
DEMOCRACY IS MORE THAN CHOICE: THE NECESSITY OF VOICE***DEMOCRACIA É MAIS DO QUE ESCOLHA: A NECESSIDADE DA VOZ*****AUGUSTUS BONNER COCHRAN, III**

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ABSTRACT

This article has taken into account the analysis of participatory democracy and how the courts' tendency to read the protection of outlaws reflects the long-standing implicit prejudices of judges for old and pre-democratic hierarchical structures in the workplace. More recent issues concerning employees, however, have added a new element, the predominance of neoliberal thinking, not only in the law, but also in social relations and self-understanding in general. From a bibliographical analysis, we conclude that Neoliberal choice is not enough; genuine democracy requires voice as well. However, it is useful to know that this is the view of the market participants, as well as the producers, citizens, students, etc. The ancient Greeks knew that we were political people, living in communities, and that to be free, we need to play active roles in governing ourselves.

KEYWORDS: Participative Democracy; Neoliberalism; Contemporaneity.

RESUMO

Este artigo tomou em consideração a análise da democracia participativa e a forma como a tendência dos tribunais para ler a proteção dos fora da lei reflete os preconceitos implícitos de longa data dos juizes para as estruturas hierárquicas antigas e pré-democráticas no local de trabalho. Mais recentes questões relativas aos empregados, no entanto, acrescentaram um novo elemento, o predomínio do pensamento neoliberal, não só na lei, mas também nas relações sociais e na autocompreensão em geral. A partir de uma análise bibliográfica, concluímos que a escolha neoliberal não é suficiente; A democracia genuína exige voz também. No entanto, é útil saber que esta é a visão dos participantes do mercado, bem como dos produtores, dos cidadãos, dos estudantes, etc. Os gregos antigos sabiam que éramos pessoas políticas, vivendo em comunidades e que, para sermos livres, nós precisamos desempenhar papéis ativos em se governar.

PALAVRAS-CHAVE: Democracia Participativa; Neoliberalismo; Contemporaneidade.

INTRODUCTION

Employment has been changing in the United States in recent decades in ways that American employment law has struggled to accommodate. Most strikingly, the rise of the platform economy and gig work in the U.S., as well as world-wide, has created a new class of workers that do not fit easily into definitions of “employee” used by most employment laws. Closer examination of this issue, however, reveals

that the trend of denying employee status, and thus protection of employment laws, is both older and broader than the appearance of gig workers. The tendency of courts to read workers out of laws' protection reflects judges' longstanding implicit biases for older, pre-democratic hierarchical structures in the workplace. More recent issues regarding gig workers, however, have added a new element, the predominance of neoliberal thought not only in the law but in social relations and self-understandings generally. Neoliberalism encourages the reconception of employment in purely market terms, but its effects are reverberating far beyond the platform economy. With the election of Donald Trump as President of the United States, and his appointment of Neil Gorsuch to the Supreme Court, and likely more vacancies to fill in the wings, the attack on the somewhat protected employment relations will likely continue and intensify, both from the direction of traditional ideas about proper workplace relationships and the novel neoliberal marketization of these relationships. Barring some political movement to resist these tendencies, the result will likely be to leave American workers with less power in the workplace and American citizens with weaker voice in their democracy.

The argument here proceeds by examining three questions.

First, we must ask who is an employee in the eyes of the law? That an important legal issue because it determines which workers enjoy the laws' protections, and it is changing as it has historically - fewer people have legal protections these days. The focus here is on the US for the sake of space, but these kind of questions illustrate my longer term research interests, comparing US and Brazilian employment law in the face of globalization.

Second, to understand legal changes we need to step back and examine the larger political economy of globalization - how should we understand recent global trends? The concept of neoliberalism illuminates our times; this macro-social context helps shed light on legal as well as other developments. A troubling paradox is that while the neoliberal era offers us seemingly endless choices, we actually have less real control over how we work and live.

And finally, we must address the “so what” question by asking about the social impact of these issues, in particular, how do they affect democracy? If these trends pose a threat not only to worker legal rights and ultimately to the efficacy of democracy, happily the issues raised likewise point to possible solutions that would both improve the situations of workers and strengthen political democracy. These solutions rest on the proposition that to improve the quality of our democracy, we must empower people in their workplaces, because having a say about work life is essential to having an effective voice in government.

The analysis of such diverse and complicated topics deserve more caution and caveats than it is possible to include in a brief article. It is important to recognize from the beginning that all the questions addressed here will be controversial, worthy of questioning, qualification, doubt, and debate. Notwithstanding the complexities of these issues, however, we have arrived at a moment when it is necessary to reassert worker power and protections and reject neoliberal individual choice as insufficient to achieve democratic ideals in our work life or our polity. Democracy, whether in the workplace or in government, demands more than choice: our voices must be heard.

2 EMPLOYMENT LAW: WHO IS EMPLOYEE?

This examination must begin with definitions: who is an employee? That question is more complicated than it might appear because not everyone who works has been considered an employee in the eyes of the law.

Katherine Stone begins her insightful book on work law From Widgets to Digits (2004) with a revealing example. She notes that in John Heaten’s 1733 painting of a New York farm, many adult workers were depicted, but none were employees: the scene includes slaves, indentured servants, merchants and craft workers, apprentices, and the farm owner and his spouse. All do productive work, but none had the legal status of employee. In 1800, probably only about 20 percent of

Americans were employees. In the 19th century, workers became freer - we abolished indentured servitude and slavery, although some forms of forced labor survived, e.g., convict labor and debt peonage - but at the same time, with the industrial revolution, workers became less independent as women and men lost the means to sustain their own livelihoods and left production in their homes, farms, and shops for offices and factories. By 1900, 50% of American workers sold their labor to someone else for a wage or salary, and in recent years, roughly 90 % of American workers have been salaried or wage workers (Perrow 2002). But recent trends suggest that perhaps in the coming years fewer American workers will be classified as employees. We may be moving back to an employee-free instead of a free-employee economy. If so, why? and why does it matter?

It is instructive to look at how law historically shaped the employment relationship. In traditional English and American law, employment was governed by master/servant law that treated it as a status, somewhat analogous to marriage, a stable relationship entailing duties and protections for both parties. Although masters were bound to care for their servants, servants were subject to the rule of their masters, in whose households they often lived and to whom they owed obedience and loyalty. Normally contracts were for a year, which was sensible in an agricultural society, balancing the seasonal burdens and benefits when farm work is heavy as well as when it is light. Annual contracts provided stability of employment, but workers who left early forfeited their wages, even for work already performed, and in England, but not the US, they could even be jailed unless they returned to work (Steinfeld 1991).

The law of master/servant, however, changed at the end of the 19th century. In this country, courts began to conceive of employment not as a fixed status but as a contract. Rejecting the English rule of one-year employment contracts, American judges came to assume that unless a contract expressly specified its length, the employment would be considered at will, that is, only valid from moment to moment

as long as both parties, employers and employees, continued to want the contract to remain in force.

While employees gained appreciable liberty - the freedom to quit without penalty - they also lost job security as employers were granted legal discretion to discharge employees at will. To paraphrase the explanation of a famous court opinion, at will employment means that employers can fire their workers at any time “for just cause, for unjust cause, or for no cause whatsoever” and the discharged employees would have no recourse to the law because there would be no breach of a contract that could be terminated at any moment.

Not surprisingly, such unchecked employer power did not go unchallenged. The sociologist Karl Polanyi’s theories nearly perfectly explain the course of events. Polanyi (1944) maintained that although all societies have always had various sorts of markets, so-called market society (the idea of a society organized as a selfregulating market) is not natural (in fact, is a utopian fantasy). Societies have always regulated markets through law or custom. Laissez-faire market economies were the historic construction of liberal ideology and laws, such as property, corporations, and contract law, without which markets could not function. Polanyi believed that reaction against market society was almost inevitable, partly because society couldn’t tolerate treating labor, land, and money as commodities to be bought and sold on the market. He labeled these “fictitious commodities” - for instance, labor is not merely an abstract factor of production, but is the activity of living human beings with human needs and rights. So against pure markets that treated labor like a thing to be bought and sold, Polanyi expected a “double movement”: first a laissez-faire liberal movement to deepen a market society and then social movements to restore limits to markets for labor, the environment, and finance.

Polanyi’s ideas accurately describe the evolution of American employment law (Brazil’s too, though obviously the specifics unfold differently in various countries) - first the design of a deregulated common law framework of at will employment

creating a laissez faire market for labor, followed by movements to restore some legal protections to workers who provide that labor.

During the Great Depression of the 1930s, Congress passed the National Labor Relations Act that protected the right of employees to organize as well as the Fair Labor Standards Act that defined a minimum wage and overtime. These New Deal laws created a floor for employee interests and having somewhat rebalanced employees' bargaining power, space for private collective negotiations of terms and conditions of work.

In the 1960s, Title VII prohibited employment discrimination on the basis of a limited number of factors, for example because of race or sex, which over the years Congress has augmented slightly, for example, adding age and disability discrimination, but not as much as you might expect: for example, not discrimination based on sexual orientation, not yet.

The third wave followed soon as Congress passed a few miscellaneous protections, for pension funds, some whistle blowers, and occupational health and safety, and as some state courts narrowed the scope of the at-will doctrine.

But the double movement seems to have stalled since then, leaving as a net result a framework of rather minimal legal protections for mostly private individual or collective employment contracts and a few statutory provisions, but with the background or default position being the common law of at-will employment. In practice, this market model means more discretion for employers who are the more powerful parties. Employers are free to fire employees who support the wrong political candidate, or the wrong football team; who exercise their free speech rights; who live their lives outside of work in ways their employers object to; who do not measure up to their employers' ideals of beauty or indeed, those who are "too pretty." Again, for good reasons, bad reasons, or no reason whatsoever - just not the few illegal reasons; for example, not based on illegal racial discrimination, or not because of sexual harassment. But otherwise, for the roughly 90% of Americans who are at-

will employees, there is no legal recourse, only the market solution - you are free to leave and look for another job elsewhere.

An intriguing question to contemplate is whether we are witnessing the beginning of another Polanyian double movement, with employers and the law undermining the legal protections erected in the 20th century by reconstructing a more deregulated labor market. One way they may be doing this is by narrowing the definition of who is an employee and thus eligible for legal protections. In a civil law system with a legislated labor code like Brazil, the law spells out very specifically the criteria for being considered an employee. But in the US, with our more pragmatic common law system the definition of employment depends more on judges because statutes are often vague.

For example, the FLSA defines an employee as “any individual employed by an employer” and then helpfully goes on to define employ as “to suffer or permit to work.” The NLRA defines an employee as “any person acting as an agent of an employer.” Title VII follows the FLSA in stating that “the term ‘employee’ means an individual employed by an employer.” Such definitions are not very helpful; they often depend heavily on implicit assumptions and common sense, sometimes to the point of being tautological.

Traditional and common sense understandings might suffice in stable times, but we live in a time of economic and social flux, and most U.S. employment laws were passed at least a half of century ago. Scholars such as Katherine Stone (2004) have been warning for some time now that these old statutes were designed for a type of “standard” or “industrial” or “9 to 5” employment model that assumes full-time work with stable careers of long, even lifetime jobs with one or a few employers, but these attributes seem increasingly rare. Instead, non-standard, contingent, casual, or precarious employment is rising exponentially - by some counts, contingent workers made up about 10% of the work force a couple of decades ago but now constitute one-third and are predicted to grow to about half by 2020.

The segment of non-standard work dominating the public's imagination recently goes by a plethora of labels: the sharing or platform or on-demand or task rabbit or gig economy. Only Lobel (2016) defines a platform company as "an online intermediary between buyers and sellers of goods and services - the ancient role of middleman" enhanced with digital technology. Although companies like Amazon, Uber, and Airbnb have become household names, the exact dimensions of the gig economy is not known. One recent studies estimated that 27% of workers in Europe and the U.S. are gig workers, while another found that 37% of U.S. workers participated in the gig economy, and the American government expects that figure to rise to 40% by 2020 (Dahlberg 2017). Lobel (2016) estimates that the platform economy involves ten thousand companies with revenues expected to be worth 1/3 of a trillion dollars by 2025. Uber alone is estimated to be worth \$65 billion dollars and to have mobilized a 600,000 drivers in 195 North American cities and 68 countries - all while claiming to "own no vehicles" and "employ no drivers" (Rosenblat and Stark, 2016, p. 3758). Small wonder Lobel (2016, p. 53) refers to the gig economy as "Uber capitalism" - she intends the pun.

How can Uber have over a 1/2 million drivers but no employees driving for it? Because Uber claims to be merely a high-tech matching service, linking people seeking rides with "partner-drivers" offering the service for a fee (Crank 2016). In other words, Uber is a technology, not transportation, business.

The platform economy does not lack for enthusiasts - many seem to have caught the "platform fever" (Murillo, Buckland, and Val 2017, p. 8). Platform advocates claim that this new more fluid economy subverts monopolies and entrenched interests; creates horizontal networks of trust-based peer-to-peer relationships; provides more and cheaper access to services by more efficiently linking supply and demand; and ensures more transparent and informed comparison shopping (Murillo, Buckland, and Val 2017, 8). But critics challenge this "romantic" view, presenting a more sinister side: relationships based on constant monitoring, not trust; a blurring of work and leisure; piecework at all hours; increased discrimination

against both customers and workers; and the commodification of everything, monetarizing all relationships and fueling inequalities and injustices (Lobel, 2017, Murillo, Buckland, and Val 2017). A key question is how to gauge the impacts of the gig labor market on workers. Platform enthusiasts argue that gig work supposedly promotes independence, choice, autonomy, freedom, and a wealth of untapped opportunities. This romantic view is captured by Task Rabbit's slogan: "a marketplace dedicated to empowering people to do what they love" (Kuttner 2013).

While many workers doubtless appreciate opportunities for part-time work, to supplement their income, exercise a little entrepreneurship, set their own schedules, and work independently without close supervision, critics challenge the claim that gig workers are independent contractors, charging that this misclassification results in wage theft, underpay, overwork, and exploitation. The ubiquitous customer ratings feel like the constant monitoring the infamous Panopticon. One judge actually quoted Foucault on surveillance as power, saying that the "state of conscious and permanent visibility assures the automatic functioning of power" (Pinsof 2016, p. 357). As for subverting entrenched monopolies, over half the business in each platform industry is done by one company; for example, Uber controls 86% of ride sharing (Murillo, Buckland, and Val 2017, p. 4). In addition to multiple worker law suits, signs of discontent include high turnover - 11% of Uber drivers stop driving within a month of starting and 50% are gone within a year - and attempts to unionize (Pinsof 2016, p. 361). Robert Kuttner (2013) claims that while what he calls the platform or Task Rabbit economy is utilizing 21st century technology, it is reviving an essentially 19th century labor market when workers who did not own farms or small businesses were casual labor. He concludes that "being empowered to do the work we love is the right slogan. It just doesn't describe the Task Rabbit economy."

Are gig workers independent contractors or employees? One London court suggested that it was "faintly ridiculous" to view Uber there as "a mosaic of 30,000 small businesses linked by a common platform" (Murillo, Buckland, and Val 2017, p. 6) and despite Uber's claim to be merely a high tech *broker* of transportation services

rather than a *provider* of such services, the same court dismissed this notion, saying that “Uber does not sell software; it sells rides.

Law requires precision, and if Congress does not provide clear definitions in statutes, courts turn to the common law tradition for criteria for determining workers’ classification as employees or independent contractors. The most prominent traditional standard is the control test, or ends/means test - looking at actual employment relations to see who controls not merely what the job is to be done, the ends of employment, but who determines how the job is to be done, the means.

To make this determination, judges examine a number of detailed facets of the way the work is carried out. For example, who provides the tools? How is payment made, by the job or by the hour, week, or month? Is the work part of the regular business of the company? What is the skill level of the worker? etc. By one count, the test involves eight primary factors and five additional factors that might be considered. The real problem is that the law does not prioritize the factors - no single factor is determinative. Courts must weigh all factors as a gestalt. Such a multi-factor, vague standard leaves lots of room for judges’ subjective judgments and produces inconsistent, unpredictable results.

Adding to the confusion, other legal tests are sometimes used by courts and agencies. The simpler economic realities test used by the Department of Labor in Administering the Fair Labor Standards Act relies on five factors: whether the work is integral to the employer’s business; whether the worker uses managerial skills, the amount the worker invests, the skill and initiative required of the worker, and the duration of the relationship. Proponents of this approach claim that these factors are more realistic indicators of whether a worker is really independent or economically dependent on a single employer.

Some reform-minded jurists recommend an alternative hybrid standard called the ABC test that asks whether the worker is free from control or direction in performing the work; whether the service is outside the scope of the normal business of the enterprise; and whether the worker is regularly engaged in the occupation.

These simpler, fewer factors eliminate some out-dated criteria, such as location of the work, irrelevant in an age of tele-commuting, and most importantly, it *presumes* employee status unless the company proves otherwise, resulting in more workers classified as employees (Pinsof 2016).

What's at stake in making this classification of employee or independent contractor? Basically, laws that protect workers cover employees. Independent contract workers are considered self-employed, are treated more like small entrepreneurs, and are expected to take care of themselves in contracting work. Denial of employee status generally means no statutory protection for organizing, against discrimination, for minimum wages or overtime, for family and medical leave, for unemployment insurance and workers' compensation. Independents must pay their own payroll taxes for income taxes, social security, and Medicare and provide their own benefit packages for disability and health care (Pinsof 2016, p. 346-47). Classification can also determine liability in torts and contract law and for compliance with government regulations. Employers have a huge stake in defining their workers as independent contractors; they thereby avoid many of the costs of complying with most employment laws, perhaps as much as 25% of the total labor bill. Murillo, Buckland, and Val (2017, p. 5) estimate that if Uber drivers were classed as employees, the company would owe them \$852 million.

What should we do about the many workers denied the legal protections because they are not considered employees? Lobel (2016) offers four solutions to the misclassification issue. First, she argues that courts could simplify and improve the current legal tests or definitions to produce clearer, more predictable, and more accurate classifications. Second, we could extend legal protections to all workers, not merely those classified as employees. A third short term solution would devise an intermediary category between employee and independent contractor for "independent workers" or "dependent contractors," workers who are basically square pegs who do not fit into either of the round holes of current categories. Lobel favors a fourth longer term option. Noting that this country ties many benefits to

employment that many countries provide for their general populations, she argues that we should move toward severing the links between jobs and social welfare provision - for example, insurance for health care that most Americans obtain through their employers, marking the US as exceptional and setting the stage for current debates over Obamacare for those omitted from these provisions. Of course, no one needs a political scientist to point out that the idea that Democrats and Republicans would follow Lobel's advice and work together to extend social benefits to even more Americans as citizens rather than as employees is pretty far-fetched in the current political climate.

So what does the future hold as far as classification of gig workers? One should be reluctant to make predictions. After all, as that great accidental philosopher Yogi Berra said, "it's hard to make predictions, especially about the future." And the trends are mixed. Although some early court cases have tended toward classifying at least some gig workers as employees, these cases involving Uber drivers and FedEx drivers are preliminary and inconclusive (Crank 2016). Counter trends exist, however, indicating that employees are a dying breed and that the protections of our employment laws may be vanishing. First, the Trump administration, if it lasts, and the conservative legal movement are busily staffing of administrative agencies and the federal courts with appointees unlikely to incline toward preserving protections for workers. But second, longer term trends in law indicate, absent another double movement, a tendency for the courts to narrow the scope of who is considered an employee, and gig workers are far from unique among other groups of workers being denied the status of employee.

For example, courts have blurred the line between professionals, who are specifically included as employees under the National Labor Relations Act, and managers and supervisors, who are not covered by that Act. The Supreme Court has found that university professors are managers "formulating and effectuating decisions of their employers" rather than professionals applying academic standards

(*Yeshiva University* 1980) and that nurses are supervisors according to the immensely complex definition in the NLRA (*Kentucky River Community Care* 2001).

In a knowledge-based economy, with workers increasingly expected to exercise their heads as well as their hands, these managerial and supervisory exclusions may deny protection to as many as twenty percent of American workers left uncovered by antiquated employment laws written with manual laborers in mind. The ironic catch-22 is that just when employers increasingly say that they need their workers' ideas to foster innovation and competitiveness, accepting that invitation to contribute professionally might be deemed evidence of managerial or supervisory authority and carry the price tag of losing legal protections as employees.

3 POLITICAL ECONOMY CONTEXT: WHAT IS NEOLIBERALISM?

These trends reflect the main reason that for suspecting that the economy is evolving away from a labor force in which most workers are employees. Recent macro political economy sheds light on more micro legal and economic issues, and the best way to understand the tenor of our times is to see how our political economy has developed historically.

Some scholars, the so-called regulation school, chart a middle course between mainstream economists, who tend to foresee smooth incremental growth, and orthodox Marxists, who predicted cataclysmic collapse. Instead, the Regulationists see a historical patterns, somewhat reminiscent of Polanyi's double movement, of cycles of steady growth and prosperity followed by intervals of crisis and experimentation as society struggles to adjust its institutional infrastructure to solve new problems of production. They paint a picture of continuity and change, with the constant being capitalism but a capitalism continually reconfigured into new institutional molds.

This pattern of punctuated equilibrium produces a scheme of US development characterized by a series of stages or political economic models. Small scale individual capitalism (1820s – 18870s) was replaced by the Gilded Age of corporate capitalism (1880s – 1920s), which was in turn collapsed in the Great Depression to be reformed by the New Deal into the Keynesian welfare state (1930s – 1970s). This new institutional infrastructure was consolidated in the postwar era in a system often called Fordism after Henry Ford's famous assembly line.

Fordism was based on mass production for mass consumption. Commodities were typically standardized - Henry Ford quipped that customers could purchase any color of Model T that their hearts desired . . . as long as it was black. Mass production required mass consumption - somebody had to buy those millions of Model Ts, so Fordism was a time of relative prosperity for most workers, at least in the manufacturing core, as the government actively pursued policies to stimulate demand for that massive supply of products and as capital and labor implicitly agreed to a social compact, the so-called Treaty of Detroit, that left management free to manage and labor free to organize and bargain collectively. Employment in general conformed to the so-called standard form. Stable perhaps even lifetime employment promised an internal career ladder with steady work at good pay and an expectation of regular raises and perhaps promotions. This model of standard employment is assumed by most of our labor and employment laws, almost all of which were written during this era. Despite its many flaws, Fordism was an era of unprecedented economic growth that was relatively equitably shared. For many, the postwar era was the "Thirty Golden Years".

Why did Fordism fail and what has replaced it after the 1970s? There is no shortage of explanations or labels for our contemporary era - Toyotism, neoFordism, neoconservatism, post-Fordism, globalization, etc. - but the best concept for grasping the post-postwar political economy is neoliberal globalization, or just neoliberalism.

Neoliberalism is a notoriously broad and vague term. Bob Jessop (2013, p. 65) calls it a "chaotic concept," and Terry Flew (2014) observes that many people just

use it as a general term of derision to denigrate anything they do not like. Despite the diversity of meanings attributed to the term, several approaches to understanding neoliberalism help to explain macro issues like the decline of the New Deal order and more micro level issues like the changes afoot in employment law, in both the U.S. and Brazil.

Probably the most obvious way to think about neoliberalism is that it as a set of philosophical ideas valorizing free markets, small government, and individual freedom, known best to Americans through the writings of Frederick Hayek and Milton Friedman. Linked to a political movement, these ideas were translated into policy during the right turn in late 20th century politics epitomized by Margaret Thatcher in Britain and Ronald Reagan in the US (Stedman Jones 2012). David Kotz (2013) presents this typical list of neolib policies- privatization, deregulation, enhanced capital mobility, welfare state reductions, tax relief for corporations and the wealthy, supply side economics, weakened labor movements, etc.

British geographer David Harvey (2005) casts neoliberalism in more radical terms, stressing that these policies reflect a political project to reclaim power by elites hard-pressed by the activism of labor and social movements in sixties. These movements had corrected some of the flaws of Fordism, but they also cost business money, like more equal pay or pollution controls. Harvey interprets neoliberalism as a business-led counterattack to restore profits by restoring capitalist class power.

Viewing neoliberalism through the lens of interest group theory rather than Harvey's class perspective, offer a complementary account of neoliberalism as a countermovement by business. They, like Harvey, point to the famous 1971 memo from soon-to-be Supreme Court Justice Lewis Powell to the Chamber of Commerce in which he suggested that capitalism was losing the battle of ideas and recommended a business counteroffensive to redeem its legitimacy. Hacker and Pierson argue that Powell's memo signaled a shift in the balance of power in American politics as corporations and the wealthy beefed up their political arms, campaign contributions, and lobbying operations beginning in the mid-1970s. They

also support another contention of Harvey's - that neoliberalism's economic results have been mediocre but that it has enjoyed spectacular success as a political project in radically redistributing wealth upwards, not merely to the affluent, but primarily to the top 1% or even fraction of 1% (Hacker and Pierson 2010; see also, Piketty 2013 and Reich 2013). The statistic that most dramatically encapsulates the contemporary Great Divergence (Noah 2012), in contrast to Fordism's Great Convergence, comes from Oxfam, who reports that the world's 8 wealthiest individuals own as much wealth as the poorer half of the world's population, that's 8 people as rich as about 3 and a half billion. Incidentally, in 2010 it took 388 wealthy individuals to equal 1/2 the world population's wealth (Oxfam 2017).

Another striking way to grasp the magnitude of these changes wrought by neoliberalism is to compare illustrative firms of the eras: if GM was the prototypical Fordist firm (ironically), Wal-Mart is the template for our time. Wal-Mart pays its non-unionized workers ("associates") far less (\$17,500 per year) than their GM counterparts earned (\$60,000 per year) and much of the company's revenue goes to top executives: Wal-Mart's CEO receives 900 times the pay of an average worker at the company, a ratio that was only 66 to 1 at GM (Reich 2007, p. 89-108). Another approach to portraying the difference between the two eras is to compare the lives of Fordist vs. post-Fordist workers. In the New York Times recently, Neil Irwin (2017) published a tale of two janitors, one who was employed by Kodak decades ago and another who works for Apple today that shows the differences in social mobility and stability and security of employment as well as the gross disparity in inequality. Wealthy investor Warren Buffett (2005) was not joking when he remarked "There's class warfare, all right, but it's my class, the rich class, that's making war, and we're winning."

Hacker and Pierson (2010) argue that this upward redistribution resulted not from technological transformation but from policies, including employment law. Sometimes the key policy choices were not to change policies as much as failures to update them as social circumstances changed. Employment law seems to be a

classic example of this “drift”: the basic law of American industrial relations was adopted during the New Deal 82 years ago and has not been significantly amended in the last 70 years. Small wonder that Uber drivers and other gig workers do not fit neatly into our legal categories!

A related approach to understanding neoliberalism emphasizes how its outlook has become dominant across the political spectrum and influenced popular thinking, to the point of being unquestioned, the only realistic way of seeing the world, just plain common sense. Harvey (2005) describes how business took Powell’s advice and waged a war of ideas, funding research, think tanks, endowed chairs, public interest law firms, journalists, even bypassing mainstream media by founding their own outlets, for example, Fox. The mark of hegemonic ideas is that they do not appear to be ideational at all; they are simply taken for granted as self-evidently true.

Notice the inversion of political realism that neoliberalism has achieved. The New Deal assumed that social and economic problems required political solutions. Contrast that with Ronald Reagan who affirmed that “Government is not the solution to our problem. Government *is* the problem”. Now, markets are seen as the only viable solutions to socio-economic problems - for example, carbon trading for greenhouse gas emissions, individual health exchanges for health care access, micro-credit for economic underdevelopment, vouchers for failing schools - conventional wisdom accepted by much of the left as well as the right. In an interview about her legacy, when Margaret Thatcher was asked what she considered to be her greatest achievement, she unhesitatingly replied “Tony Blair”. Would Ronald Reagan have said something similar about Bill Clinton?

A final take understands neoliberalism as new everyday practices and new subjectivities.

In a similar vein, Jason Read (2009) notes that neoliberalism works less by constraining our rights and duties than by shaping our interests, desires, aspirations and managing our freedom by constructing the conditions of our choices. For

example, as workers, we think of themselves as companies of one in competition rather than in solidarity with our co-workers and turns their desire for independence into “business spirit.” Closer to home, student indebtedness pushes students to select majors, and colleges, that they believe will lead to lucrative careers because they must be personally responsible and repay those loans. Notice how antithetical neoliberal logic is to traditional liberal arts that resists the drive to put a price on everything, instead insisting that some things, like learning, are intrinsically valuable, that a whole life, living well, is more than making a living.

Wendy Brown’s approach offers the best insight into what is new about *neo*-liberalism. Despite rhetoric implying a return to 19th century laissez-faire liberalism, modern neo-liberals recognize Polanyi’s insight that market societies are not natural or spontaneously, but must be constructed using the law and the state. They don’t advocate the *retreat* of the state so much as the *redeployment* of the state to create more markets, not the *de*-regulation of the economy but its *re*-regulation to foster the conditions of neoliberalism. And these neoliberal constructions often entail changes that make us less free and society less democratic.

Neoliberalism extols individual freedom, but it offers only a stunted, negative notion of freedom as choice without external interference. It is the freedom of consumers who can pick among the offerings in marketplaces but have no say in the structures or context of those markets. As Elizabeth Anderson (2015, p. 111) puts it, “consent to an option within a set cannot justify the option set itself.”

Gig work illustrates the operation of neoliberal freedom. Instead of the traditional employee, Uber drivers at first blush appear to “work on the platform, not for Uber.” They enjoy an enviable degree of freedom from direct supervision - no bosses riding along! They also choose their vehicles and determine their own working hours simply by turning the Uber app on or off. They can even work for others, like driving for Lyft, while their app is on. This freedom may a bit illusory because they are subject to heavy indirect supervision, an “automated and algorithmic management” operating within a tight set of specifications mandated by

the company, and this standardization works against their autonomy and entrepreneurship. They don't set their rates or choose customers by destination - even if that means losing money; canceling more than a minute fraction of fares results in "deactivation" (suspension or removal from the system). Once they turn the app on, they can decline ride requests (they have 15 seconds to decide) but will be disciplined or discharged for accepting less than 80 to 90%. The types and conditions of cars they drive must be acceptable to Uber. Their conduct is subject to a strongly suggestive code of conduct, enforced by the requirement that they maintain a high star customer rating (4.6 of 5 stars). While they are free to determine their hours and work other jobs, to the extent that economic necessity and available alternatives allow, identifies 12 psychological tactics as well as information asymmetry as a tool of power used by Uber to manipulate the work choices of their drivers (see also Rosenblatt and Stark 2016). In short, choice in a situation where one is dependent on another who constructs the architecture of choice (Rosenblatt 2016) is not a very positive or expansive sense of freedom - as the common law control test for employee status implicitly recognizes.

The very act of driving connotes freedom, but this image ignores an elaborate terrain of control. Americans treasure physical mobility as freedom, and we never feel freer than when behind the wheel. Yet in *Republic of Drivers*, Cotten Seiler points out how closely driving is surveilled and regulated. Quite apart from needing the resources to buy a car, usually meaning taking out a loan and chaining yourself to monthly payments, you have to obtain a license, requiring all sorts of official documentation and often classes or training. Then there is the registration of the vehicle, and its emission inspection. And of course proof of insurance. Then there are the rules of the road that intricately constrain your discretion - speed limits, lane restrictions, traffic lights, etc. And most constricting of all - you can only go where the government has seen fit to build roads, though our longing for liberation explains all those SUV ads depicting them fording rivers, crossing deserts, or climbing mountainous bluffs to reach vast vistas of . . . freedom!

We can watch these images of escape while using our SUVs normally - while stuck on freeways (NB the term, free ways) on the way to work or driving the kids to soccer. Of course, the one option that could really liberate American drivers from our frequent traffic jams is not on the menu. We can choose from thousands of makes and models of private vehicles, but the one workable transportation solution - reliable, safe, clean, comfortable, convenient, and cheap public transit - simply is not an option, for now. It's off the political agenda.

And why is that? Lots of reasons, of course, but one reason is how money shapes politics. And the role of money in politics illustrates the bankruptcy of neoliberalism's concept of democracy as analogous to private consumer choice. The 2010 Supreme Court decision in *Citizens United* applied neoliberal logic to strike down some regulations on corporate campaign contributions. In the name of constitutional individual rights, the Court protected free speech for corporate persons to voice their opinions through spending money to influence elections, but it struck down the exercise of democratic politics to make rules to protect the integrity of our elections.

Thanks to neoliberal jurisprudence the right to vote is as equally protected as Sheldon Adelson's right to give \$120 million dollars in the 2012 elections or the right of the Koch brothers and their billionaire friends to spend billions to influence our politics. Of course, seeing democracy as analogous to economic markets has always had its problems - having only two parties to choose from is oligopolistic at best. But recently we have more choices because we're evolving into a three party system - we have the Democratic Party, the Republican Party, and the Billionaires Party. And if the public, as citizens, together enact campaign finance reform, the unelected neoliberal Court is liable to rule they can't do that because their collective, democratic voice trammels individual consumer choices of what policies and politicians they want to buy.

The depoliticized neoliberal notion of democracy rules public choices out of order. Even elections are marketized, and solutions to social problems are

privatized. Feeling insecure? Hire private security guards, move to a gated community, or install a security system. Want safe drinking water? You can buy it bottled now. Want better education for your kids? Private schools, charter schools, and vouchers offer alternatives to declining public schools. Wendy Brown (quoted in Read 2009, p. 35) captures this essence of this depoliticized democracy: “The model neoliberal citizen is one who strategizes for her or himself among various social, political, and economic options, not one who strives with others to alter or organize these options.” But this neoliberal democracy of individual choice is inadequate because it provides no space for collective, political, citizen rule. Democracy is defined principally by the sovereignty of popular voice, not the sovereignty of individual choice. That is anarchism, not democracy.

Samuel Huntington (1975), a reputedly liberal Democrat and Harvard political scientist, exposed the undemocratic underside of neoliberalism at its dawn when he published an article decrying the upsurge of democracy in the sixties. Rejecting Al Smith’s prescription that “the best cure for the ills of democracy is more democracy,” Huntington asserted that our problems stemmed from an “excess of democracy” and proposed that fewer people should participate in decision-making and fewer decisions should be made democratically if we wanted to make America strong again. And that depoliticization and de-democratization has pretty much guided the neoliberal playbook for the last decades.

CONCLUSION

So what? Why do worker protections and power matter? Why be concerned that neoliberalism offers only limited notions of freedom and democratic self-determination to workers? Because when both Katherine Stone (1996, p. 1050) and Wendy Brown conclude that American workers now have more rights but less protection and power than ever, we should worry that the same assessment could be made with equal force about American citizens.

But Al Smith was right and Huntington was wrong. The cure for democracy's problems is not less democracy but more. Not just quantitatively more, but more in a qualitatively fuller sense of democracy, a stronger model than our current truncated neoliberal democracy.

Fortunately, democracy is not a single story. There are many models, but the Australian political scientist Carole Pateman (1970) traces two broad historical strands. The dominant view today reduces democracy to civil liberties and elections: we can choose which elites to govern us. But this limited selection is analogous to consumers' options - we can choose anything on the menu, but if the public does not own the restaurant, it has no say in determining what is on the menu.

Pateman advocated is a second strand of democratic theory that envisioned a more active and exalted role for citizens. Citizens should participate in actual political decisions, not merely select which elites would make decisions for them. Citizens are in effect the owners of the community, entitled and expected to shape and choose alternatives for the good of the community, not merely maximize their narrow self-interests. Democrats adhering to this model believe that expressing voice in decisions that affect our lives not only is intrinsically valuable, but also fosters our flourishing as human beings.

Democracy depends on, and promises, the development of our potential to be self-governing citizens. Pateman argues that the best education for participation is the experience of participating - a kind of practice makes perfect argument similar to the theory that responsibility is taught by giving responsibility, literally by making people responsible. Pateman suggests that the greatest opportunities to practice participation exist where we work where we spend close to half our waking adult lives, and where we are both interested in and knowledgeable about decisions. Elizabeth Anderson (2014) has recently offered a complementary argument for workplace democracy. Most work organizations, especially corporations, are organized as private governments in which authority is structured hierarchically and bureaucratically and in which most workers have virtually no say. Freedom of the

labor market cannot compensate for this daily lack of democracy - she recognizes that we are free to choose our employer, but likens this to a right to choose our Leviathan. As for free workers' right to quit at will, she asks if Franco was less a dictator because Spaniards were free to emigrate? Her insights echo Pateman. If people's experiences are confined to being order-takers rather than decision-makers every day of our lives, all the livelong day, then hopes that citizens can make wise decisions on election days once every two to four years are pretty implausible. So Pateman and Anderson advocate for voice for people at work, not based on arguments about protecting workers' rights, advancing worker interests, making distributions more egalitarian, increasing worker satisfaction, or improving productivity - although all those arguments are valid reasons for worker participation in the workplace - but because she believes that practice in localized democracy at work will develop our capacities for self-governance and that these skills will spill over into the political arena, making us better citizens and improving our democracy.

What routes might extending democracy into the workplace take? Enhancing worker participation could assume any number of forms, ranging from strengthening institutions that already exist to radically reforming the structure of economic enterprise. Beginning with the popularity of Japanese-style management in the 1980s, many companies have instituted various types of employee involvement and team production. Revitalizing antiquated labor law could also strengthen worker voice. Slightly more ambitious, some constitutional rights such as free speech could be introduced into the workplace, which might provide valuable practice in democratic dialogue because with increased sorting out, the workplace is the strongest bulwark of diversity left in America. The U.S. might consider importing works councils from Germany, as Volkswagen wanted to do in its Chattanooga plant. Corporate governance could be modified to have them run by stakeholders rather than solely by shareholders.

Looking at the gig economy, some people have suggested a more fundamental transformation, organizing platform companies as cooperatives.

Cooperatives sidestep the whole employee definition issue because coop members are not only employees of but also owners of the business. Is this feasible? If taxi drivers can organize as coops, would it be impossible for on-demand drivers to form a coop?

Neoliberal choice is not enough; genuine democracy requires voice as well. However useful choice is, this view of us as exclusively market participants is a cramped view of humanity, neglecting our other roles as producers, citizens, students, etc. The ancient Greeks knew that we were political people, living in communities, and that to be free, we need to play active roles in governing ourselves.

But is a more participatory democracy realistic? Obviously these proposals go against the grain of the neoliberal ethos of our times, but real possibilities for change are not always apparent - sometimes they surface surprisingly like grass pushing through concrete.

Some scholars of US electoral history (Burnham 1970, for example) see patterns of punctuated equilibrium not unlike, and actually corresponding fairly closely to, cycles of stability and reformation of political economic development.

Realignment theory suggests that not all elections are equal. Periodically (about every political generation) in realigning elections or eras, more than just new leaders were elected. Seismic shifts occurred - new parties were born, like the Republicans in 1860 before the Civil War; or parties restructured their coalitions, as both parties did in the 1890s; or new party majorities emerged, as during the 1932 Depression when the Democrats displaced the Republican majority that had dominated politics since the Civil War and retained majority status for a whole political generation. The exact timing of these political earthquakes is disputed, and the evidence for realignments has been murkier than ever in recent times (e.t, in 1968 and in 2008), but notice that they tend to occur in eras when the Regulationists are perceiving crises in economic models. And notice too that we *may* be in such an era today, when our institutional infrastructure and our political system may be open to restructuring and up for grabs for reforms, when we might be able to exercise our

citizen voices with more effect and begin to cure our democratic deficit. The moment is open.

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