaterally decided that the UFW should stop organizing farmworkers.<sup>224</sup> Critics at the bottom of the UFW’s internal hierarchy were unable to successfully challenge him. Absent an internal democracy of political equals, the UFW’s strategic capacity collapsed with its principal leader’s change of heart.<sup>225</sup>

Since the late 1970s, when the UFW stopped organizing farmworkers, membership in the UFW has plummeted from well over 50,000 farmworkers to fewer than 7,000 today.<sup>226</sup> Other agricultural unions haven’t fared much better. Today, among California’s 800,000 farmworkers, fewer than 35,000 — five percent — work under union contracts.<sup>227</sup> Despite the promise offered by NLRA-style industrial democracy, agricultural workplaces remain just as oppressively hierarchical now as they were then.<sup>228</sup>

### C. Suppressing Democracy in the Workplace

Even though union-recognition elections remain stacked in favor of employers, California’s agricultural growers have long opposed existing rules that attempt to make these elections fair. Instead of seeking the repeal of these rules by legislation, however, they’ve turned to the ultimate source of antidemocracy in the United States: the Supreme Court. Despite its reputation for protecting political equality, when the Court entrenches hierarchies of assets and inheritance, no democratic process is available to reverse its decisions. In a recent case that enforced a constitutional provision and a federal statute that were both enacted to protect the political equality of workers, the Court instead recognized a new right of employers to discriminate.

1. *The Right to Exclude.* — The case, *Cedar Point v. Hassid*, reviewed California’s “access rule” for the second time since 1976. The

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<sup>222</sup> See PAWEL, *supra* note 14, at 77–91.

<sup>223</sup> GANZ, *supra* note 12, at 242 (quoting ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 393 (Eden & Cedar Paul trans., 1915)); *see id.* at 242–48.

<sup>224</sup> See FLORES, *supra* note 117, at 210; GANZ, *supra* note 12, at 242–48; PAWEL, *supra* note 14, at 416–28; Gordon, *supra* note 198, at 40–44.

<sup>225</sup> See FLORES, *supra* note 117, at 210–11; GANZ, *supra* note 12, at 241–49.

<sup>226</sup> Wells & Villarejo, *supra* note 196, at 303; UNITED FARM WORKERS, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT, at sched. 13 (2021); *see also* MARTIN, *supra* note 11, at 4.

<sup>227</sup> MARTIN, *supra* note 11, at 4.

<sup>228</sup> FLORES, *supra* note 117, at 219.

rule permits union organizers to quietly talk to workers on company property three times a day: during their lunch breaks and for an hour before and after work.<sup>229</sup> Yet as soon as California's labor board announced the rule in 1976, employers challenged the rule in court as an unlawful invasion of their property rights.<sup>230</sup> The employers argued that organizer visits were nothing more than trespasses.<sup>231</sup> In addition to filing suit, they also launched a racist television campaign to scare voters away from entrenching the rule by referendum.<sup>232</sup> Without mentioning farmworkers, the ads displayed families who complained that their daughters "feel threatened" by the thought of strangers trespassing in their yards.<sup>233</sup>

When the employers' case reached the Supreme Court that same year, the Court summarily dismissed the suit for want of a "substantial federal question."<sup>234</sup> Only a decade earlier, the Court had heard an identical legal argument brought by the White owner of an Atlanta motel, Moreton Rolleston Jr.<sup>235</sup> Rolleston had objected to the Civil Rights Act of 1964,<sup>236</sup> the federal law that prohibits businesses from engaging in racial discrimination.<sup>237</sup> Rolleston observed that the Fifth Amendment to the U.S. Constitution prohibits the federal government from taking "private property" without "just compensation."<sup>238</sup> Since he thought the idea of private property included the right to exclude trespassers,<sup>239</sup> he argued that Congress owed him one million dollars for taking away his right to exclude Black customers.<sup>240</sup> The Supreme Court disagreed. In his case, like in the California employers' case, the Court rejected the argument that businesses have a constitutionally protected right to discriminate against unwanted visitors on their property.<sup>241</sup>

<sup>229</sup> CAL. CODE REGS. tit. 8, § 20900(e)(3) (2021).

<sup>230</sup> Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 693 (Cal. 1976).

<sup>231</sup> *Id.* at 705.

<sup>232</sup> See MIRIAM PAWEL, *THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CESAR CHAVEZ'S FARM WORKER MOVEMENT* 195 (2009).

<sup>233</sup> *Id.*

<sup>234</sup> *Pandol & Sons v. Agric. Lab. Rels. Bd.*, 429 U.S. 802 (1976), *dismissing appeal from* Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687 (Cal. 1976).

<sup>235</sup> See Nikolas Bowie, Opinion, *Do We Have to Pay Businesses to Obey the Law?*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/opinion/Supreme-Court-labor-property-rights.html> [<https://perma.cc/3EQ4-ZF8R>].

<sup>236</sup> 42 U.S.C. §§ 2000e to 2000e-17.

<sup>237</sup> *Atlanta Motel Sues in Major Test of Rights Act*, N.Y. TIMES, July 7, 1964, at 1.

<sup>238</sup> *Id.* at 20.

<sup>239</sup> See Jurisdictional Statement and Brief at 51-52, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (No. 515).

<sup>240</sup> *Atlanta Motel Sues in Major Test of Rights Act*, *supra* note 237, at 20.

<sup>241</sup> *Heart of Atlanta*, 379 U.S. at 261. Although the Warren Court declined to constitutionalize a business's right to exclude people from its premises, the Court also declined to interpret the National Labor Relations Act to require covered businesses to admit union literature on company property

Fifty years later, however, in 2016, a second group of agricultural employers relaunched their challenge to the access rule. This new case was organized by the Pacific Legal Foundation, a nonprofit formed in 1973 by members of then-Governor Ronald Reagan’s staff.<sup>242</sup> On behalf of the Cedar Point Nursery and the Fowler Packing Company — two California employers that together employ thousands of farmworkers<sup>243</sup> — PLF repackaged old wine into new bottles. Adopting a legal claim nearly identical to Rolleston’s, it argued that California’s access rule violated the Ku Klux Klan Act,<sup>244</sup> a federal statute enacted in 1871 to extend the Fourteenth Amendment’s protection to Black farmworkers in the South.<sup>245</sup>

As codified in 42 U.S.C. § 1983, the Klan Act prohibits a state from depriving someone of a right “secured by the Constitution.”<sup>246</sup> On PLF’s reading of the Act, the access rule deprived its clients of a right secured by the Fourteenth Amendment, which prohibits states from depriving “any person of life, liberty, or property, without due process of law.”<sup>247</sup> Although the Fourteenth Amendment also was enacted to protect the political equality of recently enslaved farmworkers, the Court has interpreted it far more often in favor of employers.<sup>248</sup> In particular, during the infamous *Lochner* era, the Court held that the phrase “due process of law” prohibited states from seizing a company’s land without paying for it.<sup>249</sup> The Court later interpreted this requirement to be identical

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“if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer’s notice or order does not discriminate against the union by allowing other distribution.” NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); see also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992) (requiring similar unique obstacles before the Act required the admission of union organizers to the workplace). Although this interpretation of the Act recognized circumstances when existing federal law might require employers to admit union organizers on company property — failing to raise any constitutional objections to such a requirement — it has long been criticized for also recognizing an implied “right to exclude” that allows a “naked property right to trump the substantial statutory interests of organized employees.” Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 308 (1994).

<sup>242</sup> *History*, PAC. LEGAL FOUND., <https://pacificlegal.org/history> [<https://perma.cc/gPV6-3KXU>]; see *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 526 (9th Cir. 2019).

<sup>243</sup> *Cedar Point*, 923 F.3d at 528–29.

<sup>244</sup> Ku Klux Klan Act of 1871, ch. 22, §§ 1–6, 17 Stat. 13, 13–15 (codified as amended in scattered sections of the U.S. Code).

<sup>245</sup> See *Cedar Point*, 923 F.3d at 529; ERIC FONER, RECONSTRUCTION 454–59 (1988) (discussing the origins of the Klan Act).

<sup>246</sup> 42 U.S.C. § 1983.

<sup>247</sup> U.S. CONST. amend. XIV, § 1; see *Cedar Point*, 923 F.3d at 529.

<sup>248</sup> See ADAM WINKLER, WE THE CORPORATIONS 157–58 (2018) (recording how only 28 of the first 604 Fourteenth Amendment cases decided by the Supreme Court involved Black people, who typically lost); Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 118 (observing that “the Court has ruled in favor of just one African American plaintiff mounting an equal protection challenge in recent decades” (citing *Johnson v. California*, 543 U.S. 499 (2005))).

<sup>249</sup> See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

with the Takings Clause of the Fifth Amendment, which declares: “[N]or shall private property be taken for public use, without just compensation.”<sup>250</sup>

Putting all this legal language together, PLF argued that the Fifth Amendment’s protection of “private property” includes the right of a property owner to exclude whomever it wants from its property — including union organizers.<sup>251</sup> Because California’s access rule deprived agricultural employers of this right, PLF argued that the employers’ “private property” had been “taken” without just compensation — in violation of the Fifth Amendment.<sup>252</sup> Because the Fourteenth Amendment has been interpreted to apply this language against the states, PLF argued that California had deprived two corporate persons of their property without “due process of law.” And because the Klan Act holds states liable for depriving any person of rights secured by the Constitution, PLF concluded that California should be held liable.<sup>253</sup>

It’s worth pausing here to reflect on the boldness of PLF’s claim. In order to free two agricultural employers from the risk that their farm-workers might unionize, PLF resurrected a segregationist argument that employers have a right to discriminate. Even though this argument had twice been rejected by the Supreme Court — including in a case involving the exact same rule now being challenged — PLF stood firm. And PLF argued that this right to discriminate was protected by a statute and a constitutional amendment that had each been enacted to protect Black agricultural workers from exploitation.

Yet the Supreme Court bought it.

2. *The Decision in Cedar Point*. — Chief Justice Roberts’s majority opinion for the 6–3 Court never acknowledged that it was overruling its own precedent — or even that there was precedent. Nor did the chief justice mention the irony of enforcing the Klan Act and the Fourteenth Amendment to protect the right of agricultural employers to discriminate.<sup>254</sup> Nor did he ask whether California, like many states, defines the term *property* to include the right to exclude some people but not all people engaged in lawful activities.<sup>255</sup> If he had, he would have seen

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<sup>250</sup> U.S. CONST. amend. V.

<sup>251</sup> Petitioners’ Brief on the Merits at 29–32, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

<sup>252</sup> *See id.* at 1–3.

<sup>253</sup> *See id.* at 12 (seeking declaratory and injunctive relief, not compensation).

<sup>254</sup> *Cf.* GARZA, *supra* note 47, at 191 (“The willful forgetting of traumatic experiences allows their harmful effects to continue . . . [and] deters us from changing how power operates in the first place.”); K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 2005 (2020) (book review) (“Recognizing erasure is a necessary first step for understanding how histories of conquest, slavery, and race shaped American legal institutions. However, erasure presents problems that are not solely a matter of correcting the historical record, or of factual inaccuracy. . . . Many broadly accepted ideas, norms, and ideals about the US legal system derive from filtered narratives.”).

<sup>255</sup> *See* Estlund, *supra* note 241, at 338–39.

that California law exempts “persons engaged in lawful labor union activities” from the people whom property owners can lawfully exclude.<sup>256</sup>

Instead, his opinion treated the case as if it presented little more than a textual question: whether “private property” had been “taken” by California’s access rule, thus violating the text of the Fifth Amendment.

When a Supreme Court case turns on the interpretation of three extremely broad words — one of which, *property*, has been at the center of American political debate for the country’s entire history — it should not come as a surprise when personal discretion enters the picture.<sup>257</sup> Indeed, Chief Justice Roberts’s opinion in *Cedar Point* simply defined the three words to authorize some discrimination that he thought was OK and to prohibit other discrimination that he thought was too much. It was a modern-day version of what the legal scholar Felix Cohen once called “transcendental nonsense,” where the definition of judicially protected property rights circularly turns on nothing more than what judges are willing to protect.<sup>258</sup>

The chief justice thought it was important to protect the employers’ desire to discriminate against union organizers. Like PLF, he defined

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<sup>256</sup> CAL. PENAL CODE § 602(0) (West 2021); *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 694 (Cal. 1976) (“Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted.”); *see also, e.g., State v. Shack*, 277 A.2d 369 (N.J. 1971) (holding that an employer’s property rights did not include the right to exclude antipoverty workers from talking to migrant farmworkers).

<sup>257</sup> *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. (forthcoming 2021) (manuscript at 4–6) (on file with the Harvard Law School Library) (discussing how nineteenth-century American lawyers expressly defined “property” to accommodate slavery and the dispossession of Native nations’ lands — and how property scholars since then have taught this story with “different but unmistakable patterns of erasure of the histories of conquest and slavery,” *id.* at 6); *see also* Park, *supra* note 254, at 1998 (“[N]ewly acquired land and enslaved people together constituted the vast majority of *all* property held by colonists on the eve of the Revolution . . .”).

<sup>258</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814–17 (1935); *cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736 (1993) (describing how courts have exercised similarly circular reasoning “in enforcing this right to exclude — determining who was or was not white enough to enjoy the privileges accompanying whiteness”).

“the very idea of property” as including an indefeasible “right to exclude” unwanted people from entering it.<sup>259</sup> So when California prohibited employers from exercising this right, he wrote that the state had “taken” the right and therefore must “pay for what it takes.”<sup>260</sup>

But if the chief justice had ended his opinion there, then the Court would have silently overruled not only its 1976 decision upholding the access rule but also its 1964 decision upholding the Civil Rights Act. After all, Moreton Rolleston’s argument was precisely that the Civil Rights Act had taken away his right to exclude Black customers.<sup>261</sup> Without mentioning this inconvenient parallel, the chief justice tried to distinguish Rolleston’s case on other grounds. He wrote without elaboration that workplaces “closed to the public,” like strawberry growers, were “readily distinguishable” from businesses “open to the public,” like hotels.<sup>262</sup>

It’s not clear that the distinction between being closed or open to the public is coherent. In both cases, an employer wants some people to come on its property (workers and White people) and doesn’t want other people on its property (organizers and Black people). Either way, an access rule does the same thing as a public accommodations law: it orders the employer to admit unwanted visitors. In another part of the opinion, the chief justice suggested that his distinction between the California access rule and the Civil Rights Act’s public accommodations provision turned on “whether the government has physically taken property for itself or someone else — by whatever means — or has instead restricted a property owner’s ability to use his own property.”<sup>263</sup> But this explanation doesn’t make sense: it would mean that the right to exclude from a “closed” business is somehow “physical,” while the right to exclude from an “open” business involves only “a property owner’s ability to use his own property.”<sup>264</sup>

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<sup>259</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES \*2). *But see* 1 BLACKSTONE, *supra*, at \*134 (“The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land.*” (emphasis added)). Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined the chief justice’s opinion. *Cedar Point*, 141 S. Ct. at 2068.

<sup>260</sup> *Cedar Point*, 141 S. Ct. at 2071.

<sup>261</sup> *Atlanta Motel Sues in Major Test of Rights Act*, *supra* note 237, at 1.

<sup>262</sup> *Cedar Point*, 141 S. Ct. at 2076–77 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

<sup>263</sup> *Id.* at 2072.

<sup>264</sup> There are, of course, many contexts in which federal law distinguishes between places “open” and “closed” to the public, including the same context as in *Cedar Point*. Until a 2019 decision by appointees of President Trump, the National Labor Relations Board interpreted the National Labor Relations Act to require employers to admit nonemployee union organizers to “public spaces” of company property. *See* UPMC, 368 N.L.R.B. No. 2 (June 14, 2019) (overruling *Montgomery Ward & Co.*, 256 N.L.R.B. 800 (1981)). Setting aside the merits of the Board’s distinction, it represented

Moreover, even if it did make sense to distinguish between a “closed” and “open” business for purposes of determining when a regulation physically takes property, such a distinction begs the question at issue: open or closed *to whom*? The chief justice’s opinion suggests that Rolleston lost merely because he failed to describe his motel as open to White people and closed to everyone else, just as Cedar Point claimed that its property was open to workers and invited visitors but closed to union organizers. When this sort of issue<sup>265</sup> arose in a 2002 decision, the Court scornfully noted that “defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, . . . [all regulations] would constitute categorical takings.”<sup>266</sup> Yet the chief justice, surprisingly, cited this 2002 decision as the basis for his distinction.<sup>267</sup>

All this is to say that the best explanation for the chief justice’s distinction between California’s access rule and the Civil Rights Act’s public accommodations requirement is probably that he just didn’t want to invalidate the Civil Rights Act. At least not *yet*. Unfortunately, when the Court interprets the phrase “private property” to include an unyielding right to discriminate, then antidiscrimination laws look pretty suspect.

In response to the dissenting justices’ fear that his new holding had just endangered countless federal and state regulations,<sup>268</sup> the chief justice used his discretion to craft three exceptions to his interpretation of the term “taken” in order to spare other precedents. He wrote that a property owner’s right to discriminate isn’t “taken” when (1) the government allows someone to enter the property only once, (2) there are some “longstanding background restrictions” against excluding certain people, or (3) when the property owner gives up the right to discriminate “as a condition of receiving certain benefits.”<sup>269</sup> Some of these ad hoc exceptions looked like they might be broad enough to save the access rule. So the chief justice had to reiterate that the fifty-year-old rule was

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an attempt to understand the meaning of a statute passed by Congress. The chief justice’s distinction, by contrast, treats the regulation of a “closed” space as if it inherently involved some sort of *physical* dispossession — automatically triggering the Takings Clause — while the regulation of an “open” space does not.

<sup>265</sup> See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988) (defining this issue as “conceptual severance”).

<sup>266</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 331 (2002).

<sup>267</sup> *Cedar Point*, 141 S. Ct. at 2072 (citing *Tahoe-Sierra*, 535 U.S. at 321–23).

<sup>268</sup> See *id.* at 2086–88 (Breyer, J., dissenting). Justices Sotomayor and Kagan joined Justice Breyer’s dissent, which principally took issue with the majority’s failure to agree that “temporary limitations on the right to exclude” are different from “permanent physical occupations” and should require compensation only when they go “too far.” *Id.* at 2083.

<sup>269</sup> *Id.* at 2078–80 (majority opinion).

not “longstanding,” nor did its protection of workers give employers any “benefits.”<sup>270</sup>

3. *The Aftermath of Cedar Point.* — In the immediate aftermath of the chief justice’s opinion, the businesses represented by PLF will not likely gain much. Even before the decision, few laws outside California guaranteed the right of workers to hear from union organizers on company property.<sup>271</sup> For its part, the United Farm Workers has rarely taken advantage of the access rule in the decades since the union was most active in the 1970s. There are more than 16,000 agricultural employers in California, yet union organizers invoked the access rule only 113 times in the six years before *Cedar Point*.<sup>272</sup> One of those times took place in 2015, when Cedar Point’s workers called the UFW to help them protest “low wages, dirty bathrooms, and harassment from supervisors.”<sup>273</sup> After a one-day strike, the effort caved — in keeping with the drought of democracy already plaguing California’s farmworkers.<sup>274</sup>

As applied to workers in other contexts, *Cedar Point* is explosive. No prior case had ever suggested, much less held, that the government must pay an employer every time it interferes with an employer’s “right to exclude” someone from their property. “The cases are to the contrary,” the Court wrote in 1964 when it upheld the Civil Rights Act.<sup>275</sup> That is no longer true.

The Court’s new rule matters because even as *Cedar Point* went out of its way to suggest that the Civil Rights Act’s protection of *consumers* is safe, it did not do the same for the Civil Rights Act’s protection of *workers*. But as discussed above, the “most significant source of workplace hierarchy is the boss’s power to fire.”<sup>276</sup> To take the vocabulary of *Cedar Point*, firing is nothing more than the “right to exclude” a worker from the employer’s private property. If the government must therefore pay employers not to exercise that right in certain situations, then workers will have difficulty enforcing any workplace protections provided by law.

To illustrate the point, consider an employer who wants to fire a worker after finding out the worker is gay. Under the Civil Rights Act’s antidiscrimination provisions, such a firing would be illegal sex discrimination and, therefore, not allowed.<sup>277</sup> Today, however, the employer could credibly argue that the government has taken away their “right to

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<sup>270</sup> *Id.* at 2079–80.

<sup>271</sup> Decades ago, the Supreme Court interpreted the National Labor Relations Act to permit employers covered by the Act to bar union organizers from their premises absent “unique obstacles” to “nontrespassory means of communication.” Estlund, *supra* note 241, at 320–21 (quoting *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 849–50 (1992)).

<sup>272</sup> See Brief for Respondents at 9–10, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

<sup>273</sup> Bacon, *supra* note 121.

<sup>274</sup> *Id.*

<sup>275</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

<sup>276</sup> Bagenstos, *supra* note 124, at 244.

<sup>277</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

exclude.” Even though *Cedar Point* suggested that businesses could not necessarily exclude people from places open to the public, its very holding was that businesses could exclude people from places open only to workers.

By recognizing a property owner’s right to discriminate, *Cedar Point* therefore is an obvious threat to workplace antidiscrimination laws. By definition, these laws “take” an employer’s “right to exclude” workers of color, pregnant workers, and LGBTQ+ workers. *Cedar Point* also threatens existing labor laws, which similarly prohibit discrimination. These laws “take” an employer’s “right to exclude” workers who want to unionize.

Just as significantly, and for the same reasons, *Cedar Point* also threatens antiretaliation laws. These laws prohibit employers from firing whistleblowers and other workers who complain of legal violations. Antiretaliation provisions are at the heart of minimum wage laws, maximum hour laws, health and safety laws, and antiharassment laws.<sup>278</sup> Even though wage, hour, and health and safety laws don’t directly interfere with an employer’s right to exclude anyone, workers have difficulty enforcing these sorts of laws when their employer can retaliate by firing them.<sup>279</sup>

*Cedar Point* also threatens many laws outside the workplace that make it easier for workers to quit or relocate to work for a less oppressive employer. For example, fair housing laws prohibit landowners from excluding potential renters on the basis of their race, occupation, immigration status, or other characteristics. Affordable housing laws similarly prohibit developers from excluding certain renters on the basis of their income. And rent-control policies, eviction protections, and other protections of renters prohibit landlords from excluding people from their property. Supreme Court decisions before *Cedar Point* upheld these sorts of laws, all of which reduce the structural domination that compels workers to live in areas with few employment opportunities.<sup>280</sup> Yet only two months after *Cedar Point*, the Supreme Court wrote that a law that prevents landlords from evicting unwanted tenants “intrudes on one of the most fundamental elements of property ownership — the right to exclude.”<sup>281</sup>

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<sup>278</sup> See generally JON O. SHIMABUKURO, L. PAIGE WHITAKER & EMILY E. ROBERTS, CONG. RSCH. SERV., R43045, SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS (2013) (providing an overview of federal whistleblower and antiretaliation laws).

<sup>279</sup> See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19–34 (1983).

<sup>280</sup> See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992) (holding that a rent-control ordinance did not “take” anyone’s property rights, including a “right to exclude”).

<sup>281</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at \*4 (U.S. Aug. 26, 2021) (per curiam).

In short, *Cedar Point* threatens an enormous variety of laws designed to reduce the ability of employers to suppress the efforts of workers to organize for more democracy in the workplace. The decision recognized a right of property owners to exclude without recognizing any countervailing right of workers to collectively bargain under California law, allowing “this naked property right to trump the substantial statutory interests of organized employees in spreading information about and seeking support for unionization, and of unorganized employees in receiving that information.”<sup>282</sup> It also defined property rights without reference to the state law that created and defined the scope of those property rights, ignoring California’s statutory exemption for “persons engaged in lawful labor union activities” from its definition of criminal trespass.<sup>283</sup> As a former UFW organizer wrote in the wake of the decision: “Rolling back . . . the ability of farmworkers to organize against their endemic poverty, is the main target of the Supreme Court’s attack.”<sup>284</sup>

Of course, it’s conceivable that the Supreme Court will not walk through any of the doors *Cedar Point* opened. Because *Cedar Point* turned entirely on the discretion of the justices — overruling some cases but not others — the justices retain the discretion to apply its holding in the future however they want. If it wishes to act modestly, the Court could declare that just compensation in these sorts of cases is insignificant — say, one dollar per taking.<sup>285</sup> Or the Court could craft new exceptions to fit the laws it wants to preserve, just as it did in *Cedar Point*. The various ad hoc exceptions in the majority opinion — distinguishing (1) one-time trespasses from multiple visits, (2) longstanding background restrictions from fifty-year-old statutes, (3) conditional exactions from disproportionate demands, and (4) property accessible only to workers from property open to the public — will give lower courts and property scholars plenty of grist to grind into new doctrinal protections of favored laws.

But if it wishes to act aggressively, the Court has many plausible options for completely disabling any of these laws under the Takings Clause. In the case of an access rule, the Court could hold that just

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<sup>282</sup> Estlund, *supra* note 241, at 308 (describing the Supreme Court’s earlier interpretation of the National Labor Relations Act).

<sup>283</sup> CAL. PENAL CODE § 602(o); see Estlund, *supra* note 241, at 338–39 (“The disjuncture between the property rights recognized [by the Supreme Court] and those recognized under state law is perhaps most apparent in the several states that explicitly exempt otherwise unlawful labor activity from their state trespass laws.” *Id.* at 338.).

<sup>284</sup> Bacon, *supra* note 121.

<sup>285</sup> See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021) (“The award of nominal damages was one way for plaintiffs at common law to . . . [remedy] a trespass to land or water rights . . .”); RESTATEMENT (SECOND) OF TORTS § 163 cmt. e (AM. L. INST. 1965) (discussing “the imposition of punitive in addition to nominal damages for . . . a harmless trespass”).

compensation for allowing union organizers on company property isn't the nominal value of each trespass, but the consequential value of the profits a company's shareholders might lose to workers if they were to unionize and demand higher wages.<sup>286</sup> The Court could easily cherry-pick economists who have estimated that a successful effort to unionize a workplace can reduce a company's market value to shareholders by over \$40,000 per unionized worker.<sup>287</sup> If it does, the antiunion Court could hold that the only "just compensation" for allowing union activity on a large company's property is millions of dollars. In the case of an antidiscrimination or antiretaliation law, the Court could similarly hold that when a government prohibits a company from excluding a worker from company property, the only just compensation is the market value of the salary that the company would rather pay a different worker. The same option is not only possible but also highly likely in the case of fair housing and affordable housing laws, because when landlords bring trespass suits to evict unwanted renters, "[c]ourts ordinarily set the compensation amount equal to the rent that owners of similar properties can obtain on the market."<sup>288</sup>

The Court could also forgo these sorts of calculations and hold that every law it doesn't like must be invalidated. Scholars who have recently called for the Court to enforce the Takings Clause more aggressively have also argued that there are circumstances when "federal courts should be allowed to enjoin federal or state government action under the Takings Clause" — including when "the government takes property but has provided no means of securing just compensation."<sup>289</sup> Before he became a senator, Josh Hawley even wrote an article listing examples of when the Court has struck down laws under the Takings

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<sup>286</sup> See Richard W. Pouders, Hugh D. Hindman & R. Stephen Cantrell, *How Unions Affect Shareholder Wealth in Firms Announcing Layoffs*, 25 J. LAB. RSCH. 495, 496 (2004) ("Unions, on behalf of their members, are viewed as competing with shareholders for corporate wealth. As a rule, the greater the level of unionization, the lower the profitability of the firm as measured by returns to shareholders."); see also, e.g., *United States v. Miller*, 317 U.S. 369, 374 (1943) (defining just compensation with reference to "market value," or "what a willing buyer would pay in cash to a willing seller"); RESTATEMENT (SECOND) OF TORTS § 929 (AM. L. INST. 1979) (assessing damages based on "the difference between the value of the land before the harm and the value after the harm"); *id.* § 931 cmt. d ("[T]he owner may have an election to receive any profits made by the defendant."); Gideon Parchomovsky & Alex Stein, Essay, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1824 (2009) ("After a trespass ends, the typical remedy an aggrieved owner can receive in court is compensation measured by the market value of the unauthorized use.").

<sup>287</sup> See, e.g., David Lee & Alexandre Mas, *Long-Run Impacts of Unions on Firms: New Evidence from Financial Markets, 1961–1999*, at 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14709, 2009) (in 1998 dollars).

<sup>288</sup> Parchomovsky & Stein, *supra* note 286, at 1824 (citing RESTATEMENT (SECOND) OF TORTS § 931 cmt. b (AM. L. INST. 1979)).

<sup>289</sup> Thomas W. Merrill, Essay, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1632 & n.14 (2015).

Clause instead of requiring just compensation for the taking.<sup>290</sup> Indeed, invalidating the access rule appears to have been the employers' long-term goal in *Cedar Point*, as their complaint asked the federal courts to enjoin the access rule.<sup>291</sup> The employers have never asked for any compensation at all.

It's not necessary to predict which among these various options the Court will ultimately pick. As of today, the ability of representative democracy to combat the "despotic dominion" of the workplace is subject to the justices' personal discretion — discretion the justices have exercised against workplace democracy in virtually every recent decision to present the issue.<sup>292</sup>

#### D. *Insulating the Suppression from Democratic Responses*

What makes a Supreme Court decision like *Cedar Point* antidemocratic isn't just that, on the merits, it suppresses the spread of democracy. Even more significant is that the decision itself cannot currently be remedied by any democratic process because of the United States's combination of judicial supremacy and a difficult-to-amend constitution.

1. *The Antidemocratic Nature of Judicial Supremacy.* — To understand the problem of judicial supremacy, consider a bill passed by the U.S. House of Representatives to assist workers who want to unionize: the Protecting the Right to Organize Act, or PRO Act.<sup>293</sup> The Act is the most recent attempt by members of Congress to make union-recognition elections less unfair. For example, it includes access provisions that allow organizers to respond when employers hold captive-audience meetings; antidiscrimination provisions that prohibit firing or replacing workers who want to strike; and antiretaliation provisions that protect workers who report labor-law violations.<sup>294</sup>

As of right now, it would be pretty reasonable for members of Congress to think that all of these provisions are constitutional despite

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<sup>290</sup> Joshua D. Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2012–2013 CATO SUP. CT. REV. 245, 256–57, 256 n.58.

<sup>291</sup> See Petitioners' Brief on the Merits at 12, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107).

<sup>292</sup> Estlund, *supra* note 241, at 336 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*2); see MCALEVEY, *supra* note 23, at 75–82; see, e.g., *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); see also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 223–37 (2014) (describing the beginning of successful constitutional challenges to unionization in the 1970s). The justices have been equally hostile to democracy elsewhere. See Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 178–231 (2020); see, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>293</sup> H.R. 842, 117th Cong. (2021).

<sup>294</sup> *Id.* §§ 104(3), 104(1)(b), 202(b)(2).

*Cedar Point*. Even though the Fifth Amendment declares that “private property” cannot “be taken for public use, without just compensation,” no judge or politician has yet interpreted this language to prohibit someone from getting fired. Congress could even explicitly state, for the record, that protecting a worker’s right to strike doesn’t “take” an employer’s “private property.” After all, members of Congress are as capable of interpreting the Constitution as are members of the Supreme Court.

Nevertheless, even if Congress and the American people overwhelmingly supported the PRO Act and agreed it was constitutional, the Act would not be enforceable if five justices were to carry through the logic of *Cedar Point*. Even though *Cedar Point* enforced the Klan Act (a statute passed by Congress) and interpreted the Fourteenth Amendment (an amendment that gives Congress the explicit authority to enforce its provisions by “appropriate legislation”), the Court has prohibited Congress from modifying its judgments or straying far from its interpretations.<sup>295</sup> As a result, if Congress wanted to enforce the terms of the PRO Act, its only options would be to enact a statute modifying the composition or powers of the Court, or to initiate a constitutional amendment through a supermajoritarian process at the federal and state level.<sup>296</sup>

There is nothing democratic about giving five lawyers — chosen for life because of their educational backgrounds and their relationship to the governing elite — the same discretion to decide the meaning of our fundamental law as two-thirds of both houses of Congress and majorities of three-quarters of state legislatures.<sup>297</sup> It is, instead, a profoundly aristocratic power premised on a deep distrust of democracy.<sup>298</sup>

It’s true that the justices are appointed by nationally elected officials: the president and a majority of the Senate. And the fact that the justices in *Cedar Point* enforced a federal statute can explain why the Court’s interpretation of the Fourteenth Amendment should be superior to California’s interpretation.<sup>299</sup> But as the legal philosopher Jeremy

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<sup>295</sup> See, e.g., *Shelby County*, 570 U.S. at 557; *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997).

<sup>296</sup> See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 17–25) (on file with the Harvard Law School Library) (discussing reforms to the Supreme Court’s personnel and powers available by statute).

<sup>297</sup> See U.S. CONST. art. V.

<sup>298</sup> See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. (forthcoming 2022) (manuscript at 2–9) (on file with the Harvard Law School Library) (discussing how the judicial review of federal law accelerated as part of a counterrevolution to Reconstruction); Aziz Rana, *Who Owns the Constitution?*, JACOBIN (Oct. 15, 2020), <https://jacobinmag.com/2020/10/us-constitution-law-supreme-court-socialism> [<https://perma.cc/LL5Z-ESS4>] (“Constitutional change in this country is driven . . . by judicial interpretation — whatever a tiny coterie of lifetime judges can be convinced to pursue or accept.”).

<sup>299</sup> See Bowie, *supra* note 112.

Waldron observes, these arguments cannot explain why the justices' interpretation of the law should be superior to the interpretation of the same federal elected officials who appointed them. "The system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary."<sup>300</sup>

It's also true that a countermajoritarian process for reviewing federal laws could, in theory, be essential for democracy to function. To the extent the Supreme Court is insulated from majoritarian values, the Court could be in a strong institutional position to police "prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>301</sup> As legal scholars Douglas NeJaime and Reva Siegel argue: "Groups that are marginalized in democratic politics may find that courts provide *alternative fora* with different institutional features that amplify marginalized groups' ability to communicate in democratic politics."<sup>302</sup>

But as a matter of historical practice, there is little evidence that the Supreme Court's review of *federal* legislation has facilitated democracy.<sup>303</sup> To the contrary: decisions from *Dred Scott* in 1857 through the *Civil Rights Cases* in 1883 and *Shelby County* in 2013 reveal that any antidemocratic pathologies that sweep the country are also likely to sweep the judiciary.<sup>304</sup> As legal scholar Girardeau Spann writes: "The formal safeguards of life tenure and salary protection, which are designed to insulate the judiciary from external political pressures, are not designed to guard against the majoritarianism inherent in a judge's own assimilation of dominant social values."<sup>305</sup>

There are, of course, examples of the Supreme Court facilitating democracy at the *state* level — most notably *Brown v. Board of Education*.<sup>306</sup> But it is important to be clear about the distinction between the (potentially democratic) judicial review of state laws and the

<sup>300</sup> Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1391 (2006).

<sup>301</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77 (1980).

<sup>302</sup> Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Reexamining Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. (forthcoming 2021) (manuscript at 6) (on file with the Harvard Law School Library).

<sup>303</sup> See Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 5–12 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/58P8-6ED5>].

<sup>304</sup> *Id.*; accord RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 38–46, 229–41 (2007).

<sup>305</sup> GIRARDEAU A. SPANN, *RACE AGAINST THE COURT* 19 (1993); see also *id.* at 2, 19–21.

<sup>306</sup> 347 U.S. 483 (1954).

(antidemocratic) judicial supremacy that prevents Congress from disagreeing with the Court's conclusions. One thing that provides democratic legitimacy to the judicial review of state laws is that Congress has enacted laws like the Klan Act, at issue in *Brown* and *Cedar Point*, which explicitly invite federal courts to enforce the Constitution against resistant state officials.<sup>307</sup> And even with cases in which the Klan Act hasn't been involved, the federal review of state law is an unavoidable feature of federal supremacy. The legal theorist James Bradley Thayer observed over a century ago that in any federal system with a national government and state governments, there will inevitably be disagreements about "the allotment of power between the two governments, — where the line is to be drawn."<sup>308</sup> There are democratic arguments in favor of national supremacy and in favor of subsidiarity. In the United States, the Civil War resolved that the federal government's interpretation of the Constitution's line-drawing would be supreme. So when Congress authorizes federal courts to interpret the Constitution and enforce it against state laws, the effect on a state legislature is no different than when Congress itself interprets the Constitution and preempts state laws by statute. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 displaced the actions of state governments just as much as *Brown* did, and all three required federal courts to enforce their terms.<sup>309</sup> Regardless of whether Congress directly preempts state laws or authorizes federal courts to do it, democracy does not demand that the act of a state government be immune from federal oversight.<sup>310</sup>

For this reason, the antidemocratic problem with a case like *Cedar Point* isn't the fact that the Court declared a state law unconstitutional. Instead, the problem is that federal supremacy has been joined by *judicial* supremacy, leaving no democratic procedure that can reverse the Court's decision if Congress or most Americans correctly believe that the Court's interpretation of the Constitution is oppressively wrong. To the extent Congress cannot reverse a decision like *Cedar Point* by statute — while the justices themselves can overturn *Cedar Point* at any time — the justices function as antidemocratically as army generals who think they know better than elected officials about what the Constitution requires.<sup>311</sup> As Abraham Lincoln protested after an early

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<sup>307</sup> See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (observing that *Brown* and related decisions nationalized a growing elite White consensus at the federal level); Bowie, *supra* note 112.

<sup>308</sup> JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 28 (Boston, Little, Brown & Co. 1893).

<sup>309</sup> Bowie, *supra* note 112; see BELLAMY, *supra* note 304, at 124 n.100.

<sup>310</sup> Bowie, *supra* note 112.

<sup>311</sup> *Id.*

claim of judicial supremacy by the Supreme Court in *Dred Scott v. Sandford*<sup>312</sup>:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>313</sup>

The proper role for federal courts in a democracy is to serve as democracy's agents, not as a countervailing force.<sup>314</sup>

Most world democracies accept this role for their courts. Only a few join the United States in embracing its strong form of judicial review — one in which the supreme power to interpret the fundamental law is removed from the hands of any democratic body.<sup>315</sup> And those democracies that do permit courts to review national legislation typically pair that power with a constitution that is easy to amend.<sup>316</sup>

2. *The Antidemocratic Nature of a Difficult-to-Amend Constitution.* — The Supreme Court's self-appointed claim of being the supreme interpreter of the U.S. Constitution wouldn't present as much of a democratic problem if the United States were like most established democracies that allow their constitutions to be amended by statute or national referendum. In such a situation, a decision like *Cedar Point* could be overturned not only by a statute like the PRO Act — which merely disagrees with the Court's interpretation of the Fifth Amendment — but also by a statute amending the text of the Constitution to clarify that no one has a constitutionally protected right to discriminate against workers or union organizers. But the U.S. Constitution happens to be one of the most difficult-to-amend constitutions in the world — the only one that requires anything like bicameral supermajorities among legislatures at both the national and subnational level.<sup>317</sup> So because the United States combines “a very powerful Supreme Court with the power to nullify laws for unconstitutional-

<sup>312</sup> 60 U.S. (19 How.) 393 (1857).

<sup>313</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3210 (James D. Richardson ed., New York, Bureau of National Literature, Inc. 1897).

<sup>314</sup> Bowie, *supra* note 112.

<sup>315</sup> TAYLOR, SHUGART, LIJPHART & GROFMAN, *supra* note 114, at 296–97; see ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 54–55 (2d ed. 2003).

<sup>316</sup> See Kim Lane Scheppele, Laurance S. Rockefeller Professor of Socio. & Int'l Affs., Princeton Univ. & Fac. Fellow, Univ. of Pa. Carey L. Sch., Testimony for the Presidential Commission on the Supreme Court 2–3 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf> [<https://perma.cc/HQ4K-G4ZE>].

<sup>317</sup> TAYLOR, SHUGART, LIJPHART & GROFMAN, *supra* note 114, at 78–81.

ity . . . with a nearly impossible-to-amend constitution,” judicial decisions that reinforce social hierarchies are effectively insulated from any democratic process.<sup>318</sup>

To see how the Constitution’s amendment process participates in suppressing democracy, consider a hypothetical. In 1861, as part of a last-ditch effort to prevent the Civil War, Congress proposed an amendment to the Constitution that would have forever protected slavery. The Corwin Amendment, as it was known, declared:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.<sup>319</sup>

This amendment, thankfully, didn’t become law. And perhaps that’s an argument for why the Constitution *should* be difficult to amend. But the failed amendment actually serves as far more persuasive evidence of the opposite conclusion. Because imagine if the Corwin Amendment had become law: Is there really an argument that any democratic society in the twenty-first century would consider itself bound by its text? Text that not only entrenches slavery but also forever prohibits future generations from abolishing slavery by national law?

The problem made clear by the Corwin Amendment is a problem shared by all laws that attempt to insulate themselves from future amendment: they amount to an “intergenerational power grab.”<sup>320</sup> Inalterable laws create hierarchies of inheritance that give generations from the past the asymmetric and unreciprocated power to dominate the present.<sup>321</sup> Even if the Corwin Amendment had been adopted by the most democratic procedure imaginable, future generations would still be effectively disenfranchised from participating in the decision to enact it. Yet these disenfranchised future generations are precisely the people targeted by any requirement of inalterability. When any law is made difficult to amend, it is therefore as if future generations are colonists being taxed without representation.

Indeed, the Americans who revolted against Great Britain in 1776 made precisely this argument against hierarchies of inheritance. Under the then-prevailing theory of the British monarchy, King George III

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<sup>318</sup> Scheppele, *supra* note 316, at 3; see Jesse Wegman, Opinion, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now.*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html> [<https://perma.cc/E8E8-ZHY3>] (“[I]f the Constitution can’t be changed to adapt to modern needs and the Supreme Court becomes both too powerful and too politicized, the political system starts breaking down.”).

<sup>319</sup> H.R.J. Res. 80, 36th Cong. (1861).

<sup>320</sup> SEIDMAN, *supra* note 115, at 41.

<sup>321</sup> Even the Court has recognized this. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (“[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.”).

earned his power to rule by virtue of something that had happened in the past: either God had bestowed upon his predecessor the divine right of kings<sup>322</sup> or some sort of social contract had empowered his predecessor's family to pass down the throne.<sup>323</sup> Either way, the basis for monarchy was not that George III was wiser or better than anyone else, but merely that he had inherited the right to rule. As the political philosopher Edmund Burke later observed while defending the British monarchy from the ideals of revolutionary France, the English Parliament had once even enacted a law recognizing a line of succession that bound "us and our *heirs*, and our *posterity*, . . . to the end of time . . ."<sup>324</sup> Burke argued that this sort of past decision was so binding that no generation in the present could reject the monarchy. The very idea of a state, Burke wrote, was a community whose "fixed compact" had been originally made "not only between those who are living, but between those who are living, those who are dead, and those who are to be born."<sup>325</sup> If a community lacked the power to bind successive generations, Burke feared that the only law that could exist would be "the will of a prevailing force."<sup>326</sup>

But as the American revolutionary Thomas Paine wrote in *Common Sense*, it was in "the nature of oppression" to permanently subject the present generation to rule by "the *foolish*, the *wicked*, and the *improper*" merely because something once seemed like a good idea.<sup>327</sup> "[T]o say that the *right* of all future generations is taken away by the act of the first Electors in their choice not only of a King, but of a family of Kings for ever, hath no parallel in or out of scripture but the doctrine of original sin," Paine taunted.<sup>328</sup> In response to Burke's argument that present generations could be bound by inalterable decisions of the past, Paine later responded that "[t]here never did, there never will, and there never can exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling posterity to the '*end of time*.'"<sup>329</sup> To Paine, Burke's argument was nothing more than a claim that the present generation had been permanently enslaved by the past — a claim incompatible with a free people. "Man has no property in man; neither has any generation

<sup>322</sup> See, e.g., ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 11–12 (London, Walter Davis 1680).

<sup>323</sup> See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 32–33 (London, J. Dodsley 1790).

<sup>324</sup> *Id.* at 33 (internal quotation marks omitted).

<sup>325</sup> *Id.* at 144.

<sup>326</sup> *Id.* at 28.

<sup>327</sup> THOMAS PAINE, COMMON SENSE 24–25 (Philadelphia, R. Bell 1776).

<sup>328</sup> *Id.* at 23–24.

<sup>329</sup> THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION 11 (London, J.S. Jordan 5th ed. 1791).

a property in the generations which are to follow,” Paine wrote.<sup>330</sup> “Every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies.”<sup>331</sup>

Where Burke feared that law would cease to be meaningful if future generations could simply ignore it, Paine responded that a better way of understanding law was as a rule always subject to amendment by the future.<sup>332</sup> “A law not repealed continues in force, not because it *cannot* be repealed, but because it *is not* repealed; and the non-repealing passes for consent,” Paine wrote.<sup>333</sup> In this respect, all laws that the present generation did not repeal “continue to derive their force from the consent of the living.”<sup>334</sup> Paine wrote that what Burke was calling for, by contrast, was the power of one generation to “become immortal” by making their authority “live for ever.”<sup>335</sup> Paine thought this was nonsense. “Instead of referring to musty records and mouldy parchments to prove that the rights of the living are lost, ‘renounced and abdicated forever,’ by those who are now no more, as Mr. Burke [did],” Paine urged his contemporaries to see themselves as in control of their own destiny.<sup>336</sup> “The circumstances of the world are continually changing, and the opinions of men change also,” Paine concluded, “and as government is for the living, and not for the dead, it is the living only that has any right in it.”<sup>337</sup>

This last line reflected conversations Paine had with his contemporary Thomas Jefferson, who joined him in recognizing that hierarchies of inheritance undermined political equality by allowing people at the top of social hierarchies in one generation to pass along their wealth, power, and privileged social status to their children.<sup>338</sup> Like Paine, Jefferson argued that “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”<sup>339</sup> Jefferson wrote these words to James Madison shortly after reading the U.S. Constitution, which he complained was too difficult to

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *See id.* at 15.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 16.

<sup>336</sup> *Id.* at 17.

<sup>337</sup> *Id.* at 16.

<sup>338</sup> *See* TAYLOR, *supra* note 28, at 280–85 (discussing Jefferson’s view and adding how intergenerational transfers of assets have produced staggering levels of inequality in the twenty-first century).

<sup>339</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 395–96 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958).

amend.<sup>340</sup> Although Madison responded that the “tacit assent” of future generations could be inferred if they chose not to amend the Constitution,<sup>341</sup> Jefferson considered it “an act of force, and not of right,” to subject these later generations to his own generation’s amendment procedures.<sup>342</sup> He therefore argued that the Constitution should expire after nineteen years, leaving the next generation the same power he and Madison possessed to determine for themselves their own fundamental law.<sup>343</sup>

The authors of most state constitutions took Jefferson’s advice: they typically included provisions that automatically called constitutional conventions every twenty years, or otherwise recognized that if “constitutional revision is too difficult, constitutionalism overwhelms democracy.”<sup>344</sup> Only a handful of states still use their eighteenth-century constitutions; most, like New York, have adopted multiple constitutions to take advantage of ideas that did not find expression in the 1780s, like workers’ compensation or the eight-hour workday.<sup>345</sup> Indeed, the U.S. Constitution itself was a replacement for the Articles of Confederation: a document that declared it could be amended only by the unanimous approval of the thirteen state legislatures.<sup>346</sup> But Madison and other advocates of the Constitution ignored this restrictive amendment procedure, recognizing that “[t]he people were in fact the fountain of all power and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.”<sup>347</sup>

All this explains why an inalterable provision like the Corwin Amendment would have been profoundly antidemocratic: for the American people in 1861 to attempt to permanently bind their successors would have been a literal act of enslavement. And this same intuition carries over to the rest of Article V, which makes it incredibly difficult for even supermajorities of the American people to clarify whether we want to be bound by a decision like *Cedar Point*.<sup>348</sup> As the democratic theorist Robert Dahl observed, it is one thing to say that the

<sup>340</sup> See *id.* at 396.

<sup>341</sup> Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 THE PAPERS OF JAMES MADISON 18, 20–21 (Charles F. Hobson & Robert A. Rutland eds., 1981).

<sup>342</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 339, at 396.

<sup>343</sup> See *id.*

<sup>344</sup> ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 363 (2009).

<sup>345</sup> EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 23–25, 110–23 (2013).

<sup>346</sup> KLARMAN, *supra* note 87, at 41–42, 311.

<sup>347</sup> *Id.* at 312 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max Farrand ed., 1911) (statement of James Madison)) (alteration in original).

<sup>348</sup> See David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 668 (2018) (book review) (“[T]he U.S. Constitution no longer works from the point of view of popular sovereignty. It is now so difficult to amend under Article V that our popular sovereign is hardly able to stir, let alone issue lucid new commands.”).

Constitution's ratification and amendment procedures were once more democratic than existing alternatives. It is another to say we should remain bound by procedures

produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveholders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten[.]<sup>349</sup>

Americans living in our twenty-first-century government of the people have never had “an opportunity to express our considered will on our constitutional system,” including whether we wish “to continue to be governed under the existing constitution.”<sup>350</sup> Instead, we appear doomed to live our lives under inherited protections of social hierarchy like the Senate's lack of proportional representation or the Supreme Court's interpretation of the Takings Clause.<sup>351</sup>

The combination of judicial supremacy and a difficult-to-amend constitution thus produces antidemocracy: the power of political minorities to suppress the spread of political equality and to reinforce hierarchies of assets and inheritance without fear of democratic accountability. This is not merely a theoretical problem. It results in predictable oppression that is impractical for people at the bottom of the social hierarchy, like farmworkers, to remedy through existing law.

#### IV. HOW DOES DEMOCRACY SURPASS ANTIDEMOCRACY?

*Cedar Point* is one of countless possible illustrations of how antidemocracy insulates social hierarchies from the spread of political equality. The decision builds on dozens of previous constitutional interpretations, laws, and acts of violence that have all cabined American democracy into its limited Election Day form. Antidemocracy today is everywhere: from the workplace to the U.S. Constitution's amendment procedures. It is longstanding: advocates of social hierarchies have suppressed democracy in America since its founding. And it is self-reinforcing: political inequality thrives in a toxic feedback loop with inequalities in wealth and distributive justice.<sup>352</sup>

But the age, pervasiveness, and interconnectedness of antidemocracy also reveal its weakness. The revolution against monarchy, the abolition of slavery, the expansion of the political franchise, and the leveling of many social hierarchies at work and at home are all testaments to the historical strength of democracy in the face of even more oppressive

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<sup>349</sup> DAHL, *supra* note 315, at 2.

<sup>350</sup> *Id.*

<sup>351</sup> See *supra* notes 103–111 and accompanying text.

<sup>352</sup> See LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 1–2 (2008); KATHARINA PISTOR, *THE CODE OF CAPITAL* 205–09 (2019); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 2–3 (2017).

forms of antidemocracy. These movements offer an important lesson for cultivating democracy in the present: when ordinary people use democratic methods to organize themselves, they can harness power that rivals the antidemocratic wealth and force that sustains social hierarchies.<sup>353</sup> Madison himself recognized that the people are “the fountain of all power”; when they are sufficiently organized, the legal basis of antidemocracy cannot continue without their cooperation.<sup>354</sup>

Analyzing the power wielded by successful democratic movements in the United States, the social theorist Frances Fox Piven writes that ordinary people at the bottom of social hierarchies nevertheless have access to a “disruptive power” to interrupt “a pattern of ongoing and institutionalized cooperation that depends on their continuing contributions.”<sup>355</sup> Piven explains that even the most authoritarian social hierarchies are still *social*, operating through relationships of interdependence that connect people at the top and bottom of the hierarchies.<sup>356</sup> “Agricultural workers depend on landowners,” she writes, “but landowners also depend on agricultural workers, just as industrial capitalists depend on workers, . . . landlords depend on tenants, and governing elites in the modern state depend on the acquiescence if not the approval of enfranchised publics.”<sup>357</sup> Because of this interdependence, ordinary people possess a latent form of power that they can activate by withholding their cooperation, as in strikes, boycotts, and other mass actions.<sup>358</sup> Yet a series of problems stands in the way of wielding this power successfully — namely, ordinary people must first recognize the fact of interdependence, coordinate their activities, and be able to break antidemocratic rules while withstanding the reprisals of those at the top of social hierarchies.<sup>359</sup>

Solving these problems requires *organizing*: drawing in people at the bottom of social hierarchies to understand their own disruptive power and to participate as equals in figuring out how to transfer power from the top of their hierarchies.<sup>360</sup> As the labor organizer Marshall Ganz has observed from his years with the United Farm Workers, the most successful cultivators of democracy — in the workplace and outside of

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<sup>353</sup> See ARONOFF, *supra* note 151, at 246–47, 272–81; MCALEVEY, *supra* note 23, at 16–19; PIVEN, *supra* note 47, at 16.

<sup>354</sup> See David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 57) (on file with the Harvard Law School Library) (“Within broad boundaries, the degree to which an attempted amendment stays inside the four corners of Article V has not been decisive in determining whether it becomes accepted by Americans as part of the written Constitution.”).

<sup>355</sup> PIVEN, *supra* note 47, at 21.

<sup>356</sup> *Id.* at 20.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at 21.

<sup>359</sup> *Id.* at 27–30.

<sup>360</sup> See GANZ, *supra* note 12, at 14–19, 241–46.

it — have been those who organize themselves to wield disruptive power against dominating social hierarchies wherever they exist.<sup>361</sup> In the successful early years of the farmworker movement, for example, the movement structured itself in a politically egalitarian manner in which Cesar Chavez, Dolores Huerta, and other leaders held themselves accountable to changing constituencies.<sup>362</sup> The movement built what Ganz calls its *strategic capacity* by harnessing the motivation of workers to improve their own lives instead of relying on external advocates, by accessing salient knowledge that only workers possessed, by sustaining a creative deliberative process that resolved conflict through negotiation and voting rather than the fiat of a leader or a unanimity requirement, and by maintaining accountability structures that allowed workers to select their leaders instead of bureaucratically insulating leaders from new ideas.<sup>363</sup> Employing this democratic structure, the farmworkers used the strategy of organizing to turn what they had (lots of people) into what they needed (economic and political leverage) to get what they wanted (political equality in the workplace).<sup>364</sup>

Building on Ganz’s identification of what worked for the farmworkers, another labor organizer, Jane McAlevey, has argued that the lifeblood of successful social movements has been *structure-based* organizing, or “mass participation by ordinary people, whose engagement was inspired by a cohesive community bound by a sense of place: the working community on the shop floor, in the labor movement, and the faith community in the church, in the fight for civil rights.”<sup>365</sup> McAlevey observes that ordinary people typically build power within structures first by identifying organic leaders among themselves, and second by getting these leaders to mobilize uninterested members of the structure to participate in increasingly assertive collective actions.<sup>366</sup> “Structure-based organizing deliberately and methodically expands the base of people whom mobilizers can tap in their never-ending single-issue campaigns,” McAlevey writes.<sup>367</sup> Once a sufficiently large majority of the structure is willing to actively participate in a difficult-to-sustain collective action — like a strike or boycott — and once they recognize how existing hierarchies depend on their cooperation, ordinary people can

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<sup>361</sup> See *id.* at 14–19; MCALEVEY, *supra* note 25, at 32 (describing “a small mountain of evidence that the unions led by [historically] leftist factions were not only the most effective but also the most democratic”).

<sup>362</sup> GANZ, *supra* note 12, at 240–43, 253–54.

<sup>363</sup> *Id.* at 14–19.

<sup>364</sup> See *id.* at 14–19, 240–41.

<sup>365</sup> MCALEVEY, *supra* note 25, at 12.

<sup>366</sup> *Id.* at 13–14, 31–37 (describing this process as *leadership identification* and *structure tests*); see also GARZA, *supra* note 47, at 67 (describing “how to use escalating tactics to put pressure on people with power”).

<sup>367</sup> MCALEVEY, *supra* note 23, at 14.

exercise the leverage necessary to transfer power to themselves from the top of the hierarchies.<sup>368</sup>

Ganz, McAlevey, and other observers of the farmworker movement have taken the United Farm Workers' decline in the 1980s as evidence of the "iron law of oligarchy": the difficulty of maintaining democratic procedures after short-term successes.<sup>369</sup> This difficulty has been shared across many democratic movements against oppression.<sup>370</sup> After winning contracts or electing political candidates, modern labor unions and campaigns often abandon organizing in favor of advocating on constituents' behalf in negotiations with elites or mobilizing a representative sample of constituents as evidence of their participation.<sup>371</sup> These strategies rely on an aristocratic theory of change, one that incorrectly believes that structural reforms in the United States have been primarily produced by "insider bargains" to build "bipartisanship"<sup>372</sup> or the litigation strategies of a few excellent lawyers rather than the "thick action of concerted social movement through which 'we the people' . . . discover and legitimize the principles on which our democracy presumably rests."<sup>373</sup>

But iron is a brittle material, and even iron laws have been shattered by movements committed to maintaining their democratic structure and strategy after initial victories.<sup>374</sup> Indeed, a resurgence of successful collective actions has recently proved that "workers can still win big" in the United States despite pervasive antidemocracy.<sup>375</sup> These high-participation collective actions include modern-day abolitionists calling for just alternatives to prisons, police, racial capitalism, and the American carceral state;<sup>376</sup> campaigns for living wages, a debt jubilee, and a

<sup>368</sup> See *id.* at 13–14, 35; PIVEN, *supra* note 47, at 20–21.

<sup>369</sup> GANZ, *supra* note 12, at 240–43; see PAWEL, *supra* note 14, at 416–28.

<sup>370</sup> See FREIRE, *supra* note 64, at 29–30, 43.

<sup>371</sup> See *id.* at 179–80; MCALEVEY, *supra* note 25, at 4–10, 74–84; see, e.g., Bill Fletcher Jr., *Governing Socialism*, in WE OWN THE FUTURE, *supra* note 24, at 93, 101–02.

<sup>372</sup> THEDA SKOCPOL, NAMING THE PROBLEM: WHAT IT WILL TAKE TO COUNTER EXTREMISM AND ENGAGE AMERICANS IN THE FIGHT AGAINST GLOBAL WARMING 129–30 (2013).

<sup>373</sup> Guinier & Torres, *supra* note 122, at 2744; see *id.* at 2743–44 (distinguishing between a jurisprudential focus on how courts make law and a demosprudential focus on how social movements make law).

<sup>374</sup> See MCALEVEY, *supra* note 25, at 32–39, 84–92.

<sup>375</sup> MCALEVEY, *supra* note 23, at 19; see *id.* at 19–41; Andrias, *supra* note 186, at 7–8; Catherine L. Fisk, Essay, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 686–87, 706 (2021).

<sup>376</sup> See GARZA, *supra* note 47, at 274–75; Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 90–92 (2020); Fisk, *supra* note 375, at 686–87; Barbara Ransby, *The Class Politics of Black Lives Matter*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/class-politics-black-lives-matter> [<https://perma.cc/V84P-NZSQ>].

sustainable planet;<sup>377</sup> actions against the treatment of “essential” workers as disposable;<sup>378</sup> and an “insurgency” of teachers’ strikes against the consequences of fiscal austerity.<sup>379</sup>

Like the early farmworker movement — and in contrast with the modest industrial democracy of the modern National Labor Relations Act — this democratic revival has been driven by “more sectoral, worker-driven, and political forms of organization.”<sup>380</sup> From Black Lives Matter to environmental justice, recent movements have engaged in “whole-worker organizing,” which treats workers as parents of children in underfunded schools, as patients in privatized healthcare systems, as renters of unaffordable homes, as neighbors increasingly vulnerable to climate change, and as riders of dysfunctional mass transit systems.<sup>381</sup> These movements have, accordingly, applied forms of structure-based organizing to neighborhoods, congressional districts, and other communities in which workers live. These movements have also taken advantage of a “solidarity dividend” that comes from explicitly demanding the abolition of structural hierarchies across lines of race, sex, sexual orientation, disability, immigration status, and incarceration status.<sup>382</sup> And these movements have also provided a “political education”<sup>383</sup> in which each elimination of social hierarchy reinforces itself by “educating workers about political issues, mobilizing them to support

<sup>377</sup> See GRAEBER, *supra* note 1, at 55–149; DAVID ROLF, THE FIGHT FOR FIFTEEN, at xv (2016); TAYLOR, *supra* note 116, at 47–62; Varshini Prakash, *People Power and Political Power*, in WINNING THE GREEN NEW DEAL 137, 137–63 (Varshini Prakash & Guido Girgenti eds., 2020).

<sup>378</sup> Gupta, Lerner & McCartin, *supra* note 24, at 155–63; Noam Scheiber & Kate Conger, *Strikes at Instacart and Amazon over Coronavirus Health Concerns*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/business/economy/coronavirus-instacart-amazon.html> [<https://perma.cc/7DSQ-D5UR>].

<sup>379</sup> See LEO CASEY, THE TEACHER INSURGENCY: A STRATEGIC AND ORGANIZING PERSPECTIVE 1–14 (2020) (describing the 2018 strike wave that began this insurgency as the “Teacher Spring”); Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 BERKELEY J. EMP. & LAB. L. 135, 145–48 (2019).

<sup>380</sup> Andrias, *supra* note 379, at 148.

<sup>381</sup> MCALEVEY, *supra* note 25, at 70; *see id.* at 69–70; GARZA, *supra* note 47, at 273–74; MCALEVEY, *supra* note 23, at 40–41; Gupta, Lerner & McCartin, *supra* note 24, at 154–55.

<sup>382</sup> HEATHER MCGHEE, THE SUM OF US 259–89 (2021); GARZA, *supra* note 47, at 157 (defining *solidarity* in the context of Black Lives Matter as “trying to understand the ways our communities experience unique forms of oppression and marginalization”); *see* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1211 (1991) (“[O]nce women experience their power in the workplace, and the structure of work changes to accommodate a new ideal worker, women likely will generalize that power into the larger political arena.”); Flynn, Holmberg, Warren & Wong, *supra* note 154, at 58–62 (articulating the demands of a third reconstruction); Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 225–26 (2021) (empirically observing that union membership reduces levels of racial resentment among White workers even after they leave the union).

<sup>383</sup> MCALEVEY, *supra* note 25, at 29.

political candidates,”<sup>384</sup> and encouraging them to join other “politically active, cross-class voluntary associations”<sup>385</sup> that can build and wield “constituent power” to demand accountability from representatives at the local, state, and federal levels.<sup>386</sup>

The net result is that this form of methodical, structure-based organizing serves to “increase political equality by building and consolidating political power for the nonwealthy, thus serving as counterweights to the political influence of the rich.”<sup>387</sup> As Chavez and Huerta recognized, mass-participation organizations are remarkably successful not only at leveling hierarchies in the workplace but also at turning out voters, particularly among people who ordinarily rarely participate in elections.<sup>388</sup> Like any labor contract, the structural protections of democracy that today seem fundamental — like the Fourteenth Amendment or the Voting Rights Act — represent the ability that organized workers once had to exact concessions, not the magnanimity of social elites.<sup>389</sup> The same is true for legislation that has sought to protect democracy in the workplace, like the original National Labor Relations Act or the California Agricultural Labor Relations Act. “In short,” write labor scholars Kate Andrias and Benjamin I. Sachs, “unions enable workers to participate collectively at every level of politics and government, equalizing power in the political economy and providing a countervailing voice to organized business groups.”<sup>390</sup>

Although the sources of antidemocracy in the United States might today appear as impenetrable as was *Dred Scott*’s protection of slavery or the unanimity requirement of the Articles of Confederation, that “apparent hopelessness” is just as deceptive.<sup>391</sup> Just as nineteenth-century organizers recognized that “[w]henver the public mind shall will the abolition of slavery, the way will open for it,”<sup>392</sup> modern organizers have

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<sup>384</sup> Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 567 (2021).

<sup>385</sup> THEDA SKOCPOL, DIMINISHED DEMOCRACY 8 (2004).

<sup>386</sup> GREENBERG & LEVIN, *supra* note 103, at 103–04.

<sup>387</sup> Andrias & Sachs, *supra* note 384, at 551–52; see PIVEN, *supra* note 47, at 18.

<sup>388</sup> See GANZ, *supra* note 12, at 189; Benjamin Radcliff & Patricia Davis, *Labor Organization and Electoral Participation in Industrial Democracies*, 44 AM. J. POL. SCI. 132, 136–38 (2000); James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* 1–6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24259, 2019).

<sup>389</sup> See ARONOFF, *supra* note 151, at 246–47; DU BOIS, *supra* note 7, at 83; MCALEVEY, *supra* note 23, at 39; Gupta, Lerner & McCartin, *supra* note 24, at 154.

<sup>390</sup> Andrias & Sachs, *supra* note 384, at 567–68.

<sup>391</sup> MASUR, *supra* note 99, at 174–75.

<sup>392</sup> *Id.*

recognized that no “group of foolish lawyers” can stop a people sufficiently organized to demand a sustainable, democratic society.<sup>393</sup> This doesn’t mean, however, that lawyers are incapable of acting in solidarity with movements.<sup>394</sup> To the contrary: the legal scholars Amna Akbar, Sameer Ashar, and Jocelyn Simonson observe that “[m]ovements often start with disrupting ideas and telling new stories about what is possible.”<sup>395</sup> When legal scholars “engage, celebrate, and participate in disruption from the grassroots,” it becomes “important and possible for legal scholars to support efforts at radical and popular ideation toward transformation.”<sup>396</sup>

In solidarity with democratic movements, American scholars have long participated in imagining what a society free from antidemocracy might look like. For example, democratic theorists have for years joined labor organizers in rejecting the ideological distinction between how political institutions and economic institutions should be governed — calling instead for democratic government in both.<sup>397</sup> Recent proposals for workplace democracy have taken inspiration from the Industrial Workers of the World, imagining business enterprises in which workers control enterprises and replace “the social division of labor and hierarchies on the job” with “direct democracy in the workplace.”<sup>398</sup> More modest proposals for corporate democracy, inspired by German firms, would allow workers to share control with shareholders in a bicameral

<sup>393</sup> NAOMI KLEIN, *THIS CHANGES EVERYTHING* 72–73 (2014); *see id.* at 455–57, 462–63 (discussing the parallels between the climate justice movement and the abolition movement); MCALEVEY, *supra* note 25, at 39; PIVEN, *supra* note 47, at 16.

<sup>394</sup> *See, e.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 3–4) (on file with the Harvard Law School Library); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1932–52 (2019); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 859–60 (2021).

<sup>395</sup> Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 829 (2021).

<sup>396</sup> *Id.*; *see also* FREIRE, *supra* note 64, at 33; GUINIER & TORRES, *supra* note 122, at 159 (describing “a commitment not only to struggle but also to struggle toward a larger vision”); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 406–10 (2018).

<sup>397</sup> Estlund, *supra* note 20, at 808 & n.53 (describing this intellectual tradition); *see, e.g.*, ANDERSON, *supra* note 18, at 38–39, 42; JAMES A. GROSS, *BROKEN PROMISE I* (1995); SIDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 808 (Longmans, Green & Co. 2d ed. 1920) (1897); Bowie, *supra* note 135, at 2030–31; Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Feature, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1829, 1831 (2020); Janice R. Foley & Michael Polanyi, *Workplace Democracy: Why Bother?*, 27 ECON. & INDUS. DEMOCRACY 173, 185–86 (2006). *See generally* ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1985).

<sup>398</sup> IMMANUEL NESS & DARIO AZZELLINI, *OURS TO MASTER AND TO OWN: WORKERS’ CONTROL FROM THE COMMUNE TO THE PRESENT* 6 (2011); *see id.* at 4–6; MICHAEL ALBERT & ROBIN HAHNEL, *THE POLITICAL ECONOMY OF PARTICIPATORY ECONOMICS* 23–31 (1991); RICHARD WOLFF, *DEMOCRACY AT WORK: A CURE FOR CAPITALISM* 118, 145–54 (2012).

system.<sup>399</sup> As free-market capitalism appears incapable of responding to the existential threat of climate change, political theorists have also joined a growing environmental movement in imagining the nationalization of the fossil-fuel industry, allowing workers and voters to direct a just transition to post-carbon democracy.<sup>400</sup> Labor theorists have also drawn on the labor movement's achievements outside the United States to propose "a new labor law that is capable of empowering all workers to demand a truly equitable American democracy and a genuinely equitable American economy," with provisions that include sectoral bargaining, works councils, and just-cause protections.<sup>401</sup>

Other theorists have sought to reduce the daily domination people face by imagining the forms of public investment, debt relief, and social insurance that would give us all more free time to "shape, cultivate, and transform the commitments in light of which we lead our lives."<sup>402</sup> They have also imagined egalitarian methods of paying for these programs that would reduce the massive inequalities of assets and inheritance that give some members of our democracy far more political power than others.<sup>403</sup> And they have imagined democratic methods of organizing our communities so that political minorities can always share in exercising *power* over the issues that most affect them instead of merely petitioning elites to protect their *rights*.<sup>404</sup> In this respect, scholars who have imagined better schools, demilitarized police departments, a Green New

<sup>399</sup> HAYDEN & BODIE, *supra* note 158, at 161, 167–69, 174; Elizabeth Anderson, *Workplace Government and Republican Theory*, in REPUBLICANISM AND THE FUTURE OF DEMOCRACY, *supra* note 19, at 189, 203–05; Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 171–72 (1988). *See generally* JOSEPH R. BLASI, RICHARD B. FREEMAN & DOUGLAS L. KRUSE, THE CITIZEN'S SHARE: PUTTING OWNERSHIP BACK INTO DEMOCRACY (2013).

<sup>400</sup> ARONOFF, *supra* note 151, at 253–66; KLEIN, *supra* note 393, at 96–98, 127–28; Lyra Walsh Fuchs, *From Fossil Capitalism to Green Democracy*, DISSENT (Apr. 28, 2021), [https://www.dissentmagazine.org/online\\_articles/from-fossil-capitalism-to-green-democracy](https://www.dissentmagazine.org/online_articles/from-fossil-capitalism-to-green-democracy) [https://perma.cc/EFR5-HCXV]; *see also* MONTGOMERY, *supra* note 161, at 361, 391, 399–401 (discussing older calls for nationalization).

<sup>401</sup> SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 1 (2020); *see id.* at 1–8; Andrias, *supra* note 186, at 8–9; Fisk, *supra* note 375, at 699–700; Sachs, *supra* note 186, at 203–07 (proposing the creation of political unions unbundled from collective bargaining responsibilities).

<sup>402</sup> MARTIN HÄGGLUND, THIS LIFE: SECULAR FAITH AND SPIRITUAL FREEDOM 302 (2019); *see id.* at 284–88; 301–04; GOUREVITCH, *supra* note 161, at 177–79; GRAEBER, *supra* note 150, at 398–400; JAFFE, *supra* note 137, at 324–25; WEEKS, *supra* note 154, at 231–33; Flynn, Holmberg, Warren & Wong, *supra* note 154, at 55–62.

<sup>403</sup> *See, e.g.*, DOROTHY A. BROWN, THE WHITENESS OF WEALTH 192–93, 200–22 (2021); STEPHANIE KELTON, THE DEFICIT MYTH 222–26 (2020); KLEIN, *supra* note 393, at 113–14; THOMAS PIKETTY, CAPITAL AND IDEOLOGY 1018–20 (Arthur Goldhammer trans., 2020); EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE 145–53 (2019).

<sup>404</sup> *See, e.g.*, GUINIER, *supra* note 73, at 6–7; Blackhawk, *supra* note 104, at 1862–66; Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9–10 (2010); Reese, *supra* note 104, at 630–33.

Deal, affordable housing, reparations, a debt jubilee, guaranteed health insurance, a jobs guarantee, and a universal basic income are not merely offering ends desirable in themselves but also ways of leveling pervasive and intersectional hierarchies of domination that transcend the workplace.<sup>405</sup> As the authors of the Combahee River Collective wrote in 1977: “If Black women were free, it would mean that everyone else would have to be free since our freedom would necessitate the destruction of all the systems of oppression.”<sup>406</sup> The same is true for migrant farmworkers, whose persecution and exclusion from the benefits of citizenship have served identical ends as the persecution and disenfranchisement of their enslaved and sharecropping predecessors.<sup>407</sup>

Few of these democratic visions will likely be achievable absent democratic methods of making and applying the law in the face of a hostile Supreme Court and an effectively unamendable Constitution.<sup>408</sup> Yet they are increasingly urgent. As the legal scholar Aziz Rana observes of President Donald Trump’s attempted coup earlier this year: “[A] lesson of the Trump-led insurrection at the Capitol is that failing to address the undemocratic terms of the constitutional order actually spurs the authoritarian tendencies of the Right, including the potential for more violent resistance.”<sup>409</sup> To the extent a major political party has embraced “that their coalition is a minority one that needs anti-majoritarian tools to wield power,” it is inevitable that its leaders will “see democracy as a threat to their power” and respond with judicially

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<sup>405</sup> See, e.g., KAREN M. TANI, STATES OF DEPENDENCY 159 (2016) (describing how New Deal-era welfare programs helped Black women reclaim their own reproductive capacity and reject White- or male-dominated institutions meant to control them); Darrick Hamilton, *A Three-Legged Stool for Racial and Economic Justice*, in WE OWN THE FUTURE, *supra* note 24, at 64, 66–77; Mary Kay Henry, *A Workers’ Green New Deal*, in WINNING THE GREEN NEW DEAL, *supra* note 377, at 126, 126–34.

<sup>406</sup> HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE 22–23 (Keeanga-Yamahtta Taylor ed., 2017); see GUINIER & TORRES, *supra* note 122, at 11–12.

<sup>407</sup> ARAIZA, *supra* note 196, at 13–15; see CLAUDIO LÓPEZ-GUERRA, DEMOCRACY AND DISENFRANCHISEMENT: THE MORALITY OF ELECTORAL EXCLUSIONS 84 (2014) (“Virtually all contemporary political philosophers, even those who defend the right of countries to close their borders to protect a cultural identity, agree that it would be unjust to deny access to the ballot to immigrants who have become permanent residents.”); Michelle Chen, *On Immigration: A Socialist Case for Open Borders*, in WE OWN THE FUTURE, *supra* note 24, at 177, 182 (“The left case for border restriction centers on protecting the ‘legal’ workers from market competition — through a tiered workforce structure that renders ‘alien’ workers a permanent underclass.”); see also DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 7–8 (2009) (discussing the use of prosecutions and disenfranchisement to force Black people into exploitative labor); ROBIN D.G. KELLEY, HAMMER AND HOE 29 (1990) (discussing how exploitative labor has been sustained by the suppression of social equality).

<sup>408</sup> See Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1593–95 (2016); Joseph Fishkin & William E. Forbath, *The Anti-oligarchy Constitution*, 94 B.U. L. REV. 669, 692–93 (2014).

<sup>409</sup> Rana, *supra* note 84.

enforced constitutional interpretations to suppress voting blocs and subvert elections.<sup>410</sup> Accordingly, scholars imagining a world without anti-democracy have proposed practical, straightforward statutes that would eliminate the influence of money in politics, extend the franchise to all residents, replace partisan gerrymandering and the Electoral College with proportionally representative multimember elections, and eliminate the filibuster.<sup>411</sup> To reduce the antidemocratic influence of the Court, these scholars have also proposed federal statutes to “democratize” the federal courts by depriving them of their power to decline to enforce federal laws.<sup>412</sup> And to reduce the antidemocratic influence of the Constitution’s amendment process, a recent essay in the *Harvard Law Review* observes that simple majorities in Congress have the formal power to admit dozens of new states, all of which could supply enough senators, representatives, and state legislatures to enact any law or constitutional amendment under the procedures of Article V.<sup>413</sup> In particular, a sufficiently motivated Congress could assemble enough votes to ratify four amendments:

- (1) a transfer of the Senate’s power to a body that represents citizens equally;
- (2) an expansion of the House so that all citizens are represented in equal-sized districts;
- (3) a replacement of the Electoral College with a popular vote; and
- (4) a modification of the Constitution’s amendment process that would ensure future amendments are ratified by states representing most Americans.<sup>414</sup>

The essay recognizes that this proposal might sound radical, but warns that “it is no more radical than a nominally democratic system of government that gives citizens widely disproportionate voting power depending on where they live.”<sup>415</sup> The essay concludes: “The people

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<sup>410</sup> *Id.*; see JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 206–07 (2020) (describing the Republican Party’s “creeping counter-majoritarianism”); Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021, 11:48 AM), <https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html> [<https://perma.cc/9Y36-8W5E>] (discussing how at least four conservative justices appear to believe that the Constitution permits state legislatures to overturn the results of a presidential election).

<sup>411</sup> See *supra* notes 103–111 and accompanying text.

<sup>412</sup> See, e.g., Doerfler & Moyn, *supra* note 296 (manuscript at 4); Christopher Jon Sprigman, *Congress’s Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1781–82 (2020); Bowie, *supra* note 112; see also, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868) (affirming Congress’s power to deprive the Supreme Court of jurisdiction to review the first Reconstruction Act).

<sup>413</sup> Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1049–51 (2020).

<sup>414</sup> *Id.* at 1050.

<sup>415</sup> *Id.* at 1050–51.

should not tolerate a system that is manifestly unfair; they should instead fight fire with fire, and use the unfair provisions of the Constitution to create a better system.”<sup>416</sup>

What these and similar proposals have in common is the rigorous commitment to democracy everywhere — from our workplaces to our fundamental law — not just for some people on Election Day. Instead of continuously quoting *The Federalist* to debate whether the United States was founded as a democracy or a republic,<sup>417</sup> the authors of these proposals ask the more relevant question: How can we become more democratic? The difficulty of answering this question is not imagining what more democracy might look like, but learning from past examples of how democracy has been cultivated in the face of hostile property owners who use antidemocracy to preserve the status quo. One lesson provided by the farmworkers is that the deeply egalitarian roots of democracy offer a far more preferable alternative to ecosystems built on dominating hierarchies. Another is that the solidarity and collective power grown by democratic organizing is a far more effective theory of change than aristocratic strategies. The harmful effects of decisions like *Cedar Point* are going to be remedied by ordinary people who organically create new power, not by smarter advocates, better judges, or the discretion and intelligence of elite individuals who hoard what power they’ve inherited.

This, at least, was what Cesar Chavez meant when he used to say: “power makes you stupid.”<sup>418</sup> Power is necessary to end misery, but it must be claimed, grown, and shared with care.

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<sup>416</sup> *Id.* at 1051; see also LINDA COLLEY, *THE GUN, THE SHIP, AND THE PEN* 13–14 (2021) (“Wherever [constitutions] exist, they only function well to the degree that politicians, the law courts and the populations concerned are able and willing to put sustained effort into thinking about them, revising them when necessary, and making them work.”); Rana, *supra* note 298 (“Armed with a flexible amendment structure, the people could intervene through mass movements in constitutional politics, negotiating and re-negotiating the terms of the existing order in response to genuine popular needs.”).

<sup>417</sup> See HACKER & PIERSON, *supra* note 410, at 177 (tracing an increasingly common refrain among conservatives — “We’re a republic, not a democracy” — to the radically antigovernment John Birch Society and the belief “that democracy itself is a problem, because it threatens the property and power of powerful minorities”).

<sup>418</sup> GANZ, *supra* note 12, at 253.