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The Myth of Equality in the Employment Relation

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THE MYTH OF EQUALITY IN THE EMPLOYMENT RELATION

*Aditi Bagchi**

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ABSTRACT

Although it is widely understood that employers and employees are not equally situated, we fail to account adequately for this inequality in the law governing their relationship. We can best understand this inequality in terms of status, which encompasses one's level of economic resources, leisure, and discretion. For a variety of misguided reasons, contract law has been highly resistant to the introduction of status-based principles. Courts have preferred to characterize the unfavorable circumstances that many em-

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ployees face as the product of unequal bargaining power. But bargaining power disparity does not capture the moral problem raised by inequality in the employment relation, and thus, it has failed to inspire any meaningful attempt to address that inequality. By contrast, a status-based approach would motivate several common sense doctrinal changes.

The persistent myth of equality is still more paradoxical in the context of statutory labor law. Due to political constraints and several sources of uncertainty about its future, the National Labor Relations Act was limited to a bare bones framework for collective bargaining. Later amendments and judicial interpretations entrenched a strictly procedural interpretation of the Act, oriented toward the goal of minimizing commercial disruption rather than disrupting status inequality. The present regime sustains a false image of unions as equal in strength to employers, in need of only an illusive “level playing field.” As a result, it does not effectively mitigate the negative dimensions of social status stemming from employment. A few modest changes would help re-orient or at least broaden the Act so that unions can play a meaningful role in mitigating status inequality.

INTRODUCTION

Most myths are told and retold, and their plausibility derives from the repeated re-telling. Other myths are latent. They do not parade as truths; we may reject them in principle even as we abide by them in fact. They survive because they are not explicit, and, therefore, not subject to adequate scrutiny. The myth of equality in the employment relation takes the latter form.

It is commonplace that employers and employees are not on equal footing. The inequality between them is multi-dimensional. Employers have more wealth.¹ Employers have more bargaining power.² Owners and managers are usually of higher social status.³

1. Employers are an ambiguously defined and heterogeneous group. However, a number of facts suggest that they are wealthier than non-employers. First, small-business-owning households are “more than eight times as likely to be classified as high [wealth]” as households not owning a business (21.2% versus 2.5%). George Haynes & Charles Ou, *How Did Small Business-Owning Households Fare During the Longest U.S. Economic Expansion?*, 276 SMALL BUS. RES. SUMMARY 1 (2006). Owners of private businesses represent just over 13% of the U.S. population but own almost half of the aggregate wealth. See Marco Cagetti & Mariacristina De Nardi, *Entrepreneurship, Frictions, and Wealth*, 114 J. POL. ECON. 835, 839 (2006). Business owners also represent more than three-quarters of the richest 1% of households. *Id.* One might argue that in publicly traded companies, shareholders are the true owners and are not characteristically wealthy. However, even if most shareholders are not wealthy, most shares are owned by the wealthy. See Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze*, 43 (The Levy Economics Institute of Bard College, Working Paper No. 502, 2007), available at http://www.levy.org/pubs/wp_502.pdf (noting that the wealthiest 20% own

These are familiar attributes of our social and economic environment. But though the related rhetoric of inequality is potent in the political context, it is surprisingly inert in the domain of contract and even labor law. To be sure, it is not entirely absent. For example, employment cases often refer to the inequality of bargaining power between employers and employees.⁴ More generally, the doctrines of good faith and modification can both be understood as concerned with preventing a party from exploiting a shift in bargaining power that takes place over the course of contract; they are not concerned, however, with the initial distribution of bargaining power.⁵ Labor law cases often espouse the objective of putting bargaining partners on an even playing field—on which those with superior “weapons” are entitled to prevail.⁶

almost 90% of all stock); *see also* Lawrence Mishel et al., *THE STATE OF WORKING AMERICA 2006/2007* 78-79 (2007); Thomas W. Joo, *Comment: Corporate Governance and the “D-Word,”* 63 *WASH. & LEE L. REV.* 1579, 1588 (2006). Finally, managers of businesses owned by others, whom employees may perceive as their employer or at least exercising the power of an employer, are also wealthier than non-managerial employees. *See* Howard Aldrich & Jane Weiss, *Differentiation Within the United States Capitalist Class: Workforce Size and Income Differences*, 46 *AM. SOC. REV.* 279, 280 (1981) (discussing variations in income and wealth among those who employ themselves and/or others).

2. *See* SYDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 660 (2d ed. 1920) (1897). *See generally* Bruce E. Kaufman, *Labor’s Inequality of Bargaining Power: Changes Over Time and Implications for Public Policy*, 10 *J. LAB. RES.* 285, 292-94 (1989) (describing changes in balance over time).

3. *See* Sharon Hannes, *The Market for Takeover Defenses*, 101 *NW. U. L. REV.* 125, 170 (2007) (noting status benefits of managing a business); Michael Klausner & Kate Litvak, *What Economists Have Taught Us About Venture Capital Contracting*, in *BRIDGING THE ENTREPRENEURIAL FINANCING GAP* 54, 57 (Michael J. Whincop ed., 2001); BANKS MCDOWELL, *ETHICAL CONDUCT AND THE PROFESSIONAL’S DILEMMA: CHOOSING BETWEEN SERVICE AND SUCCESS* 15 (1991) (noting that corporate and business managers enjoy high social status); Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 *J. CORP. L.* 285, 290-91 (1990) (noting status benefits of close corporation ownership); ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 113 (1995) (discussing small business ownership as a “route” to higher social status).

4. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (finding employer “possesse[d] considerably more bargaining power than . . . its employees”).

5. *See, e.g.*, *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902) (refusing to enforce modification obtained by employees after relative bargaining power had shifted in their favor).

6. *See* 29 U.S.C. § 151 (2006) (stipulating that the policies of the National Labor Relations Act (NLRA) were expected to restore equality of bargaining power between employers and employees); *NLRB v. Int’l Union*, 361 U.S. 477, 489 (1960) (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft–Hartley Acts have recognized.”).

The inequality between employers and employees is frequently invoked in political rhetoric, as in order to justify changes in the tax code or trade policy that ostensibly will make it more difficult or costly to move jobs overseas, or to explain why the general balance of political power disfavors the working class.⁷ But it is seldom invoked to justify specific interventions in the employment relationship itself, and those interventions are still more rarely promoted or defended as means by which to undermine the prevalence of economic and occupational status.⁸ Direct regulation of the terms of the employment relationship in the United States, as in laws providing for statutory leave and notice of termination, is startlingly limited in comparison to other developed democracies.⁹ Nevertheless, what regulation exists is of great controversy.

I do not argue here that judges should undertake through adjudication of individual disputes to recognize or redress this inequality just because it has purchase in the political domain. Even if appropriately invoked in politics, there may be good reasons for setting aside the issue when developing and applying law, especially judge-made law. I will not address arguments from institutional competency or democratic accountability at length here, but will focus instead on the substantive choice of whether contract and labor law should reflect status inequalities. A contract and labor law that reflects status inequality would differ from existing law in certain concrete ways, and while it is not the ambition of this Article to fully consider the merits and demerits of these doctrinal reforms, some possible changes will

7. See, e.g., Jackie Calmes & Edmund L. Andrews, *Obama Asks Curb on Use of Havens to Reduce Taxes*, N.Y. TIMES, May 5, 2009, at A1; Robin Toner, *A New Populism Spurs Democrats on the Economy*, N.Y. TIMES, July 16, 2007, at A1.

8. Richard Epstein has argued categorically against the recognition of status in contract. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1364-66 (1983) (“[C]ommon law rules in their ideal form make legal entitlements among strangers without reference to personal status. . . . Individuals should not have to sacrifice their rights against the rest of the world because they become an employer of *A* or an employee of *B*. Stating propositions in general form is, moreover, a powerful antidote to abuse and favoritism, even if standing alone it cannot guarantee a just set of rules or outcomes. . . . As the identities of the contracting parties and the terms on which they contract are of no special concern to the state, a contract between an employer and an employee is indistinguishable from one between two prospective employees.”).

9. See Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333, 355 (2007); Carol Daugherty Rasic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. “Employment-at-Will” Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 J. INT’L L. & PRAC. 441, 442 (1995); Americo Pla Rodriguez, *Termination of Employment on the Initiative of the Employer*, 5 COMP. LAB. L. 221, 221 (1982); Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207, 207 (1983); Jack Stieber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L. 229, 229 (1980).

be discussed below. On the assumption that we cannot start from scratch, the proposals are for modest interventions that will mitigate employees' experience of status. The interventions would be "status based" inasmuch as they would not depend on or be justified with reference to either employer–employee contractual intent or general defects in the process of contract formation. Instead, reforms targeted toward status inequality would have the express aim of undercutting the dependency and persistent inequality of circumstance characteristic of status hierarchies.

I begin with the premise that many, if not most, employment relationships are characterized by such dependency and lifetime inequality. But even if there really is an inequality of power and status between employers and employees, and even if we generally disfavor this inequality, this does not mean it should be taken into account at the level of the employment contract. There are many situations where we have reasons to believe that are separate from the empirical truth-value of a claim. We may have reason to proceed as if employers and employees are equally situated, even if they are not. I will argue that there are now no such good reasons.

Several reasons may motivate the persistent myth of equality in the individual employment relationship.¹⁰ First, the move from status to free contract in employment relations took centuries, and reintroducing the notion of status in contract, however benignly intended, might risk a step backward. The United States is committed to being not only race blind, but also class blind. Second, historically dominant theories of contract have emphasized the significance of will and promise, and, at first blush, the moral salience of neither appears to turn on status. Third, it may be too costly to tailor the rules of contract to the specific situations of contracting parties, as opposed to limiting the court's inquiry to the contract itself and related communications. Fourth, while mandatory terms are an alternative to tailored application of doctrine, they are blunt instruments. Interventions motivated by inequality may take the form of Pareto-inferior mandatory terms, i.e., some or even most workers may prefer contracts without terms imposed for their benefit in exchange for some other term or modification. For example, workers may prefer not to have work time limitations if they can secure a higher wage rate for extra work hours.

There are other reasons to believe in equality in the context of collective labor agreements.¹¹ Indeed, the National Labor Relations Act¹² regime has been constructed as if only an even *legal* playing field were necessary to secure social justice. This reflects in part salient policy goals and the political climate during the formative legislative period, as well as uncertainty at

10. *See infra* Part II.

11. *See infra* Part III.

12. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

that time with respect to the future balance of power between unions and employers. It also reflects a risk-averse strategy on the part of labor. Pro-employer and pro-labor agendas and ideologies converged on a procedural approach to labor reform predicated on a myth of potential equality. Later, the more conservative political climate in which the ambiguities of the statutory regime of collective bargaining were resolved entrenched a procedural interpretation of the Act.

In the end, both theory and politics, for a hodgepodge of reasons, have projected equality onto the employment relation. Some of the reasons I will consider are residual and no longer relate to compelling accounts of contract or labor. Others are plausible in principle but fail on a contemporary understanding of the facts. After describing some of the ways in which contract law perpetuates the myth of equality in the employment relation, in Part I, I will consider the kinds of reasons that contract and (individual) employment law might have to accept or reject the presumption of equality in Part II. I also will show why each should be rejected, and briefly discuss initial doctrinal changes that we could adopt upon recognizing the work of status. In Part III, I will identify and reject the reasons that apply in the context of collective bargaining. Again, I will briefly discuss certain doctrinal changes we might consider to begin a limited reorientation of the law of collective bargaining.

I. THE MYTH OF EQUALITY

The myth of equality in the employment relation is not quite like the myth of Icarus. It too is told and retold, but its telling is implicit rather than explicit. Still, like other myths, the myth of equality inspires and instructs notwithstanding its widely acknowledged falsehood.

The myth of equality is manifest in the perceived plausibility of a series of three propositions: (1) any injustice or unfairness arising out of the employment agreement stems from inequality of bargaining power; (2) this inequality of bargaining power causes employees to accept terms that are unfavorable to them; and (3) employees could perhaps obtain more favorable terms if they were willing to accept a lower wage, but they prefer a higher wage with less favorable accompanying terms.

Numerous courts have observed a disparity in bargaining power between employers and employees, and many have justified pro-employee defaults or interpretations on this basis.¹³ To be sure, there is a disparity in

13. See, e.g., *Jamesbury Corp. v. Worcester Valve Co.*, 443 F.2d 205, 213 (1st Cir. 1971) (noting that any doubt over the definition of a term would be resolved against the employer, because the “agreement was a standard form contract drawn up by [the employer]” who “had superior bargaining power”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (“Given the lack of choice and the potential disadvantages that

bargaining power between most (but not all) employers and employees in that employees usually face a more limited set of employment options than do employers seeking to fill open positions. The problem is that a disparity in bargaining power is characteristic of many if not most contractual settings. Most major retailers exercise bargaining power relative to individual consumers.¹⁴ Many successful firms exercise bargaining power vis-à-vis business partners who are smaller, less successful, have tighter margins, or whose products or needs are more time-constrained for other reasons. Thus, the bare fact that one contracting party is more powerful than the other, and, therefore, able to extract terms favorable to it, tells us little about the fairness of the transaction, let alone the need for legal treatment favorable to the weaker party.¹⁵

The doctrine of unconscionability has adapted to reflect this reality.¹⁶ Thus, even if a disparity in bargaining power were to be regarded as a defect in the bargaining process, such a procedural anomaly would be insufficient to render a contract voidable under that doctrine. Courts will further inquire whether the resulting contract is substantively unconscionable, that is, whether its terms “shock the conscience.”¹⁷ This vague standard saves most

even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.”); *Ravetto v. Triton Thalassic Techs., Inc.*, 941 A.2d 309, 325 (Conn. 2008) (“[B]ecause the employer generally enjoys superior bargaining power in the employment relationship, it is incumbent upon the employer to make any obligation for reimbursement explicit in the employment agreement.”). *See also* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945) (noting that the Fair Labor Standards Act was enacted in order to aid those “employees who lack[] sufficient bargaining power to secure for themselves a minimum subsistence wage”). *But see generally* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009) (suggesting a role for default rules that favor the party with more bargaining power, on the grounds that it will reduce their incentive to elaborate terms and thereby reduce transaction costs).

14. *See* *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649, at *6 (Ohio Ct. App. June 29, 2006) (finding that there is an “inherent disparity of the bargaining position” between the consumer and “a multi-billion dollar corporation”).

15. Legal economists frequently observe that “[u]nequal bargaining power is not a problem that will cause markets not to provide all benefits that workers are willing to pay for, nor is unequal bargaining power a type of market failure.” Ian Ayres & Stewart Schwab, *The Employment Contract*, Presentation given at the Economic Analysis of State Employment Law Symposium, in 8:3 KAN. J.L. & PUB. POL’Y 71, 75 (1999).

16. *See* *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 474 (Mich. Ct. App. 2005) (citing *Nw. Acceptance Corp. v. Almont Gravel, Inc.*, 412 N.W.2d 719, 723 (1987)) (“In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present.”). *Accord* *Armendariz*, 6 P.3d at 690; *Bland ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998); *Doyle v. Fin. Am., LLC*, 918 A.2d 1266, 1274 (Md. Ct. Spec. App. 2007).

17. *Clark*, 706 N.W.2d at 475.

retail and other commercial contracts; indeed, it is intended to be a high standard, under which only truly exceptional contracts will fail. For example, while most consumers are not in a position to bargain over the terms on which they purchase ordinary consumer goods, the normal operation of competitive consumer markets ensures that the identical, take-it-or-leave-it terms on which goods are offered are usually quite responsive and favorable to consumers. Thus, few retail contracts will be deemed unconscionable, irrespective of the absence of a bargaining process or bargaining power on the part of consumers. It is even more difficult to show unconscionability in the commercial context. Because businesses are expected and permitted to exploit normal business advantages (so long as those advantages do not legally qualify as anticompetitive), the ability of a supplier or distributor to unilaterally set the terms of business is of little legal consequence. The terms on which businesses do business with each other will never shock the conscience such that those terms can be voided.

Given that disparity of bargaining power is pervasive and of inconsistent effect, it is not surprising that acknowledging disparity in bargaining power between employers and employees has not been of systematic consequence. One prominent arena in which employer control has been challenged has been in the context of arbitration terms, which often require most claims against the employer to be submitted to an arbitrator of the employer's choice and under the employer's control. The Supreme Court has held that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context,"¹⁸ and this holding has come to mean that they are usually enforced.¹⁹ More generally, courts are unwilling to strike down terms that were not negotiated, even if the employee lacked opportunity to negotiate them, unless there is further, independent suggestion of unconscionability or wrongdoing.²⁰

If the concept of unequal bargaining power is neither unique nor potent in the employment context, why does it persist as our most ready characterization of that relationship? In searching for a way to articulate the problem endemic in most employment relations, inequality of bargaining power is appealing because it would appear to speak to a defect recognizable on the terms of classical, formal contract theory. It appears to bear some

18. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

19. *See, e.g., Brennan v. CIGNA Corp.*, Nos. 06-5027, 06-5124, 2008 WL 2441049, at *3 (3d Cir. June 18, 2008) ("More than a disparity in bargaining power is needed to show that an arbitration agreement between an employer and its employee was not entered into willingly . . .").

20. *See, e.g., Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 761 (Wash. 2004) (holding an adhesion contract of employment was not procedurally unconscionable when the employee's argument rested solely on her lack of bargaining power).

relation to duress, a doctrine of longstanding pedigree and incontrovertible standing. That is, if duress is the deprivation of complete choice, disparity of bargaining power results in the less drastic constraint of choice. The boundaries of duress are vague—it is not always clear under what circumstances we are prepared to characterize contractual consent as having been forced. That makes it all the more appealing to have a sibling concept like unconscionability, which will pick up some of the cases in the penumbra—those cases where the constraint on choice was severe enough to undermine the normative significance of consent but not so complete as to empty it of force altogether.

But employees, while admittedly weak vis-à-vis their employers, are rarely subject to anything like duress. A contract is formed under duress when one party forces another to accept an agreement where the latter has no choice but to agree.²¹ It is only duress, however, if the defendant created the circumstances under which the weaker party acted; otherwise, the defendant cannot be said to have “forced” the weaker party, but only to have exploited it.²² Most obviously, employers rarely have individually created the circumstances of constrained choice in which their employees and prospective employees operate. But also, employees—at least in the United States—are rarely so desperate that we could plausibly say they had no choice but to accept the terms offered by a given employer. Emphasizing this desperation where it exists can actually be distracting because it converts the problem of relative inequality into one of absolute poverty. Inasmuch as the relevance of disparity of bargaining power hinges on its familial relationship to duress, the obvious ways in which employees do exercise choice and, in any case, were not deprived by choice by their employers make the analogy irrelevant in all but the most extreme circumstances. This brings us to the second misleading proposition.

The second misconception that sustains the latent myth of status equality between employers and employees is the proposition that inequality of bargaining power causes employees, under conditions of constrained choice, to accept terms that are unfavorable to them. Just as duress might cause one to part with one’s money rather than one’s life, disparity in bargaining power will cause one to accept an ungenerous sick-leave policy rather than remain unemployed. This understanding of what takes place when employees accept unfavorable terms no doubt has a great deal of truth

21. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979); 25 AM. JUR. 2D *Duress and Undue Influence* § 1 (2004). See, e.g., *In re Estate of Hollett*, 834 A.2d 348, 351 (N.H. 2003); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1231 (10th Cir. 1999).

22. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979) (stating the requirement that defendant has engaged in an improper threat). See also Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 126-30 (2008) (providing a detailed discussion of the distinction between duress and exploitation).

to it, but it is also misleading. Employees are often simply unaware of the full package for which they are signing up.²³ Even where employers have written policies, these are often broad, flexible, inconsistent, or simply ambiguous.²⁴ Employees lack information about the interpretation and application of that policy, on which its favorability or unfavorability will often turn.²⁵ Moreover, employers rarely explain, nor could they explain in advance, the precise boundaries of an employee's obligations, the probability of better terms in the future, and other characteristics of the work environment that determine the quality of work life. The employment agreement is an incomplete one.²⁶ At best, the employee agrees that a number of matters will be settled later.

Employees also lack information relevant to understanding that those terms that are known to them are unfavorable, such as the alternative packages available in the market, and the alternatives financially or administratively feasible at the particular firm at which they are, or are to be, em-

23. See generally Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95 (2006); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 19-20 (2002); Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002).

24. For examples of ambiguous and inconsistent policies, see *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 557-58 (1st Cir. 2005) (e-mail ambiguously stating an arbitration policy); *Hubner v. Cutthroat Commc'ns, Inc.*, 80 P.3d 1256 (Mont. 2003) (employer handbook simultaneously claiming and disclaiming enforceability); *Trabing v. Kinko's, Inc.*, 57 P.3d 1248 (Wyo. 2002) (handbook ambiguous as to at-will status).

25. See Melissa Ilyse Rassas, Comment, *Explaining the Outlier: Oregon's New Non-Compete Agreement Law & the Broadcasting Industry*, 11 U. PA. J. BUS. L. 447, 472 (2009) (noting that "many employees do not know that their agreement may be unenforceable"); see also Pierre H. Bergeron, *Navigating the "Deep and Unsettled Sea" of Covenant Not To Compete Litigation in Ohio: A Comprehensive Look*, 31 U. TOL. L. REV. 373, 373 (2000); Kevin C. Marcoux, *Section 8(b)(1)(A) from Allis-Chalmers to Pattern Makers' League: A Case Study in Judicial Legislation*, 74 CAL. L. REV. 1409, 1439 (1986); *DeCamina v. Coopers & Lybrand, LLP*, 591 N.W.2d 364, 368 (Mich. Ct. App. 1999) (stating that the FAA did not require "knowledge," and an otherwise valid arbitration clause did not depend on whether a party was "specifically aware of its scope").

26. See KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 152 (2004) ("Employment contracts are famously incomplete It is well understood that employment contracts embody shared understandings and mutually agreed terms that are not a part of the formal contractual apparatus."). See also Aditi Bagchi, Note, *Unions and the Duty of Good Faith in Employment Contracts*, 112 YALE L.J. 1881, 1886-90 (2003); Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA. J. LAB. & EMP. L. 883, 890 (2006); Richard Mitchell, Anthony O'Donnell & Ian Ramsay, *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labor Law*, 23 WIS. INT'L L.J. 417, 460 (2005); Gregory K. Dow, *The New Institutional Economics and Employment Regulation*, in *GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP* 57, 57-59 (Bruce E. Kaufman ed., 1997).

ployed. Thus, while the employee no doubt consents to the arrangement for contract purposes, it is misleading to say that the employee has accepted unfavorable terms *per se*.

For the same reason, it is also misleading to say, as is often said, that employees could perhaps obtain more favorable terms if they were willing to accept a lower wage, but they prefer the higher wage with less favorable accompanying terms.²⁷ As argued above, many employees are operating under great uncertainty such that, to the extent there is a trade-off for pay, the first choice is between ignorance and uncertainty, rather than between favorable and unfavorable terms. More generally, to make the claim that employees prefer less favorable terms for higher pay is to run an implicit hypothetical about what employees would do. But the hypothetical is ambiguous. One could ask what a particular worker would have agreed to with a particular firm, or one might ask what workers with certain characteristics would likely agree to with firms of a certain type. And one might take the employee as she is, in the hypothetical, or one might correct for cognitive biases and information shortfalls.²⁸ One must make assumptions about the absolute level of wages and other benefits to be traded off, and about background conditions, such as employment and other support available (or not) to the employee. One must decide generally what the rules of bargaining will be.²⁹

Certainly, there is a sense in which many employees would accept, *ceteris paribus*, higher wages for fewer paid vacation days, or less generous sick leave. But their choices will differ depending on a number of factors, and there is nothing natural about any single set of assumptions. The very fact that workers in many developed democracies receive higher benefits with and sometimes without lower pay should give us pause before we posit that all negative aspects of the typical U.S. employment relationship have been or would be freely accepted in exchange for higher pay.

If inequality of bargaining is not the root of the problem, then what is? The preliminary point is that inequality of bargaining power is inadequate to account for observed outcomes in the employment relation; we need to look further to information deficiencies. But the more important point is that inequality of bargaining power is inadequate to explain what is *objectionable* about observed outcomes, even if it nominally causes the employer to appropriate a disproportionate share of the surplus created by the employment relation. The distribution of that surplus is not disproportionate in

27. See, e.g., Ayres & Schwab, *supra* note 15, at 72.

28. See David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1817 (1991). Charny labels these choices with “generality” and “idealization.” *Id.* at 1820.

29. See P.S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1, 19 (1985) (doubting that “neutral principles of fair procedure” exist in the “contractual sphere”).

some objective mathematical sense; there is no particular reason to expect an even distribution—that is not what we observe in most contracts. Relative bargaining power is a property of the bilateral relationship between an employee and employer, but the problem with the employment relation lies elsewhere. We need to zoom out and focus on the inequality between the larger social groups to which employees and employers belong. The notion of status is useful in capturing a number of the dimensions of that problem. Obviously, not all employees are low status and not all employers are high status. Notably, in larger companies, many shares are held by widely dispersed small investors, including those whose only equity assets lie in their retirement accounts. Nevertheless, legal treatment of the employment relation is significant in part because low social status is rooted in one's circumstances of employment.

Status can be taken to refer either to the capacities and incapacities of the members of a group, or more specifically as the “sum of legal conditions imposed by the operation of law.”³⁰ I use it in the former, more expansive sense, not least because my point turns on the fact that a too-zealous commitment to avoiding legal status may actually fortify the work of social status. Status, in this broad sense, might generally refer to the actual lack of capacity to pursue various projects and pleasures that others of higher status might ordinarily expect to be able to pursue, but also to the common and relatively open acknowledgement of that diminished capacity. Thus, to be of relatively low social status may mean more than not having the opportunity to study Shakespeare, not spending a summer traveling in Europe, or not having believed for a full year or even two that one might be able to make a living writing novels or music. It means living in a society where whatever material facts underpin those realities are commonly and openly assumed to apply to that person.

The specific incapacities associated with low social status are difficult to articulate, but I will attempt a rough sketch here.³¹ First, while low social status in the United States is associated with limited economic resources, being of “low income” is a more specified condition than just the bare amount of income and wealth would reveal. To be of low income implies that one can afford certain things but not others, even if, in principle, either is equally possible or impractical at a given income. Thus, to be of low income implies one cannot afford piano lessons, but it does not mean one cannot afford brand name sneakers. It may mean one cannot afford fresh tropical fruits, but it does not mean one cannot afford cigarettes. What one

30. Wolfgang G. Friedmann, *Some Reflections on Status and Freedom*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 222, 222 (Ralph A. Newman ed., 1962).

31. See generally BETH SHULMAN, *THE BETRAYAL OF WORK: HOW LOW-WAGE JOBS FAIL 30 MILLION AMERICANS AND THEIR FAMILIES* (2003); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).

can afford at a low income depends on the hierarchy of needs projected onto and perceived at the associated status level because the socially constructed order of needs determines what falls above and below the financially determined cutoff. Nevertheless, while that order itself varies with status because it is perhaps surprisingly uniform across class, having limited economic resources has certain systematic consequences in terms of access to a relatively fixed set of goods, services, and experiences.

A second dimension of low status is limited leisure time. At very low incomes, individuals must work a large number of hours at one or more jobs in order to pay monthly bills, including minimum credit card payments. Excepting those with multiple jobs, one might expect that individuals of higher income actually work more hours.³² However, to some extent the large number of work hours is offset by the ability to purchase services that reduce the amount of time spent on unpaid housework and family care. Finally, individuals of higher social status are more likely to be entitled to sick leave and paid vacation and more likely to have incomes that enable them to obtain medical care and take vacations away from home, both of which enhance the value of leisure time.

The final dimension of status, as I refer to it here, is the lack of discretion and power within the employment relation itself.³³ Persons of lower social status have less discretion over the clothing they may wear to work, whether and when they may take breaks, leave work early, and take time off for personal or health reasons. They also have less discretion about how to perform the tasks for which they are responsible at work. Finally, they have less choice about the actual site of employment because they are likely to have fewer job opportunities.

The problem of status, as the concept is used here, is related to but distinct from both the concept of class and the question of intergenerational

32. *But see* Daniel Kahneman et al., *Would You Be Happier If You Were Richer?: A Focusing Illusion*, 312 *SCI.* 1908, 1910 (2006) (arguing that women with higher-incomes actually spend more time in “obligatory” activities and less time on enjoyable passive leisure). While the empirical point is ultimately beyond the scope of this Article, it is not implausible that the relationship between income and leisure varies by sex. Moreover, the self-reporting on which an empirical study must rely may also undermine its credibility.

33. *See* Jane Wardle et al., *Sex Differences in the Association of Socioeconomic Status with Obesity*, 92 *AM. J. PUB. HEALTH* 1299, 1299 (2002) (“Low-status jobs are associated with lack of autonomy”); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 *WIS. L. REV.* 955, 992-93 n.156 (1988) (“[L]abor processes differ between secondary or peripheral firms, with low wage and low status jobs, where simple, traditional forms of control prevail (direct coercion, paternalism, threat of dismissal), and primary or core enterprises, where capital employs bureaucratic-authoritarian forms of control, which frequently include greater reliance on incentives and worker autonomy.”); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L.J.* 1198, 1226 (1983) (“[C]onstrained judgment is associated with the proletarian characteristics of low status and reward”).

mobility. While there is obvious overlap between the notions of class and status, class has historically turned on one's role inside or outside of production, and has often referred to the group of all such similarly situated persons.³⁴ The concept of class has been important in theories (or hopes or predictions) of collective action directed toward achieving new modes of production, or reform of entire political economic structures.³⁵ Status is a more micro-oriented idea that applies first and foremost to the individual.³⁶ It refers not to a collective state, but to a commonality or parallel between the socioeconomic situations of numerous persons. While class analysts are usually interested in class as an independent variable, i.e., its causal role in explaining political economic dynamics as well as the quality and character of individual lives, the notion of status aims to characterize the *results* of social sorting.³⁷

I take "status" to be conceptually agnostic about the ultimate sources of the condition to which it refers. For example, status might be determined by occupation, race, sex, religion, and/or any number of other common social markers. In itself, it implies nothing about its own remedy.³⁸ Finally, status hierarchies are not universal. Class is fundamentally a function of

34. There is no universally accepted concept of either status or class, and, therefore, no agreement on the relation between the concepts. What follows is, in part, my characterization of how the terms are often used, but ultimately my statement of how I will use the terms.

35. The concept of class has been criticized as no longer relevant or helpful in understanding contemporary society. See generally PAUL W. KINGSTON, *THE CLASSLESS SOCIETY* (2000); JAN PAKULSKI & MALCOLM WATERS, *THE DEATH OF CLASS* (1996).

36. Some sociologists have proposed reorienting the concept of class toward "micro-level" explanations of life conditions by focusing on occupational hierarchies. See Kim A. Weeden & David B. Grusky, *The Case for a New Class Map*, 111 AM. J. SOC. 141, 142 (2005) (arguing that "occupations are better suited than big classes for the new microlevel agenda of explaining individual-level behaviors and attitudes"). To the extent class is reconceived in this manner, the distinction between class and status fades. See Alejandro Portes, *The Resilient Importance of Class: A Nominalist Interpretation*, 14 POL. POWER & SOC. THEORY 249, 250-51, 257 (2000).

37. See John H. Goldthorpe, *Occupational Sociology, Yes: Class Analysis, No: Comment on Grusky and Weeden's Research Agenda*, 45 ACTA SOCIOLOGICA 211, 212 (2002) ("The aim is then to show how different class positions, as understood via these concepts, create different sets of constraints and opportunities for the individuals who hold them; and, in turn, to explain class-linked variation, both in what happens to individuals *and* in how they typically act, via causal processes that originate in their different 'class situations.'").

38. Status can be used as an explanatory variable as well, and in that context could be competitive with class. See Michael Hechter, *From Class to Culture*, 110 AM. J. SOC. 400, 405 (2004) ("In a society where castes are relatively impermeable and occupationally specialized, each caste is simultaneously a class and a status group. In social formations having ample prospects for occupational mobility, however, class and status are more likely to be mutually competitive."). However, consistent with its use in legal discourse, I am using "status" here to characterize rather than explain certain socioeconomic circumstances. See *supra* note 30 and accompanying text.

one's relation to production, and one needs only a few related facts about a person to identify her class in any society.³⁹ But to the extent occupation determines status, it does so more indirectly. The status of any given occupation in a society turns on contingent features of that society that lead the occupation to be highly or poorly compensated, associated with extensive or limited leisure, and subject to strict controls or relative autonomy. Contingent social facts also determine how any given occupation is perceived along those dimensions. For all these reasons, speaking about status—however perilous—implies and carries less baggage than does class-based discourse.

The problem of status is also separate from that of intergenerational mobility.⁴⁰ The notion of status implies some stagnancy—one would not readily characterize a society in which the properties associated with status are fluid and apply to different persons at different periods in their lives as a status-ridden society. Moreover, it is likely that many of the material conditions associated with status, and the economic conditions that reinforce it, also undermine intergenerational mobility. In the United States, intergenerational mobility increased until about 1980 and has declined ever since.⁴¹ But even to the extent mobility is present, it is likely to take place between childhood and adulthood, i.e., some children born to low-income parents may be high-earners in their adulthood. The experience of a single, perhaps oppressive, status over the course of adulthood remains.

While promoting intergenerational mobility is desirable for many reasons, it should not exhaust our concern for the persistence of status in adulthood. The rhetoric of equal opportunity emphasizes, almost to the point of exclusivity, the social interest in ensuring all doors are open to children or young adults first “setting out.”⁴² That interest is real and unique in its multiple motivations, though the reality is that even if opportunities were as open as they could ever be, one's life course would reflect not just one's

39. At least in the tradition of Marx and Weber. See 2 MAX WEBER, *ECONOMY AND SOCIETY* 926-40 (Guenther Roth & Claus Wittich eds., 1978).

40. The concept of intergenerational mobility is itself ambiguous. See Dirk Van de Gaer, Erik Schokkaert & Michel Martinez, *Three Meanings of Intergenerational Mobility*, 68 *ECONOMICA* 519 (2001). I take the concept as largely descriptive, referring to changes in status within families, across generations, but normatively motivated by commitment to equality of opportunity and/or equality of life chances.

41. Daniel Aaronson & Bhashkar Mazumder, *Intergenerational Economic Mobility in the United States, 1940 to 2000*, 43 *J. HUM. RESOURCES* 139, 141 (2008).

42. See, e.g., Frank Bruni, *Better Schools, Bush Says, Honor Dr. King*, *N.Y. TIMES*, Jan. 16, 2001, at A19 (quoting George W. Bush: “The fundamental question is, is every child learning? Access is equal, but not opportunity, when not all children are learning in America.”); Susan Collins, Senator of Maine, *Excerpts From the Republican Party's Response to the President's Address, Reply to President Clinton's State of the Union Address*, in *N.Y. TIMES*, Jan. 28, 2000, at A18 (“Our four-point plan for educational excellence will ensure that all children have an equal opportunity to reach their full potential.”).

own choices and capabilities, but one's parents' choices and expectations. But on the approach taken here, robust social categories of status would be a problem even if low status as an adult reflected only one's own poor choices in early adulthood.

In this, the approach here is consistent with the intuitions mobilized in the nineteenth century against indentured servitude—against not just the trickery, deceit, or abuse associated with the practice, but against the very idea that one could be bound completely to another by virtue of a trade made at some earlier moment in time. Status would matter even if there was intergenerational mobility, and even if it was in each instance traceable to earlier free acts of the individual. This is in part because we are not prepared to collapse entirely our personal identities at different periods of our lives, and are therefore unwilling to hold a later self fully responsible for the choices of a former self. It is in part because the individual experience of low status is morally unattractive, in that it makes more difficult human flourishing in the familiar forms we find valuable. And it is in part because low status is only low relative to high status, and the fact of extreme inequality in a society marks institutional injustice irrespective of the micro paths by which individuals are sorted into available slots. With or without equal opportunity, we have many reasons to reform a legal regime that sustains low status as a social category characterized by a life of limited resources, limited leisure, and the everyday experience of disempowerment.

One might argue that when one focuses on the material dimensions of low status, it is impossible to distinguish it from low bargaining power. After all, the two are related, and one might find bargaining power more useful in explaining why some workers are paid little, have long hours, limited vacation, and limited discretion in the workplace. While the circumstances characterized by low status are indeed also usually characterized by low bargaining power, there are strong reasons to move away from our emphasis on bargaining power and speak directly about status.

Consider the following analogy. Lying is a problem. It is a moral problem. It is, in a certain sense, caused by the failure of certain neurons to fire (let's just say this is true). But the problem with lying is not that the wrong neurons are firing. One would not attempt to cure a liar by giving her a pill that triggers neurons of restraint; in all but the bizarre, pathological case, this would be a very peculiar treatment of the problem. Such a response would fail to recognize the problem as a moral one. Instead of transforming immoral behavior into moral conduct, it would deprive the person of her moral agency and thereby mask the (im)moral dimension of lying. By contrast, if someone has a neurological disorder that causes the right arm to go up when she wants to lift her left arm, then correcting the firing of neurons might very well be the right and obvious response.

Bargaining power inequality causes moral problems with contract outcomes in the same sense that neuron misfiring may cause lying. It is the

mechanism by which underlying characteristics of the labor market and broader political economy are expressed in individual economic outcomes. We lack the conceptual resources to characterize individual outcomes as fair or unfair, let alone just or unjust, if we look no further than the bargaining process. By attributing unappealing outcomes directly, or ultimately, to bargaining power inequality, we obscure the justice or injustice, i.e., the moral properties, of background institutions. On the other hand, bargaining power inequality may relate to inefficient contract design in the same way that the misfiring of neurons relates to a medically cognizable neurological condition.

To be sure, the analogy is not precise. Notably, truth serums might exist, but there is no way to level bargaining power and thereby diffuse the moral choice present in the shape of social institutions. The point is that even if bargaining power is the immediate, micro-level cause of the condition that we are ultimately concerned with, it is not the problem *per se*. My point is not that we ought not to solve the problem of status by correcting bargaining power inequality, but that such a misdiagnosis affords no coherent, constructive response. The problems associated with limited resources, limited leisure, and a constricted daily routine are not intelligible as problems in light of bargaining power alone. If it were possible to correct the status inequality by somehow addressing bargaining inequality, it would be an option worth considering, but since that is not practical, it does not make sense to continue to focus exclusively on bargaining power. More to the point, the measures we can take to remedy the ills associated with low status cannot be coherently justified on the basis of bargaining power alone. Thus, focus on the concept of bargaining power ends up doing more harm than good.

II. REASONS TO SUPPORT A SYSTEMIC BELIEF IN STATUS EQUALITY

It may appear unnecessary—or rhetorically manipulative—to argue that we should take into account a truth. Before I address the specific reasons we might have to ignore status inequality in contract, and before I show why they should be rejected, it is worth pausing to acknowledge that there are good reasons, especially in law, why we might sometimes proceed as though something is the case even when we have strong grounds for doubting it. In fact, the best arguments against taking status inequality into account in contract and labor law may have less to do with the unavoidable economic cost of doing so than the principled desire not to frame legal questions in a manner that assumes and thereby risks legitimating and perhaps petrifying injustice.

I have previously argued that deliberative autonomy is a moral principle that constrains governance in a democratic society, irrespective of empirical facts regarding the level of deliberation and choice actually

present. Equality too is a regulative principle that, for example, may constrain governmental use of statistics or other facts, which themselves stem from existing injustice, for certain purposes.⁴³

The regulatory presumption of equality usually comes into effect to protect the interests of the weak. For example, where social institutions are incompatible with moral equality, the fact of, or facts arising from, social inequality may not be employed as grounds for policy that would perpetuate or worsen that inequality. As the purpose of their adoption in law is to advance moral ends, regulative principles do not bar reforms that are themselves morally motivated. Thus, if the background fact of status inequality were incorporated into the law as part of a redistributive program, a broad regulative principle of equality would not be an obstacle.

Still another systemic objection could be raised to the acknowledgment of status inequality. A liberal state has reason to respect the values of its citizens. That is, it has reason to acknowledge value in practices and institutions by virtue of those things being valued, without regard for whether those practices or institutions have objective value (or, without attempting to ascertain whether they do). In particular, relationships that most individuals in a given society find valuable in their lives, or even relationships that individuals claim to find valuable, are *prima facie* worth protecting. For example, familial relationships or even friendships may be given weight in government policy without state actors deciding independently that family and friendship comprise the good life. Even where the value of certain kinds of family relationships appears doubtful to others, we are (and should be) reluctant to override the self-understanding of participants in the practice. Similarly, if employers and employees value the employment relationship as one based on fundamental equality, liberals should be reluctant to override that self-understanding on a theory of false consciousness.

43. As I noted previously:

A regulative principle is an assumption about the world that . . . [may or may not] correspond to empirical reality[,] . . . but which we justifiably regard as true for other reasons. Regulative principles do not derive strictly from the nature of their apparent object. For example, in the case of deliberative autonomy, the content of the principle does not derive from the quality of our cognitive capacities. Because regulative principles are adopted instrumentally—either necessarily because they are the only means by which to attain necessary (i.e. moral) ends, or because they are the best means of advancing cognitive inquiry—their value does not hinge on their manifestation in the world of mechanical causality.

Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 857-58 (2005). If normative principles like autonomy and equality are understood as regulative principles, their apparent conflict with positive autonomy or positive equality “‘is not a true conflict.’ It is ‘merely a different interest of reason that causes a divorce between ways of thinking.’” *Id.* at 858 (quoting IMMANUEL KANT, *CRITIQUE OF PURE REASON* 603 (Paul Guyer & Allen W. Wood trans. & eds., 1998)).

The question is really whether employees and their employers understand employment in this way. Popular culture offers much evidence that individuals perceive family and friendship as supplying much of what is good and valuable in their lives.⁴⁴ I doubt that we can have like confidence in the role of employment relationships. While lateral relationships in the workplace are important, the overwhelming fact of status inequality stemming from employment is commonplace in our culture. The small tyrannies of the ordinary employment experience and the vagaries of the labor market are much more important to people's experience of employment than the oft-romanticized relationships that a few employees have with their small business or individual employers.⁴⁵ While a self-understanding of equality would indeed be a compelling reason to disregard the sharp social hierarchy in which most employees and employers are situated, cultural understandings of the employment relation do not buttress but only make more peculiar contract law's stubborn blindness to status.

There are more specific reasons why we might have to presume equality, or ignore status inequality, between employers and employees. The presumption might be normatively useful in other ways. First, reintroducing status into contract would appear to reverse the liberal developments in the nineteenth- and early twentieth- centuries that moved us from feudal to free labor. Second, to the extent contract is animated by moral principles of promise, and to the extent status does not and should not bear on the quality of promise, there is no room for status in contract law. Third, employees and employers do not stand in any consistent status relation (status inequality varies considerably in magnitude and character), and it may be prohibitively expensive to tailor the rules of contract to individual employment relations. Fourth, should we forego tailoring and regulate on the basis of broadly applicable mandatory terms, the resulting contracts will often be Pareto inferior, in that many workers will prefer a contract without the mandatory term. I consider these reasons in turn.

A. Back to Status?

Initial disdain for the idea of adjusting contractual liability to favor employees of low economic status may be rooted in the standard account of

44. A difficult intuition to prove empirically, one might look to the subject matter of feel-good sitcoms as indicative of what people are interested in seeing for light entertainment: Most top sitcoms revolve around friendships and family life. Work-life is mined for its absurdities. See *The Top Tens: The Top Ten Sitcoms of All Time*, <http://www.the-top-tens.com/lists/the-top-ten-sitcoms-of-all-time.asp> (last visited Dec. 18, 2009).

45. Surveys confirm that people rank socializing with friends as among the most enjoyable things to do, while facing one's boss ranks as among the least pleasant. Benedict Carey, *TV Time, Unlike Child Care, Ranks High in Mood Study*, N.Y. TIMES, Dec. 3, 2004, at A22.

the movement from status to free labor. In his classic account, Henry Maine observed that it is not

difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. . . .

All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.⁴⁶

Status, then, represents the inglorious past in which the terms of relations between individuals were set by familial institutions rather than choices made by the individuals involved. Status is associated with unfreedom. Not just the requirement of consent, but also its dispositive role in contract, guard against a rigid social order imposed from above.

There is a basic problem with this picture. As Robert Steinfield has demonstrated, free consent to an employment model is compatible with a range of employment relations, including models which we would now regard as decidedly unfree, such as indentured servitude.⁴⁷ A society in which a large portion of the working population is, at any given time, in a highly dependent, radically hierarchical economic relationship that, in turn, constricts their relations with others is surely one we would characterize by status. But such a society was compatible with early American understandings of the employment relation.

Courts interpreted freely entered employment relationships along two quite distinct lines, both of which entrenched status even as they paid homage to free choice. Some courts, in some instances, construed the sale of labor “as a form of lease giving the lessee (employer) the enforceable legal right to possession and control of the leased ‘property’ for the term of the lease.”⁴⁸ Others constructed the transaction along entirely contractual lines in which delineated obligations were undertaken, albeit subject to “specific performance and even criminal penalties” upon breach.⁴⁹ As Steinfield argues:

46. SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 169-70 (14th ed. 1984) (1861).

47. ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* 5 (1991).

48. *Id.*

49. *Id.*

The core assumptions of individualist market society—that the social universe is composed of numerous, independent individuals all of whom have a natural property in their own persons and all of whom are naturally disposed to exchange their goods with one another—leave ample scope for different legal and social specifications of what the sale of labor by one individual to another will entail.⁵⁰

Indeed, three notorious nineteenth-century doctrines in the area of employment contract could each be compatible with respecting the bargains freely struck by employees and employers. But each reinforced what were effectively status-based employment relations in the period. First, the “entire contract doctrine” prevented employees from collecting for partial completion of an employment contract.⁵¹ If an employee entered a service contract for one year, for example, but quit in the tenth month, she would not be entitled to any remuneration. This is consistent with general contract principles, since however substantial her performance, her failure to complete was willful. Of course, the rule rendered employees in a subsistence economy immobile for extended periods, and created an incentive for employers to extract increasing amount of labor or otherwise make working conditions unbearable toward the end of the contract, since early departure by the employee would result in a windfall to the employer. But it is not difficult to construct the hypothetical bargain in which an employee would specifically agree to such an arrangement.

Second, the assumption of employer control gave the employer wide latitude over the worker during the purchased labor time, including matters likely not contemplated at the time of initial contract.⁵² But again, wide discretion—still wider than commonly assumed in the contemporary landscape—is something that an employee could in principle freely accept. The resulting relationships would nevertheless be characterized as status-based relationships.

Finally, the early law of workplace accidents was highly unfavorable to employees, denying them recovery for even those injuries arising in the

50. *Id.*

51. *See, e.g., Stark v. Parker*, 19 Mass. (1 Pick.) 267, 267-68, 276 (1824); *Faxon v. Mansfield*, 2 Mass. (1 Tyng) 147, 147-48 (1806).

52. *See, e.g., Mitchell v. Toale*, 25 S.C. 238, 243 (1886) (“The servant is bound to obey all the master’s lawful and reasonable commands, even though such commands may, under the circumstances, seem harsh and severe, but the master has a right to manage his own affairs, and it must be a very extreme case in which a servant would be justified in refusing obedience to his orders.”) (citation omitted). To this day, employees owe their employers a fiduciary duty that “prohibits him from ‘acting in any manner inconsistent with his agency or trust,’ and he is ‘at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.’” *Gortat v. Capala Bros., Inc.*, 585 F. Supp. 2d 372, 376 (E.D.N.Y. 2008) (quoting *Lamdin v. Broadway Surface Adver. Corp.*, 5 N.E.2d 66 (N.Y. 1936)).

ordinary course of employment.⁵³ But again, it would not be shocking—even if arguably inefficient—were workers to freely assume the risk of such accidents. The resulting vulnerability of the employee and indifference of the employer would be shocking, and would accent the status difference between them.

John Witt points out that each of these doctrines represents a default rule around which employees and employers could have contracted. He argues that it was not the pro-employer defaults that mattered so much as the host of complex rules that “allocated bargaining power [between] employers and employees, such as the law of labor combinations, duress, and fraud,” which together with costly enforcement mechanisms made it difficult for employees to contract around default rules and enforce those deviations if won.⁵⁴ But many of the defects in the bargaining process Witt identifies are characteristic of contemporary employment relations. We do not think because employers are more likely to be repeated players familiar with complex and sometimes inconsistent law, and have the resources to enforce it, that employees have not agreed to the contracts that they may only dimly perceive. The specific employee disadvantages Witt describes helped reinforce employee status; they do not undermine status as an appropriate lens through which to view the resulting relations.

The lesson from this historical excursion is that what we recognize as status is not limited to the extreme case where the law directly enforces feudalism. Law that is formally committed to respecting the free choices of employees may nevertheless, through pro-employer defaults as well as more subtle features such as cost, inconsistency, and evidentiary rules, effectively reinforce status. The risk of too formal an approach to contract has long been recognized. Friedrich Kessler warned that standard contracts could “become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.”⁵⁵ He found the “spectacle” especially “fascinating” because it was contract ideology that was used a century before “to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant.”⁵⁶ This earlier social service performed by contract law facilitated “the return back from contract to status which we experience today” because “the belief in freedom of contract

53. See, e.g., *Farwell v. Boston & Worcester R.R.*, 45 Mass. (1 Met.) 49, 49 (1842); *Atchison & E. Bridge Co. v. Miller*, 80 P. 18, 29 (Kan. 1905).

54. See John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 638 (2000).

55. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

56. *Id.* at 640-41.

has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.”⁵⁷ Similarly, Neil Chamberlain observed that:

Probably because of its contrast with status, in the Maine tradition, “contract” has become something of a sacred cow, and any attack upon it or any derogation of its sufficiency is likely to be eyed askance, as suggesting a return to feudalism or evidencing an insensitiveness to totalitarian systems of vassalage.⁵⁸

But he too rejected this attitude arguing that not only non-contractual relationships should be associated with class or occupational status; within the class of contractual relationships, there was plenty of variety—and room for status.⁵⁹

The primary postwar response to the persistence of status within a contract-based regime of free labor was the welfare state. Manfred Rehbinder defended the “socialization of private law” as acknowledging that the “freedom of the individual is not only a question of legal structure, but also a question of concrete economic order, especially of the distribution of goods.”⁶⁰ But this “socialization of private law” was in fact the generation of a new body of public law that would reign in and provide a new backdrop to private law. The movement to finish what formal contract law could not was a political one, and the common law of contract was—though admittedly reformed, reshaped, squeezed-in—not the primary object.⁶¹

Nor was the revision of the socioeconomic environment in which employment relationships are now embedded, however dramatic it was, sufficient to eliminate the dependency and radical hierarchy characteristic of a status regime. Thus, fears that taking into account status in the law will thrust us back to a prior era are misplaced. Just as we have used not just (relatively) frank discussion of race but also legal tools such as affirmative

57. *Id.* at 641.

58. Neil W. Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 834 (1948).

59. *Id.*

60. Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 946 (1971).

61. See Herbert D. Laube, *The Defaulting Employee—Britton v. Turner Re-viewed*, 83 U. PA. L. REV. 825, 847 (1935) (describing a change in the “political center of gravity”); Barry J. Reiter, *The Control of Contract Power*, 1 O.J.L.S. 347, 352 (1981) (“Ultimately, ‘the market’ turns out to have been a short term bridge philosophy carrying society from a period of organization in religious and feudal terms to the modern era of democratic political direction.”); see also R. H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. REV. 261, 272 (1941) (“Maine believed that the movement from status to contract was characteristic of progressive societies. The further movement from contract to status may characterise a social retrogression or a movement to a plane of legal progress higher than Maine conceived. The history and spirit of the Common Law give every assurance that the second possibility embodies the future of our legal system.”).

action to reign in the insidious effects of a race-based social structure,⁶² so too can we use the concept of status to begin to reign in and remedy disturbing and pervasive features of the all-important employment relationship. The rhetoric of universal free will, however optimistically cast in opposition to status-based privilege, has been inadequate.

B. Narrow Corrective Justice

Status inequality might be misplaced in the language of contract if the field were fully occupied by a normative principle such as corrective justice. While it is unlikely that actors within the legal system self-consciously ever adopted will-based theories of contract in order to displace social issues, Morton Horwitz has argued that “the will theory of contract was part of a more general process whereby courts came to reflect commercial interests.”⁶³ Apart from any political economic pressures that industrialization placed on the legal system, Horwitz suggests that both the rise of commerce and the rise of will theory were related to a rejection of the theory of objective value that underpinned the equitable idea of contract.⁶⁴ A newfound belief in the incommensurable desires of the individual translated into a reluctance to second-guess the arrangements struck by free individuals—laissez-faire ideology.⁶⁵

Even today, advocates of a formal approach to contract insist that “the law of contract [must] presuppose[] that people are, at least sometimes, autonomous agents who are capable of making their own decisions about when to contract and on what terms.”⁶⁶ Quoting a contemporary, Kessler observed that:

[C]ourts are extremely hesitant to declare contracts void as against public policy “because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of

62. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (recognizing diversity, or specifically, efforts to include historically disadvantaged groups and thereby undermine racial stereotypes, as a compelling state interest); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (allowing affirmative action to correct for past discrimination in market). But see generally Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (exploring history of resistance to acknowledging and affirmatively reacting to social fact of race).

63. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 953 (1974).

64. *Id.* at 947.

65. *Id.*

66. Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 206 (1997).

contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”⁶⁷

The earlier emphasis on will alone did not easily accommodate attention to the facts that might condition exercise of the will. But there is more conceptual room for status in contemporary philosophical accounts of contract, which emphasize the assumption of voluntary obligation as the distinctive mark of contract. While corrective justice theories of contract vary, they now usually stem from a commitment to enforcing or at least supporting the moral practice of promise. In the United States today, theories of promise are more important to lawyers, judges, and perhaps lay persons’ understanding of what animates contractual obligation than giving effect to a contracting party’s will independent of any obligation or right it might create with respect to the other party.

Whatever the merits of a promissory view of contract, it fails inasmuch as it claims (and it rarely does⁶⁸) that the bare fact of promise fully determines the scope of responsibility arising from voluntary transactions between individuals. Most theories of promise acknowledge that the content of the promissory obligation will turn on background norms.⁶⁹ These norms, i.e., the content of promise, will differ depending on the nature of the relationship within which a promise is made. Moreover, since the practice is valuable because it supports certain kinds of valuable relationships,⁷⁰ its value depends in turn on the kinds of relationships within which it is situated. We might use contract to support some relations—including certain kinds of employment relations—but not others.

Another of the values associated with promising is the capacity created by the practice to obligate one’s future self and thereby create and

67. Kessler, *supra* note 55, at 630-31 (quoting *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)).

68. *But see* Spencer Nathan Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 O.J.L.S. 17, 24 (1988) (“[T]he only way to define unfairness is by focusing on the bargaining process and not the outcome.”). Thal argues that:

The act of bargaining reflects on the sanctity of the promise which follows, and so it is the act of bargaining, and not the act of promising, which is the foundation for the freedom of contract doctrine, and specifically the notion that if you make a bargain you should be held to it.

Id. at 27.

69. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981) (“There exists a convention that defines the practice of promising and its entailments.”).

70. *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1420 (2004) (“[P]romises generally, and contracts in particular, establish a relation of recognition and respect—and indeed a kind of community—among those who participate in them, and I explain the reasons that exist for making and for keeping promises and contracts in terms of the value of this relation.”).

express a morally continuous self. But even this aspect of contract is in question under certain circumstances, such as those described by Gillian Hadfield, where the promisor simply does not view the promise as future-directed.⁷¹ Under conditions of stark inequality, rejection of present circumstances and undue optimism over future circumstances might undermine this “linking” function. It would be perverse to hold employees to earlier promises (sometimes only implicit) in order to empower them to extend and cultivate their personal identities if those aspects of their identity most relevant to the contracts at issue are ones they would happily escape.

The content and value of promise will also vary depending on whether the parties already owe each other something, whether the promise is aimed at creating trust or profit, whether and how the parties value their relations to one another, and how similarly situated parties behave.⁷² One need not deny the place of individual responsibility as a normative anchor in private law to appreciate that its content and scope will be conditioned on social facts, starting with the language used by the parties and including the social inequalities which frame their interaction. The fact of status inequality can be integrated into a more complete account of what individuals owe each other in private law.

Moreover, as Richard Craswell pointed out, much of the force of promissory theory is directed toward explaining the force of contractual obligation and not toward defending particular default rules which may be contracted around by the parties.⁷³ In principle, one might take the position that the content and scope of obligations in a given contract is fully determined by the parties’ intentions, and that the content of those intentions, even when constructed out of background practices, is an empirical rather than a normative question.⁷⁴ But no one has ever proposed that courts set about resolving contractual uncertainties in this way. Instead, courts use interpretative defaults to supply meaning where the easily accessible facts of a case do not settle it. If set as majoritarian defaults, those rules will require constructing hypothetical bargains, and the specifications of those

71. See Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1255 (1998) (“‘She chose’ does not distinguish, fundamentally, between choice among present alternatives and choice over the future.”).

72. Cf. Wojciech Sadurski, *Social Justice and Legal Justice*, 3 LAW & PHIL. 329, 337 (1984). Sadurski argues that the value of promise will depend at least in part on whether its content is just. *Id.*

73. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489-90 (1989).

74. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125 (1976) (observing that if courts had “followed [through on] the teachings of pure contract theory, . . . the duration of hiring and the notice required would have been open questions in each case to be decided without presumptions of either yearly hiring or termination at will”).

hypotheticals will be normatively laden. If set as punitive defaults, we might use these defaults to motivate either employers or employees to reveal information to the other. In either case, we must choose ends toward which the default rules will be employed, and principles of corrective justice will not always supply these ends.⁷⁵ The mitigation of status inequality is one such compatible end.

C. Cost of Tailored Rules

The two remaining objections to status-based interventions in employment contracts are of a decidedly different flavor than those discussed thus far. Arguing that it is too costly to tailor status-interventions in the form of either default rules or mandatory terms to the myriad of different employment relations appeals to welfarist concerns. The idea is that even if status-interventions were otherwise justified, they should not be undertaken because of other negative effects.

One must start out in this context by conceding that status-based interventions in the employment relationship, like interventions justified on other grounds, are likely to exact some economic cost. The aggregate wealth created by employment contracts will likely be less, since the flexibility that is a comparative advantage of the U.S. labor regime makes it possible for firms to allocate their resources more efficiently, and to reallocate them more quickly, than were those choices constrained by rigid employment rules.⁷⁶ Moreover, it is worth pointing out that some other countries that have highly regulated labor markets have attempted to reform those markets so as to afford greater flexibility to firms.⁷⁷ All that said, there is a huge space within which to make trade-offs between wealth and redistribution. Neither is a dispositive retort to the other since absolute priority to either would lead us down a slippery slope to a deeply unattractive society.

The more interesting variation of the welfarist's objection sounds in futility: attempting to implement any rule that will effectively alter the terms ultimately governing employment relations will be unsuccessful because

75. See Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 431-34 (2001) (discussing doctrinal indeterminacy of autonomy-based theories of contract).

76. See Alejandro Cuñat & Marc J. Melitz, *Volatility, Labor Market Flexibility, and the Pattern of Comparative Advantage*, at 23 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 13062, 2007), available at http://www.princeton.edu/~mmelitz/papers/acmm_07_0413.pdf (identifying the United States as having highly flexible labor markets (only Hong Kong and Singapore are more flexible)). Countries with more flexible labor markets exploit that comparative advantage by specializing in volatile industries. *Id.* at 20.

77. Kathleen Thelen, *Varieties of Labor Politics in the Developed Democracies*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 71, 72 (Peter A. Hall & David Soskice eds., 2001).

appropriately tailoring rules is so prohibitively costly that courts, and even legislatures, will consistently get it wrong.⁷⁸ The result would be nurses subject to rules better suited to carpenters, and machinists subject to rules better suited to daycare workers. In part because we have thus far so systematically eschewed the categorization of jobs and sectors, the prospect of setting notice periods or financially feasible leave policies across firms and sectors is daunting indeed.

The objection here is a path-dependent one, for a legal system already well versed in variations across sectors and job classifications would be far less likely to systematically impose Pareto-inferior moves. The good news is that while the common law of contract has moved at a snail's pace in its employment-related reforms, the surrounding administrative state has exploded since the days of classical theory. The National Labor Relations Act regime already makes a number of critical distinctions relevant to status-based interventions, including the preliminary distinction between supervisory and non-supervisory employees. Other agencies, like the Occupational Safety and Health Administration, also possess a wealth of information regarding industry practices. It is possible to develop not only tailored rules, but common-law-style (but actually statutory or administrative) standards to guide application of doctrines, which turn on facts that vary considerably. The futility point is really a feasibility point, and, therefore, contingent on the administrative capacities of agencies. Administrative agencies today already develop and administer a wide range of regulation that is reasonably sensitive to variance across employment contexts.

Nevertheless, it is probably true that however improved our capacity to develop tailored contractual defaults in the employment context, it is unlikely that these terms are those that would have been adopted had they been negotiated by the parties themselves. Our purpose would not be wholly defeated, however, even if parties contracted around new legal defaults such that the resulting bargains were to mirror precisely typical contracts prior to enactment of the reform. To be sure, if parties contract around these defaults, they will expend resources in negotiating around them that come out of the surplus generated by the employment contract.⁷⁹ Those costs represent a dead-weight loss, and would not be associated with a more equitable distribution of the surplus in those transactions. However, there

78. See Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 372 (2004) (“[C]ontract law rules are created either by courts or by private law reform groups, and both of these bodies lack the expertise and staff to develop complex legal rules. This means that creating complex rules for contract law is prohibitively costly. And so the incongruence of simple rules and complex relationships has created a dilemma for courts charged with the task of resolving disputes, particularly those involving parties to long-term relational contracts.”).

79. Robert E. Scott, *Rethinking the Default Rule Project*, 6 VA. J. 84, 94 n.4 (2003); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 99 (7th ed. 2007).

would be some ethical “payoff” even in these transactions inasmuch as the additional, and admittedly costly, negotiations force clarity upon the employment relation. That is, the information divulged has value that we would not normally count as part of the transactional surplus. It is difficult to assess this value against the lost surplus.

The other important advantage of these defaults is cumulative. There will be some employment contracts whose terms will differ as a result of the defaults. In some cases, the costs of transacting around the defaults will be prohibitive; in some cases, the costs will be prohibitive because one or both of the parties is uncertain as to the value she assigns to each of a number of possible substitute terms. The fact that the resulting contracts will be more equitable along a single dimension may not be of cognizable value to a non-paternalist if both parties would actually prefer a different term that, standing alone, is inferior for the employee. However, because status is not generated by isolated contracts but arises from and is reinforced by patterned contracting, these repeated deviations from “optimal contracting” at the transactional level will disrupt and potentially undermine status as an institution.

D. Pareto-inferior Mandatory Terms

Many regulations are not tailored, and presumably some status-based contract interventions too would not be tailored but would take the form of sweeping mandatory terms. Here, the welfarist objection sounds in irony: there is a risk that in attempting to mitigate the conditions faced by poorly situated employees, one makes their lives worse.

This objection is a legitimate brake on excess. But the balancing that is necessary in setting any mandatory term is demonstrably possible, and perhaps inevitable, as evidenced by the cyclical hand-wringing associated with the minimum wage. The well-known risk associated with an excessive minimum wage is that it may result in higher unemployment or underemployment as employers cut back on their purchase of labor at the higher price.⁸⁰ With respect to mandatory terms like the minimum wage, political constraints make it unlikely that what is mandatory will be anything more than a low standard that caters to the most budget-constrained employers. Given the influence of employer groups like the Chamber of Commerce and their superior access to information regarding employers’ ability to pay

80. For a discussion of extensive and ongoing efforts to gauge the effects of a minimum wage on employment, among other outcomes, see generally Christopher J. Flinn, *Minimum Wage Effects on Labor Market Outcomes Under Search, Matching, and Endogenous Contact Rates*, 74 *ECONOMETRICA* 1013 (2006). See also William E. Even & David A. Macpherson, *The Wage and Employment Dynamics of Minimum Wage Workers*, 69 *S. ECON. J.* 676 (2003).

higher wage rates, a risk-averse Congress is unlikely to pass legislation that might render large swaths of employees unemployable.

The federal minimum wage cannot be set at a rate that is appropriate across the widely varying economic conditions of the country. Since localities can deviate upward but not downward from its specified rate, Congress can be expected to settle for the least common denominator, i.e., a rate that is unlikely to set off dramatic employment losses in any particular sector or in any particular geographic region. That rate will likely be too low to raise families out of poverty in some parts of the country, and it will be below the economic capacities of many firms in certain sectors, but if it does not do as much good as possible, it is at least unlikely to do much harm. The fact that the minimum is not tailored to industry or job classification likely results in a larger number of sectors and jobs for which the floor is lower than it should be than sectors in which it is higher than it should be. The politics of mandatory terms, at least in a veto-ridden political process such as ours, promotes the virtue of moderation.⁸¹

There are other types of mandatory terms which might appear systematically welfare diminishing, but are not. Terms that forcibly allocate some downside risk may appear inferior to the terms we would expect the parties to agree upon were they to allocate the risk between themselves and compensate the risk-bearer. However, there is reason to believe that in the employment context the parties will systematically allocate risk poorly. In particular, in many cases where employees usually bear the risk, it is likely to turn out that employers would usually bear the risk better.

Often an employee will not know to demand price compensation where an employer's traits are associated with above-average risk—the employee will be unaware of the relevant traits. Even a punitive pro-employee default is unlikely to force useful information about the level of risk associated with an employer because all employers will make the demand and the employee will not know how much compensation is appropriate from a given employer relative to other employers. Often the risk to be allocated is a function of facts separately held by employer and employee, which neither has incentive to reveal, making it still more unlikely that a default favoring either side will result in the pooling of information necessary to motivate cooperative assignment of risk.⁸² Where one party lacks the informational

81. For a more in-depth discussion of the politics of the minimum wage, see Russell S. Sobel, *Theory and Evidence on the Political Economy of the Minimum Wage*, 107 J. POL. ECON. 761 (1999); André Blais et al., *The Determinants of Minimum Wage Rates*, 62 PUB. CHOICE 15 (1989).

82. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 763 (1992) (“The separation of market power and information between two contracting parties creates powerful incentives for strategic contractual behavior.”); Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on*

resources to either bargain or effectively shop, there is no reason to believe that, in the absence of a mandatory term, parties will efficiently allocate risk.

While the employer is in a better position to assess certain risks to the employee, she is not able to unilaterally, optimally allocate risk without relevant information from the employee. Nor is the employer motivated to allocate risk optimally where the employee is unable to assess the value of relevant provisions and, often, could not exact a premium for bearing additional risk in any event. The alternative to an admittedly hit-or-miss mandatory term is not optimal allocation of risk based on private information.

E. Concrete Reforms Motivated by Status

My arguments are intended to support the adoption of a range of possible status-based interventions, though I do not explore their individual merits at length. A few examples will clarify the scope and magnitude envisioned.

First, courts should interpret ambiguous or unstated policies with respect to sick leave and vacation entitlements against the employer. An employer who qualifies her statement of a policy with “usually” or “normally” would be held to that policy in the absence of clear exceptions. But also, an employer who fails to state any policy in a given year may be held to past practice or to a general default, e.g., one day of paid vacation per forty-day work cycle. A slightly more dramatic step would be to enact statutory paid vacation.⁸³ It is possible that in many work settings this will have no effect on the actual amount of paid leisure time since employers would be able to pay employees to forfeit vacation days, perhaps at an overtime rate, and could also adjust wage rates accordingly. It is quite likely, however, that altering statutory defaults would affect the combination of wages and paid leisure offered to many employees.

The more modest proposal of enforcing ambiguous or unstated policies against employers will have a smaller effect, but may accustom both employers and employees to viewing paid vacation as a component of their compensation packages rather than as discretionary “gifts” imparted to employees to boost morale. Notably, present law does provide for interpreting ambiguity in a written contract against its drafter (*contra proferentem*),⁸⁴ but the rule is of limited applicability in the work context since most employees

Private Contracts Can Enhance Efficiency, 6 J. L. ECON. & ORG. 381, 402 (1990) (showing that deceptive signaling may cause pooling around incorrect preference point).

83. Cf. Council Directive 93/104, art. 7, 1993 O.J. (L 307) 18-24.

84. 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12 (4th ed. 1999).

lack written contracts and, even where a contract exists, at present, silence with regard to vacation leave would not be interpreted as ambiguous.

This proposed reform would alleviate status in a number of ways. First, the defaults are likely to result in an increase in either the amount of leisure available to employees or their financial compensation. It is certainly theoretically possible that employers will contract around defaults or purchase back vacation time while adjusting base wages downward. But the rule will express social expectations in a manner that may both alter employee preferences, prompt reflection over those preferences, and employer perceptions of labor market norms. In addition, forcing clarity is of independent value in restraining unbridled discretion on the part of employers over important aspects of employee quality of life. It will facilitate life planning, enhancing the experience of control by individual employees at the expense of their employers. There is of course still a variety of important ways in which employees will remain at the mercy of employers, but such a salient, albeit limited, constraint on employers will reduce the experience of total control. Employers will remain authorities in the workplace, but it will be clearer that their legitimate power lies in control over compensation, not in the dispensing of gifts.

A related reform would be to set pro-employee defaults regarding notice of termination.⁸⁵ For example, unless an employer has stated an alternative notice period (of as little as one day) both orally and in writing within the last six months, the default notice period should be construed as three weeks. Many employers will choose to set a shorter notice period. But requiring employers to specify this in advance will ensure that employees do not assume that some other notice period applies, either based on their flawed perception of common practice, common decency, common sense, or on their perceptions of their individual job situations.⁸⁶ Moreover, requiring employers to “renew” their opt-out on a regular basis will ensure that employees do not come to believe that the formal rule no longer applies to them due to long tenure or positive feedback they may have received since the last statement of the policy.

85. Under prevailing law (in all states but Montana), employment is presumed at-will, and at-will employment requires neither cause for nor notice of termination on the part of either employee or employer. See Joseph Z. Fleming, *Labor and Employment Law: Recent Developments—At-Will Termination of Employment Has Not Been Terminated*, 20 NOVA L. REV. 437, 437 (1995); Carol Daugherty Rasnic, *Die Kündigung, Licenciement, Recesso dal Contratto, ‘Firing’, or ‘Sacking’: Comparing European and American Laws on Management Prerogatives and Discretion in Termination Decisions*, 18 IND. INT’L & COMP. L. REV. 19, 19 (2008) (describing U.S. law as anomalous for the absence of employee rights at termination).

86. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110-11, 131-40 (1997) (examining employees’ false beliefs that they can be fired only for just cause).

This reform would deliver at least one of two benefits in the sphere of employment authority. First, for employers willing to abide by the default or who provide for some notice period, it will reduce marginally the magnitude of the catastrophe employers have the power to inflict on their employees through termination. To be sure, employees will not be indifferent to termination. But there will be at least a small window of opportunity within which they might secure immediate employment elsewhere.⁸⁷

The second benefit is more subtle, but especially important with respect to those employees whose employers choose to opt out of the default and refuse any obligation to provide notice. These employees will be put on notice of something else: the nature of their employment relationship. Employers incur an unholy benefit from employees' false expectations and perceptions regarding their employment. Inasmuch as they trust that their employer has their interests, among others, at heart and would not inflict sudden termination upon them, a periodic check on that confusion will infuse self-preserving realism into employees' attitudes.⁸⁸ As employees are reminded that the employer is legitimately constrained not just to pursue but to prioritize purposes other than employee well-being, employees will order their employment-related objectives accordingly.

Another reform that an honest look at status could motivate is a policy of enforcing ostensibly nonbinding commitments by employers in the absence of documented agreement that the commitment was nonbinding. Employers frequently promise promotions, additional time off, bonuses, and other improvements to employees. Sometimes the promise is expressly nonbinding; at other times, there is no reference made to the legal status of the promise. Rarely are such promises made in direct and formal exchange for some additional performance or task by the employee. Instead, the promise is "planted" in order to induce some behavior, but there is no enforceable contract. I have argued elsewhere in favor of enforcing promises made by employers to employees in the absence of written documentation

87. See Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 135, 158 (2006) (arguing for at-will-with-notice, and observing the various benefits employees derive from advance notice of termination).

88. But see Ben-Shahar, *supra* note 13, at 412-13. Ben-Shahar suggests that one of the advantages of default rules favoring the more powerful contracting party is that the weaker party can avoid the psychic costs of having the unfavorable distributive character of the contract spelled out openly. *Id.* From a utility-maximizing standpoint, this indeed has value, and it is beyond the scope of this Essay to defeat a utility-oriented approach in favor of a deontological one. But as a general matter, we should be wary of benefits secured by way of Noble Lies. More particularly, disguising or simply ignoring status inequalities between contracting parties only enables and reinforces status hierarchies.

that the promise is not binding.⁸⁹ It costs little to document the nonbindingness of these promises, but it will ensure that employers are not able to extract more from employees than the true nature of the employer's commitment, i.e., the probability of the employer's performance, warrants. Of course, the enforcement of employer promises would not normally entail specific performance; as in other contractual settings, expectation damages would be the norm. But the replacement of a paternalistic regime of private promise with the formality of contract will inject, or perhaps uncover, a healthy *quid-pro-quo* dynamic in the employment relation. The benefits employers confer on their employees are neither gift nor reward: they are compensation to which employees are entitled. Legal recognition of that entitlement would be empowering.

A final concrete reform would be to move further toward judicial deference only for arbitration proceedings that comply with judicially or statutorily determined standards.⁹⁰ There has already been much discussion about the problem of arbitration provisions in employment agreements, of which employees are often only dimly aware at the time they begin employment.⁹¹ In fact, a bill that would render unenforceable mandatory arbitration provisions in employment and consumer contracts, the Arbitration Fairness Act of 2009, has been introduced after a similar bill failed to pass in earlier sessions.⁹² Even with a Democratic Congress and President, it seems unlikely that a bill that would so drastically alter the employment law landscape will actually become law in the near future.

However, courts already refuse to defer to panels composed entirely of persons selected by the employer, and there is discussion regarding the ap-

89. See Aditi Bagchi, *Separating Contract and Promise* (U. Penn. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-35, 2007), available at <http://ssrn.com/abstract=1012150> (on file with author).

90. At present, mandatory arbitration provisions are usually enforced. See Michael Newman & Faith Isenhath, *Two Trends in Alternative Dispute Resolution in the Federal Courts*, 55 *FED. LAW.* 14, 14 (July 2008) (describing "the recent inclusion of (and the federal courts' willingness to uphold) arbitration provisions in employment agreements").

91. See generally Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 *NEV. L.J.* 251 (2007); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 *U.S.F. L. REV.* 49 (2003); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *EMP. RTS. & EMP. POL'Y J.* 189 (1997); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 *WIS. L. REV.* 33 (1997); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 *UMKC L. REV.* 449 (1996). But see Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 *U. MICH. J.L. REFORM* 783 (2008).

92. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009). This bill was modeled after the Arbitration Fairness Act of 2007, S. 1782 & H.R. 3010, 110th Cong. (1st Sess. 2007).

propriate level and distribution of arbitration costs.⁹³ But notwithstanding guidelines regarding uniform standards for arbitration proceedings,⁹⁴ courts have yet to converge on a single set of procedural protections, and the Supreme Court in particular seems wary of imposing restrictions on a process that is an attractive alternative to costly judicial proceedings and to which many employees have in fact consented to as a formal contractual matter.⁹⁵

Whether it is preferable to disallow mandatory arbitration provisions in employment contracts, to restrict their use to certain kinds of claims (e.g., contract-based but not statutory claims), or to enforce them subject to certain basic and uniform procedural protections is an empirical question that turns on data about the kinds of claims normally arbitrated and relative costs and rates of success in arbitration as compared to in court. It is a question that cannot be answered here. The last reform, the adoption of a consistent and clear standard of due process, is the most modest and most feasible. But even it will deliver substantial benefits to employees. Some benefits are material and obvious: certain employees will not lose legitimate claims that would otherwise have been thwarted by biased and uninformed arbitrators. Improved procedural protections that result in more predictable compensation and termination will enhance employees' financial security.

Predictability would improve because employers would be more constrained in their exercise of discretion. This is perhaps the more meaningful sense in which due process in arbitration would empower employees. For even those employees lucky enough to have an employment contract, employers will feel no restraint in their dealings if they have full confidence that they can get away with unfair treatment, even in violation of the contract by way of rigged arbitration. From the employee perspective, going through the gestures of contract only to learn from coworkers' experiences that the contract fails to meaningfully bind one's employer is in a way worse than operating outside of contract altogether, for it suggests that ef-

93. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999); *McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

94. U.S. DEP'T OF COMMERCE & U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS ("DUNLOP COMMISSION"), REPORT AND RECOMMENDATIONS 118-19 (Dec. 1994); TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), reprinted in 9A LAB. REL. REP. (BNA) 534:401 (1996).

95. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (enforcing arbitration of age discrimination claim); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000) (enforcing arbitration of consumer financing contract); see also *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) (enforcing arbitration of telephone company's tariff).

fective legal protection cannot even be purchased.⁹⁶ Outrage at the selective use by some employers of biased arbitration to rid themselves of statutory claims does not stem from the intuition that statutorily protected interests are more important to individual employees than contractual claims; the latter may affect bread-and-butter issues like pay. That outrage is inspired at least in part from the effect on the employment relation of the unbridled employer power that manipulable arbitration provisions create. If employers are permitted to use biased arbitration procedures to evade even those basic background checks on employer power imposed by law, the resulting situation of unchecked authority magnifies the disempowerment associated with low status. More consistent regulation of arbitration proceedings would invigorate existing contractual and statutory restraints on employer discretion.

These reforms are mere examples of interventions in the employment relation that could mitigate status. One could argue for each of these reforms on alternative grounds; for example, one might view them as corrections for various market failures traceable to information asymmetry or high transaction costs, or as antidotes to a disparity in bargaining power. I have argued that we can best understand the normative impulse behind them through the lens of status. These reforms will not perfect any labor market process or bargaining procedure; indeed, there are no criteria by which we could characterize such perfection without reference to the normative aims of those processes. But if we can recognize that rigid status hierarchies have negative normative value, reforms such as those discussed here may be motivated directly by the mitigation of status.

III. THE PARADOX OF THE EQUALITY ASSUMPTION IN COLLECTIVE BARGAINING

If the myth of equality in the individual employment relation is surprising, it is still more peculiar in the context of collective bargaining. The Northern labor movement, which pushed for state and federal legislation that would protect unions and facilitate collective bargaining, never accepted the myth that literal freedom of contract in an open market amounted to equality. Indeed, the labor movement and leading abolitionists

96. While the condition of vulnerability may not be new, the conclusion that it cannot be avoided is all the more bitter in light of our gradually acquired public understanding of the employment relation as a contractual one between legal equals. See Jonathan Simon, *For the Government of Its Servants: Law and Disciplinary Power in the Work Place, 1870-1906*, 13 *STUD. L. POL. & SOC'Y.* 105, 107 (1993) ("The law provided authoritative representations through which participants interpreted their world and their place in it: how employment relations worked, to what extent they were alterable, to what extent they were justifiable. . . . A world increasingly shaped by the disciplinary power of managers was made to appear as one governed by the mutual sovereignty of contracting parties." (citation omitted)).

regarded one another with mutual suspicion.⁹⁷ Abolitionists viewed free labor as unequivocally free; they described it as voluntary even while acknowledging a worker's absolute dependence on his employer.⁹⁸ But workers saw unions as not only a means toward better wages and working conditions, but also as instruments of workplace governance and a gradual movement from submission to self-assertion.⁹⁹

Despite that clarity of ultimate purpose on the part of some, the National Labor Relations Act (NLRA) regime has been constructed as if only an even legal playing field were necessary to secure social justice.¹⁰⁰ If workers voluntarily form a union, then the union and the employer are invited to reach a voluntary agreement.¹⁰¹ Because the Act conceives of collective bargaining as analogous to individual contracting, with the same implications for liberty and thus for democracy itself, we are loath to prod or impose too much.¹⁰² This approach reflects, in part, salient policy goals and the political climate during the formative legislative period. It is also the product of uncertainty at that time with respect to the future balance of power between unions and employers, and a risk-averse strategy on the part

97. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 784 (1985).

98. See ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 67 (1980).

99. See Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002-03 (1955) ("Addition of the union alters the situation in at least two ways: First, the employees, through the union, must participate in the determinations. Second, the acceptance of unions and collective bargaining has increased the employee's confidence and his sense of dignity and importance; where previously there may have been submission, albeit resentful, there is now self-assertion.").

100. See Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 389 (1950) ("The purpose of the original Wagner Act was to facilitate the organization of unions and the establishment of collective bargaining relationships. . . . The Wagner Act was not concerned, except incidentally, with what took place after the proper union had been recognized by the employer and negotiations got under way.").

101. See *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) ("The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. . . . The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.").

102. Chamberlain, *supra* note 58, at 831, 836 ("Our whole system of collective bargaining has been reared on the implicit premise that either union or management might refuse to consummate a contract. . . . [But if] it is the policy of the United States to encourage the practice of *collective* bargaining, that is to say collective contracting, we must face the fact that we have provided and can provide but a weak reed of support for such a system if we presume its voluntary nature. In *collective* bargaining, no alternative exists to the conclusion of some contract.").

of labor. Pro-employer and pro-labor agendas and ideologies converged on a procedural approach to labor reform predicated on a myth of potential equality. Later, the ambiguities of the statutory regime of collective bargaining were resolved in a manner that cemented the procedural interpretation of the NLRA regime.

The origins of the NLRA, also known as the Wagner Act, explain a great deal of its emphasis on unionization and collective bargaining *per se*, and its related failure to specify a program reasonably calculated to bring about the lasting social reform to which at least some of its proponents aspired. First, in the midst of depression, industrial peace was the most immediate aim of the Act.¹⁰³ Second, as unions were growing but had not yet become as numerous or powerful as they would in the immediate aftermath of the Act, the Act reflected not a political triumph, but an abstract ideal of business harmony imposed from above. Whether this quasi-corporatist vision would succeed depended on numerous factors, each of which escalated uncertainty regarding the future operation of the Act, including employers' and unions' inclination to cooperate and union capacity to exact peaceful cooperation. Finally, in part because of this uncertainty regarding the operational outcomes of the Act, the political and judicial future of the Act itself was uncertain. If it managed to survive judicial scrutiny, it might not survive legislative turnover or administrative undercutting. Employers were unlikely to accept anything more than the already seemingly radical reforms the Act represented, and excess ambition on the part of labor was neither feasible nor advisable.

A. The Priority of Industrial Peace

For one of the legislative acts most associated with labor's quest for distributive justice, the NLRA is remarkable in its open focus on altogether different purposes. Section 1 of the Act describes how the failure of employers to recognize collective bargaining resulted in strikes that interfered with commerce.¹⁰⁴ This reference to maintaining open channels of commerce was more than lip service to establish federal authority to act. The Act was passed in a depression with widespread worker unrest, especially in the form of strikes for union recognition.¹⁰⁵ The avoidance of strikes and

103. See *infra* Section III.A.

104. 29 U.S.C. § 151 (2006).

105. See Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1407 (1958) ("The simplest and most direct purpose was to reduce the number of strikes for union recognition. Prior to 1935 the outright refusal of employers to deal with a labor union was a prolific cause of industrial strife. The cause could be eliminated by placing an employer under a statutory duty to acknowledge as the legal representative of all his employees any union designated by the majority.").

other disruptions to industry was subsequently recognized as the essential purpose of the Act.¹⁰⁶

To be sure, the Act had other purposes. Section 1 also identified “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association” as the cause of unrest.¹⁰⁷ This inequality did not just disrupt the flow of commerce, but also “aggravate[d] recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”¹⁰⁸ The goal of raising workers’ wages appeared calculated to promote consumption and industrial peace, not redistribution. Tibor Machan has argued that even to the extent the Act can be understood to have been aimed at improving the circumstances of workers, or of executing the “moral duty” toward those badly off, this otherwise private moral duty was “politicized” only because doing so advanced social welfare overall.¹⁰⁹ Thus, in his account, the aims of correcting an imbalance in bargaining power and reducing the suffering of workers are inadequate in themselves to explain the Act without further reference to the general public interest in recognizing those aims and imposing duties on employers in order to effectuate them.¹¹⁰

Of the various goals adopted in the Act, only equality of bargaining power and industrial democracy might be connected to status and distributive justice. Archibald Cox, while naming the reduction of industrial strife as the immediate purpose of the Act, did say that “[t]he most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards.”¹¹¹ But the correction of bargaining power inequality was widely regarded as important because it produced a litany of economic ills, and having facilitated employer recognition of unions, the

106. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (citing NLRA provision that the goal is to “minimize[e] industrial strife”). See also Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1363 (1983) (“While income redistribution to union employees from (amongst others) their employers was one apparent consequence of [the Norris-LaGuardia and the NLRA], their passage was not overtly justified in these terms. Instead, it was said that the statutes were not designed to repudiate the market or to confiscate employer wealth. The statutes were said to be designed to cure the present system of its imperfections . . .”).

107. 29 U.S.C. § 151 (2006).

108. *Id.*

109. Tibor R. Machan, *Some Philosophical Aspects of National Labor Policy*, 4 *HARV. J.L. & PUB. POL’Y* 67, 95-105 (1981).

110. *Id.*

111. Cox, *supra* note 105, at 1407.

Act was designed to do little more. Cox describes as influential Chief Justice Taft's comment in *American Steel Foundries v. Tri-City Central Trades Council*, in which Taft explains that labor unions

were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.¹¹²

The Act similarly presumed that bargaining equality was not just necessary, but also sufficient to achieve its various purposes.¹¹³

The Act was promoted and passed with the help of numerous individuals and groups, so it is not possible to reduce their motivations to a single purpose, or even a single, fixed hierarchy of aims.¹¹⁴ But the purposes manifest in the structure of the Act, or in its silence with respect to the precise scope and nature of employers' duties upon union recognition and the remedies available upon their failure to comply in a timely manner, may be traceable in part to a genuine expectation that the Act would usher in a long-lasting era of something more than industrial peace: a full-fledged organized economy. Michael Wachter has recently argued that the NLRA, coming after the Supreme Court struck down the more expansive National Industrial Recovery Act, sought to initiate a corporatist-like scheme of economic governance in the United States.¹¹⁵ This ambition crystallized in the years after the passage of the Act, as the imperatives of war accentuated the im-

112. *Id.* at 1407-08 (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)).

113. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509, 1511, 1545 (1981) ("Industrial pluralism[, the prevailing approach to the NLRA,] is the view that collective bargaining is self-government by management and labor [It] is based upon a false assumption: the assumption that management and labor have equal power in the workplace.").

114. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 16 (1994); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 *VA. L. REV.* 423, 453-61 (1988); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 *INT'L REV. L. & ECON.* 239 (1992). See also generally Daniel P. O'Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 *TEMP. L. REV.* 177 (2008).

115. See Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 *U. PA. L. REV.* 581, 583 (2007) (explaining the decline of unions in the last several decades as a misfit between their anticompetitive premises and the increasingly free market economy); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 *U. CHI. L. REV.* 1012, 1029 (1984) (observing that the Wagner Act was part of a broad experiment with "collectivist solutions to economic problems").

portance of continuous production.¹¹⁶ Had this grand experiment with quasi-corporatist institutions succeeded, the narrow purposes of the Act may have achieved the wider ambition of the labor movement (albeit at substantial cost, such that its success may not have been desirable). At the time of the NLRA, it was simply unknown whether it would be struck down like its predecessor, the National Industrial Recovery Act;¹¹⁷ that danger warned against excessive detail, and, in particular, excessive restriction on the traditional prerogatives of employers. But if the Act survived judicial scrutiny, it was also unknown whether and for how long the quasi-corporatist model of which it was intended to be a part would last. And since that model was hitherto largely unknown in the United States, its distributional outcomes could not be predicted either.

B. Caution under Uncertainty

Still another set of structural conditions helps to explain the narrow procedural character of the NLRA. American political institutions had proven distinctly inhospitable to labor in the decades leading up to passage of the Act. William Forbath has explained how the fragmented political structure of the United States created too many points of entry and influence for labor and its opponents; legislative battle for representatives, senators, and executives at both the state and federal levels was extremely costly with limited return.¹¹⁸ The absence of an elite civil service with a stake in regulatory reform disadvantaged the American labor movement relative to its peers in other countries such as England.¹¹⁹ Its absence was intended; both courts and politicians resisted the creation of administrative officers charged with oversight of the workplace, perceiving them as threats to their respective powers.¹²⁰ Most importantly, hard-won legislative victories were frequently overturned or undercut by the judiciary.¹²¹ While the American labor movement began more committed to a radical reworking of the employment relation than were some of its foreign counterparts, by the end of

116. See Virginia A. Seitz, *Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's*, 28 AM. J. LEGAL HIST. 199, 210 (1984) (“[T]he war demanded uninterrupted production. The government could not permit employers to take long strikes. Both the WLB and the NLRB were motivated by the need to avert work stoppages which would impair the war effort.”).

117. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (invalidating provisions of NIRA); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 392 (1935) (same).

118. See William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 LAW & SOC. INQUIRY 1, 10 (1991).

119. *Id.* at 13.

120. *Id.*

121. *Id.* at 17.

the nineteenth century, voluntarist strategies prevailed over a broad legislative reform agenda.¹²² While still involved in politics, given the frequency with which their legislative accomplishments were struck down by courts, the labor movement's primary goal was to "halt[] . . . judicial intervention[]." ¹²³ It is not surprising, then, that the labor movement would settle for and perhaps not even seek more than the bare-bones framework of collective bargaining offered by the NLRA. Between the urgency of industrial peace, vague visions of an organized economy, and the perceived futility of a detailed overhaul of the workplace, it was perhaps over-determined that the Act would fail either to spell out the steps by which to finally rid the United States of status inequality, or even to adopt that purpose as one in the light of which its ambiguities should be resolved going forward.

C. Entrenchment of the Procedural Interpretation of the Act

The end of World War II quickly clarified that many of the uncertainties and ambiguities in the NLRA would be decided to the general disadvantage of workers. Once the favorable economic conditions and the imperative of wartime industrial peace had passed, employers renewed resistance to unionization and collective bargaining, and a new wave of industrial unrest ensued.¹²⁴ The Republican Party won control of Congress in the midterm elections of 1946, and, in June 1947, they passed the Labor Management Relations Act (Taft-Hartley Act or LMRA).¹²⁵ The LMRA amended the NLRA to give the President and Attorney General the power to end strikes under certain circumstances. It also added numerous basic restrictions on labor, banning secondary boycotts,¹²⁶ sympathy boycotts,¹²⁷ jurisdictional strikes,¹²⁸ and closed shops.¹²⁹ It required union officers to swear

122. *Id.* at 16-18. See also Sean Wilentz, *Against Exceptionalism: Class Consciousness and the American Labor Movement, 1790-1920*, 26 INT'L LAB. & WORKING CLASS HIST. 1, 10 (1984) ("[T]he Jacksonian labor movement proclaimed, with unprecedented clarity, that the issues at stake concerned the character of property and the nature of the wage relation itself.").

123. See Forbath, *supra* note 118, at 16, 20. Forbath offers the example of the struggle for an eight-hour day. *Id.* at 17-18. Labor leaders concluded that it was likely unconstitutional, but could be won by collective bargaining. *Id.*

124. See Seitz, *supra* note 116, at 235-36.

125. See 29 U.S.C. §§ 141-197 (2006). See generally Thomas Robert Mulroy, *The Taft-Hartley Act in Action*, 15 U. CHI. L. REV. 595 (1948) (describing largely pro-management changes brought about by the Labor Management Relations Act of 1947).

126. 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

127. *Id.* § 158(b)(4)(ii)(B).

128. See *Id.* § 158(b)(4)(ii)(D), § 160(k). See generally *NLRB v. Radio & Television Broad. Eng'rs Union, Local 1212*, 364 U.S. 573 (1961).

129. 29 U.S.C. § 158(a)(3), (b)(2) (2006).

they were not communists.¹³⁰ About a decade later, the 1959 Landrum–Griffin Amendments to the Act prohibited consumer picketing of suppliers and customers, and outlawed hot-cargo agreements.¹³¹

Finally, a long string of judicial decisions restricted the efficacy of collective bargaining as a tool by which to achieve substantive aims of labor.¹³² As soon as 1938, the Supreme Court delivered one of the most important decisions in setting the balance of power between the now ostensibly equal parties of labor and management. In *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court unanimously held that it was not an unfair labor practice for employers to replace striking workers.¹³³ Moreover, employers were not required to fire replacement workers when the strike was over; it was permissible, in fact, to promise those workers permanent employment.¹³⁴ Needless to say, while serving well the cause of continuity in industrial production, the decision substantially blunted labor’s primary weapon, the strike.

But the Court went further. It announced that it could not “act at large in equalizing disparities of bargaining power between employer and union.”¹³⁵ But there was nothing natural or inevitable about existing disparities; rather, they were reinforced by pragmatic attempts to minimize the public cost of the private economic warfare invited by the Act.¹³⁶ In *American Ship Building Co. v. NLRB*, the Court held that while an employer may not “use[] a lockout as a means to injure a labor organization or to evade his duty to bargain collectively,” it was free to temporarily layoff employees in order to bring economic pressure to bear in support of the employer’s bargaining position after an impasse has been reached.¹³⁷ But in *NLRB v. Retail*

130. Labor Management Relations Act of 1947, ch. 120, § 9(h), 61 Stat. 136 (1947) (repealed 1959).

131. 29 U.S.C. § 158(b)(4), (e) (2006).

132. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 291, 298-300 (1978) (arguing that the Act’s ambiguous provisions were interpreted literally to permit employees to bargain through a single representative, but did not overturn the idea that employer-employee relations were a matter for private ordering, and that government could not set terms or otherwise interfere in bargaining); Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 483-84, 486 (1981) (arguing that one could interpret the Act either to protect workers’ rights or to promote industrial peace but that, since 1947, the Court has advanced the latter interpretation). It has taken unions and collective bargaining as ends in themselves. *Id.* at 488.

133. 304 U.S. 333, 345 (1938).

134. *Id.* at 346.

135. *NLRB v. Int’l Union of Marine and Shipbuilding Workers of America*, 361 U.S. 477, 490 (1960).

136. See Stone, *supra* note 113, at 1547 (arguing that the procedural interpretation of the Act brings employers to the table but does not equalize bargaining power). A “procedural” interpretation removes many traditional labor weapons from the table, such as secondary and consumer boycotts; its restrictions on employers are less invasive. *Id.*

137. 380 U.S. 300, 308-09 (1965).

Store Employees Union, the Court held it was unlawful to picket outside insurance companies in order to put pressure on their primary customer, Safeco, because the action was calculated to result in no business for those companies, which would result in substantial loss to them.¹³⁸ Repeatedly, the Court felt constrained or entitled, in light of the limited aims associated with the Act, not to interfere or impose itself in collective bargaining. The Court sustained background norms of employer control, which, after all, the Act had never identified as its target, and minimized commercial disruption, which had been expressly named as the Act's primary object.

The Court has avoided industrial unrest on too wide a range of issues.¹³⁹ In *NLRB v. American National Insurance Co.*, it held that employers were entitled to insist on a "management functions clause" that would reserve various areas to complete management discretion, including hiring, promoting, disciplining, and scheduling.¹⁴⁰ This prerogative, it held, followed from the fact that employers are not required to make any concessions to unions, and courts, including the NLRB, are not entitled to "sit in judgment []on . . . [the] terms of [a] collective bargaining agreement."¹⁴¹ In *First National Maintenance Corp. v. NLRB*, the Court held that employers are only required to "bargain[] over management decisions that have a substantial impact on the continued availability of employment . . . if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."¹⁴² In particular, because "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business . . . outweigh[ed] the incremental benefit that might be gained through [a] union's participation in making th[at] decision," the Act would not be construed to mandate bargaining on such decisions.¹⁴³ The Act was read by the courts not only to entrench a deep asymmetry in economic power, but to limit the ends toward which unions and collective bargaining could be employed.¹⁴⁴

Eventually, the language of class and the concept of status became anathema even to labor. Class and status openly pegged workers as members of a socially stigmatized group. It simply became more strategic to invoke the encompassing and appealing cloak of universal middle-classness.

138. 447 U.S. 607, 613-15 (1980).

139. See generally *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (limiting the subjects of bargaining).

140. 343 U.S. 395 (1952).

141. *Id.* at 401-04.

142. 452 U.S. 666, 679 (1981).

143. *Id.* at 686.

144. See Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 455 (1981) ("Collective bargaining limits worker participation" by deflecting away from "the organization of the work process, enterprise management and goals, and the internal direction of labor unions.").

As Margo Anderson explains, “the very denial of class distinctions could be turned around and used as a weapon for demanding better wages, fringe benefits, and mobility for one’s children.”¹⁴⁵ The unfavorable conditions in which many workers found themselves were explained by reference to other aspects of their identities, such as race, ethnicity, sex, or region.¹⁴⁶ But notwithstanding the disappearing language of class, the reality of status is ever-present.¹⁴⁷

D. Doctrinal Implications

The myth of equality between workers and employers in the collective bargaining context is different from the parallel myth in the context of the individual employment relation. While it is commonly recognized, at least in political discourse, that many workers are in a disadvantaged social position, unions are sometimes perceived as frighteningly omnipotent and capable of coercing employers—especially in the public sector—into inefficient long-term agreements that harm consumers and taxpayers.¹⁴⁸ There is some truth to that image: some unions are very powerful in particular markets, and the long-term effects (e.g. as a result of pension plans) of collective bargaining agreements in industries that were protected, but are now subject to foreign competition, do impose substantial costs on firms still subject to those agreements. The ongoing crisis of the American auto sector and the earlier collapse of American steel are prime examples. Public sector unions are also uniquely situated and exercise enormous power without direct market constraints.

But the rapidly diminishing rate of unionization in the private sector attests to the overall weakness of the labor movement today. More specifi-

145. Margo Anderson, *The Language of Class in Twentieth-Century America*, 12 SOC. SCI. HIST. 349, 367 (1988).

146. *Id.* at 368.

147. *See id.* at 350 (“[O]ne of the most interesting facets of this American attitude toward ‘class’ is the massive amount of evidence, both statistical and historical, that the United States was and remains a highly stratified society—especially in terms of class, socioeconomic status, or income. It is in many ways remarkable that for the most part Americans do not seem to perceive, or seem to mind, the enormous social and economic distinctions among them.”).

148. *See, e.g.*, Jim Rutenberg et al., *100 DAYS: Early Resolve: Obama Stand in Auto Crisis*, N.Y. TIMES, Apr. 29, 2009, at A1; Editorial, *Recession? Not in Albany*, N.Y. TIMES, Apr. 1, 2009, at A30; Kevin Coyne, *He Who Dares to Mention Police Pay*, N.Y. TIMES, Mar. 22, 2009, at NJ1; Danny Hakim, *Paterson Does Poorly in Survey*, N.Y. TIMES, Mar. 4, 2009, at A19; William C. Rhoden, *Advice for the N.F.L. Union*, N.Y. TIMES, Nov. 22, 2008, at D2; Editorial, *When Wall Street Runs Dry*, N.Y. TIMES, Nov. 15, 2008, at A20; Danny Hakim & Nicholas Confessore, *Sensing the Moment Favors Them, Unions in Albany Push for Gains*, N.Y. TIMES, May 15, 2008, at B1.

cally, unions find it difficult to organize workers.¹⁴⁹ This is in part because of the challenges of the certification process itself, even where unions are initially supported by a majority of employees in a potential bargaining unit, and in part because it is increasingly difficult for unions to effectively advocate for employees upon unionization, due to the various structural disadvantages that plague their bargaining position.¹⁵⁰ As a result of these obstacles, unions are less able than ever to operate as a means by which workers may secure higher income, more leisure, and more voice in their employment relations. Three doctrinal changes would help unions play that role in alleviating status.

The first has already been proposed in the Employee Free Choice Act (EFCA).¹⁵¹ The EFCA would direct the NLRB to certify a union as a bargaining representative upon securing cards indicating support from a majority of the members of a bargaining unit, without elaborate and extended election procedures.¹⁵² Paul Weiler and others proposed this alternative to elections a while back,¹⁵³ but under a Democratic Congress and with the support of President Obama, the legislation—or at least this component of the legislation—has a real possibility of enactment. Enactment is still far from certain, however, given robust opposition from Republican leadership and the likely defection of some Democrats.

Union leaders, as well as politicians and scholars, have long complained of employer tactics of intimidation and delay, most of which are effectively irremediable even in those few cases where unions manage the extended judicial hurdles involved in having those tactics named unfair labor practices.¹⁵⁴ These tactics not only make organizing prohibitively ex-

149. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776-81 (1983); Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 213-14 (1991).

150. See Walter J. Gershenfeld, *The Changing Face of Employment/Workplace Dispute Resolution*, 43 BRANDEIS L.J. 135, 143 (2004-05) (“Unions have found it increasingly difficult to match management’s expenditures when it comes to organizing employees.”); Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 274 (2004) (“[T]o the extent that de-unionization and declining union density lead to lower union bargaining power, they make unions less attractive to workers and make organizing more difficult.”).

151. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (1st Sess. 2009).

152. *Id.* § 2(a).

153. See Weiler *supra* note 149, at 1805.

154. See Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 158 (2009) (“The primary criticism of the National Labor Relations Act (NLRA) procedure is that the delays between petitioning for and holding an election, the lack of sufficient penalties for unfair labor practices, and the almost unlimited employer free speech rights allow employers to mount coercive anti-union campaigns that undermine worker free choice.”). See also Senator Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Work-*

pensive, they also make it ineffective even where affordable. Initial support for a union is reliably diffused as would-be bargaining unit members come to appreciate the vehemence of employer opposition. They come to understand that employers are not only willing to engage in hostile, punitive behavior toward union supporters, but are also usually able to get away with it.

Of course, there is a reason that employers are entitled to demand an election by secret ballot. The first reason is misguided; the second overemphasized to the exclusion of other values. Weiler explains that the intuition behind the secret ballot requirement lies in our association between unions and legislatures.¹⁵⁵ But we overestimate the juridical power of unions. Unions do not exercise legislative authority over employees, nor may they act freely and unilaterally as full counterweights to employers. Indeed, they are not able to impose any conditions on anyone without further manifestation of consent. They can effectively exercise power on behalf of employees only to the extent employees are prepared to back up their demands to employers by going on strike, or by manifesting support in more subtle ways.¹⁵⁶ A union that makes proposals that do not have widespread support in the bargaining unit can win nothing for that bargaining unit. Nor can the union impose terms on employers. It is a central tenet of the collective bargaining model that employers are not required to make any concessions. While they are no doubt affected by what demands are made, given their legal and economic power to resist employee demands, an employer's stake in having a voice in the process that sets the employees' agenda is quite limited.

The second reason for requiring a full-blown election for bargaining representatives stems from the ideal of reflective deliberation and choice on the part of employees. All else equal, it is preferable that employee endorsement of a union is made with the maximum amount of information regarding the union and the likely consequences of unionization, and with an extended period for discussion and persuasion. But, of course, all else is not equal. The provision of information is skewed as a result of the disparity in authority and resources the union and employer may bring to bear on the election process, and the information provided is interspersed with unlawful threats (as the boundary between such threats and lawful statements of intent is ambiguous). The period of persuasion is also one of intima-

ers' Right to Choose Under the National Labor Relations Act, 45 HARV. J. ON LEGIS. 311, 312 (2008).

155. See Weiler, *supra* note 149, at 1809 (“[A]n ingrained premise of the American model is that certification confers on the trade union a quasi-governmental authority over the employees and therefore requires a procedure comparable to that by which a government is chosen.”).

156. See *id.* at 1811 (“[T]o achieve any degree of real authority in the bargaining unit and to win a decent contract that will give collective action a reasonable prospect of survival, the union must obtain a strike mandate from the employees. In practice this requires not just a bare majority, but a solid one.”).

tion. In light of the fact that the endorsement of a union is of limited direct effect—again, the union has no power to institute changes without the cooperation and consent of both members of the bargaining unit and the employer—we should reassess the tradeoff between effective use of unions as a means by which to promote employee interests, and the general interest in ever more informed and deliberate choice. We should give more weight to the former than current law allows, and the card-check provision of EFCA would move in that direction.

A second reform that would move us away from the implicit and flawed assumption of equality between unions and employers would be to expand the role of unions in important decisions that fall outside the scope of mandatory bargaining. Even if there is no bargaining required pursuant to *First National*, employers might still be required to provide relevant financial and other business information to unions and accept and review proposals from the earliest stage at which major business decisions are begun. There is no essential reason that the requirement to provide information be tied to a requirement to bargain. The provision of information in the absence of a duty to bargain will not empower unions to extract concessions from employers. But it delivers at least two benefits. First, it would enable unions to make plausible suggestions to the employer. Over time, one could expect unions would be in a better negotiating position with respect to not just the particular employers who have shared information, but other employers too, since access to information will educate a cadre of union officers about the market. Second, by enabling the union to provide a realistic picture of a firm's business position to its members, an information requirement will mitigate employees' experience of passive subjection to distant market forces and facilitate their long-term planning.

A final, more ambitious change to the operation of the NLRA regime would be to redefine the scope of its coverage. Section 2 of the Act defines "employee" so as to exclude "any individual employed as a supervisor," and defines a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action."¹⁵⁷ The Supreme Court has endorsed a "three-part test for determining supervisory status."¹⁵⁸ Courts are to ask with respect to a given group of employees whether "(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,'

157. 29 U.S.C. § 152(3), (11) (2006).

158. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001) (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573 (1994)).

and (3) their authority is held ‘in the interest of the employer.’”¹⁵⁹ The labor movement has long protested the exclusion of employees with only limited supervisory functions from the scope of the Act. Most recently, they promoted legislation that would narrow the definition of a supervisory employee.¹⁶⁰ However, the bills have not progressed in either the House or the Senate.

The change proposed here is not merely to narrow the concept of the supervisory employee, but to consciously define “employee” in a manner that tracks status. Recognizing that collective bargaining involves certain trade-offs, we should assess the end for which we accept its costs. That end, I suggest, should be the amelioration of status. We should make the limited protections and assistance that the NLRA affords available accordingly. High-status employees, including well-paid sports players and entertainers, should not be entitled to participate in the NLRA regime. Only relatively low-paid employees with limited leisure and discretion should have access to it. To some extent, such a reorientation of the concept of “employee” will track existing coverage, inasmuch as employees with supervisory responsibilities are more likely to be high-status. But because status is multi-dimensional, drawing the boundaries of “employee” under the NLRA with such a reference point will produce results different from the present focus on the extent to which the employee acts as the employer’s agent when managing other employees. It may bear closer resemblance to the exemption for “executive, administrative, or professional” employees found in the Fair Labor Standards Act, which imposes work time and other restrictions on most employees.¹⁶¹

As was the case with the present definition of employee, it will take numerous administrative and judicial decisions to work out the precise boundaries of a status-based definition of “employee” for purposes of the NLRA. The resulting definition is unlikely to map perfectly onto low- and high-status categories, not least because the content of those categories, together with the large and amorphous group of middle-status employees, varies over time and depends on normative aims more specific than those

159. *Id.* at 574 (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994)).

160. See Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act, H.R. 1644, 110th Cong. (2007); Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act, S. 969, 110th Cong. (2007).

161. 29 U.S.C. § 213(a)(1) (2006). For a discussion exploring the politics of this exclusion, see Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2220 (1998). She traces multiple rationales for hours regulation of some jobs but not others, including the early rationale of health to later concerns about worksharing but also status preservation of higher status employees. See generally *id.*

set out here. Moreover, it is likely that the aims of collective bargaining unrelated to status, including industrial peace and business performance, will and should continue to be given substantial weight. With this plurality of legitimate purpose, status-based employee classifications are bound to be controversial and unsettled—much like any other definition of covered employee ever employed. But it will be a step forward to move beyond a false image of the NLRA regime as one in which allowing workers to unionize—after jumping through a sufficient number of hoops—and then giving them the opportunity to bargain with employers under severely restricted conditions, is sufficient to substantially improve their status. For most workers, it has not done enough.

CONCLUSION

For most people, the employment relation is a vital one. It is vital in that much else that is valuable in one's life depends on it. But it is also vital in that, because it determines the circumstances in which we spend most of our days, our place in the employment relation comes to shape our sense of self, as well as others' impressions of us—and the latter feeds back again into our own self-image.

It is thus worthwhile to rethink false assumptions that underlie legal regulation of the employment relation. We can better understand widely perceived defects in the experience of employment if we do not attempt to trace them to status-neutral concepts, such as disparity in bargaining power. We can make unions a more effective institutional tool if we do not imagine that their bare-boned legal status will suffice to reshape the workplace. Thinking openly about status will not only bring into focus an overlooked but essential dimension of distributive justice, but also will help us identify what we can do to mitigate the negative, pervasive experience of employment-based status.