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Abstract

What can the case of temporary labor migration regulation tell us about the rule of law and administrative justice from managed to neoliberal capitalism in the United States? This paper demonstrates how the enforcement of temporary migrant labor contracts from state-led economic planning into a market-driven order (1942-2011) challenges dominant understandings of economic rights in jurisprudential theory and histories of the American administrative state. Contrary to existing conceptualizations of the managed capitalist state as a rights-abrogator, I show how regulatory agencies created and backed private contracts (1942-64). I subsequently trace what happened to this legal form through the roll-back of managed migration in the post-1964 period. Counterintuitively, from the perspective of temporary labor migration, neoliberalism is not about the strengthening of private contract, but contract's changing form in kind and process. Through the retreat of managed migration, private contracts are deformalized and subsumed to a fragmented, "bottom-up" administrative justice, empowering employers in the legal process.

Keywords

Rule of law, Administrative Law, Neoliberalism, Labor Migration, United States.

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Gabrielle Clark
Max Weber Programme, 2012-2013

If there is political economy, what is its corresponding public law? (Foucault 2004, 38)

Introduction

What can the case of temporary labor migration regulation tell us about the rule of law and administrative justice from managed to neoliberal capitalism in the United States?[1] An unstudied area of public administration across time, temporary labor migration regulation has been central to government immigration and labor market policy since WW I and WW II labor mobilization projects. Often termed "guest worker" policy in social science research and political discourse, the federal government transported, placed, and backed what were called "alien labor" contracts, from 1942-1947, as part of wartime economic planning, and, until 1964, as part of managing agricultural labor markets. In the post-1964 period, federal state agencies now issue visas only to subjects defined as "non-immigrant" workers (e.g. H-1 and H-2 visas) and guarantee what are called "temporary alien" employment rights in the labor market. We see in temporary labor migration regulation a species of general shift in American public policy, deregulation of 20th-century interventionist methods in the economy, alongside the maintenance of a more minimalist regulatory government. Rather than managing the labor market directly by becoming a labor supplier and director, as in the past, the government now performs a licensing role, allowing businesses to access foreign labor according to market needs.[2]

Comparing the "alien labor" contract with "temporary alien" employment law in administrative process, I suggest, can inform what we know and don't know about the rule of law and administrative justice from managed to neoliberal capitalism. [3] Neither jurisprudential approaches to the administrative and regulatory state, nor the history of administrative law across regulatory periods, can account for the legal institutions and processes constructed under temporary migrant labor policy. Both literatures posit that interventionist planning abrogates economic rights, such as property and contract, through regulation and discretionary administrative processes. [4] Through this lens, the rise of a market society of private exchange and judicial review of agency action constitute the meaning of the rule of law.

The case of temporary migration points us to the possibility of understanding transformations in the rule of law and administrative justice across managed to neoliberal capitalism in a different way, however.[5] State-led migration in the period of wartime economic and agricultural planning (1942-

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[1] The terms managed capitalism and neoliberalism are well-defined in literatures dedicated to the study of political economy and capitalism, as is the significance of the transition from one to the other. Generally speaking, managed capitalism is defined as state control of the economy, whether through outright strong dirigisme or lighter forms of market regulation. It arose concomitant to the period of embedded liberalism in the international order (1930s-1970). Neoliberalism, in contrast, is about the retreat of the state from the market in the post-1970 period, including the dismantling of the welfare state, erosion of social provisions, turn to monetarism in fiscal and financial management, and tax cuts for business. See Harvey (2007, 2010), Jessop (2008), and Fraser (2013).

[2] This has corresponded to an economic turn away from employing guest workers primarily for industrial and agricultural production towards using foreign temporary labor in the knowledge economy (although temporary foreign workers still work in agriculture and seasonal tourism, the ratio of the former to the latter is now 33:1, DHS Population Statistics, 2009).

[3] This article re-appropriates Galanter's (1983) title from "Reading the Landscape of Disputes: What we Know and Don't Know About Our Allegedly Contentious and Litigious Society"

[4] For an account of the relationship between market liberalism and the rule of law see Tamanaha (2006). An exception to the idea that property is abrogated by state intervention is found in Reich (1975, 1990). Here, Reich argues that state policies create new kinds of property.

[5] An investigation of these questions has, until now, remained outside of both scholarly and public purview. While scholars have examined the history and current configuration of what are commonly known as "guest worker" programs, this research habitually remains within the ambit of immigration/migration studies, fields that do not generally analyze shifts in legal structures over time (Galarza 1963; Calavita 1992, Hahamovitch 1997, 2011; Gamboa 2000; Cox and Rodriguez 2009; Ngai 2004; Ness 2012). In the literature on temporary labor migration, moreover, it is commonplace to assert that it is a regime without law or that it is a labor system akin to slavery and indentured service (Chakravartty 2006; Ness

1964) indicates that state agents created private rights through publicly-backed legal forms, such as the "alien labor" contract, and administrative processes to enforce them.[6] The deregulation of state-led migration suggests that we examine what happens to these contractual rights when they are privatized and placed under another kind of administrative justice, one that is not only divorced from state planning, but judicialized in form.

Ultimately, as I will show below, what remains unaccounted for in jurisprudential thought and administrative state histories alike is that the deregulation of state-led capitalism has entailed not only a shift from regulation to rights, but a shift in kind and process in contractual design and administration. Under wartime and post-war economic planning, contractual rights were well-defined, yet subsumed to a "top-down" discretionary administrative process operating in the name of a state plan. Today, in contrast, the contract has been deformalized, while new contractual questions arise in a fragmented "bottom-up" system of justice removed from questions of production. A shift from "top-down" to "bottom-up" legality has also shifted norms of administrative due process over time, as what process is due in some ways shrinks through the retreat of state action in the market. Judicialization today, moreover, far from quelling administrative discretion, has opened up new spaces for it. The logics of administration and the enterprise, as opposed to a plan, are ascendant. We come to see economic rights and justice-dispensation as contingent processes with concomitant historically-specific meanings that cannot be accounted for without examining the institutional study of legal practices across time.[7]

But, is this article only about changes in public and private law across a political economic transformation (including the balance between them)? In some senses, it is. However, at the same time, in what I present, we can also examine the distribution of power between the state, employers, and employees under different systems. What we will see is that one cannot easily assess which system was "better" or "worse" from either perspective. Contractual law under both administrative systems has suppressed and protected workers in different ways, while facilitating and restricting employer power in others. Certainly, however, we see how more courts today, through the logic of administration and the enterprise, disempower migrants, the "have nots", in a way of their own.[8] At the

(Contd.)

2012). This is incorrect from a legal perspective, as the regime has always been highly rule-bound. The above statements are activist, to the extent that that they are motivated by concern for the pernicious social condition in which foreign temporary workers often find themselves. The absence of workplace power, however, is not produced by the lack of law, but by the kind of, and failure of, legal rights-enforcement, a failure whose nature, I demonstrate below, is historically contingent. Cindy Hahamovitch (1997, 2011) has written how astonished she has been in her research on temporary labor migration to discover the extent to which the state has managed it. Unlike what I do here, however, she does not theorize the relationship between temporary labor migration and the legal history of the American administrative and regulatory state. An area wherein immigrants' rights have been linked to administrative state development is the intersection of deportation with due process rights (Salyer 1995; Kanstroom 2010; Law 2010).

[6] My legal historical point is akin to two recent arguments. That economic rights can come from government is the argument Ciepley (2013) has made in the realm of corporate law. That administration divorced from the judiciary is part of American rule of law culture is Mashaw's (2012) argument in his recent book on the first hundred years of administrative law. Contrary to today's judicio-centric culture, Mashaw posits, court control of this bureaucracy in the early years of the American republic was limited to common-law writs.

[7] As Nardulli, Peyton, and Bajjalieh (2013) have recently posited, there is not one rule of law, there are many rules of law. These rules, they suggest, are "likely to evolve in a layered manner, responding to specific historical developments in light of extant political circumstances. The historical developments that shape legal regimes are far more likely to affect specific legal domains commercial, family relations, criminal, than to reshape a country's entire corpus of law" (2013, 143). This suggests that the rule of law is not only instantiated in synchronically specific ways across substantive legal spheres, but that its practice, style, and meaning varies diachronically within spaces of law and justice. I would like to add that the form of discretion within the law is also contingent. Thus, it is not only that justice has been rationalized into executive-led justice in the 20th century as Heydebrand and Seron (1990) have demonstrated. The forms of executive-led disputing change, as does their meaning in legal practice across state transformations. Studying forms associated with these legal processes, such as settlement, should take into account across time, in addition to in time, variables.

[8] The "have nots" re-appropriates a phrase from Galanter's (1974)"Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change"

same time, judicial review produces a jurisprudence reminiscent of the *Lochner* era, as protective temporary migrant labor regulations are struck down in Federal Court.[9]

I. What we Know and Don't Know about the Rule of Law and Administrative Justice from Managed to Neoliberal Capitalism in the United States

Conceptualizing the managed capitalist state as a creator and enforcer of private contractual rights is to see it in reverse form from both jurisprudential and historical perspectives. For, from classical to more contemporary liberal political and legal theory, the rule of law has been theorized as a mechanism by which state power over private rights, including property and contract, is delimited.[10] Long held truisms within American legal theory, dating back to the English constitutional theorist A. V. Dicey (1885), established a distinction between a public law that is by nature coercive and discretionary, to be constrained by judicial review, against a non-coercive private realm.[11] Even Progressives and New Deal jurists reproduced this distinction when they deconstructed law's economic and social merit.[12] For example, James Landis (1938) and Felix Frankfurter defended the administrative process in terms of science, expertise, predictability, and social justice, not the rule of law (Horwitz 1992; Ernst 2009; Grisinger 2012).[13] In some sense, then, one could argue that Progressive legal discourse left itself open to destruction on its own terms. Post-WW II legal thought in the United States resurrected jurisprudential principles committed to the restraint of state power over private rights through judicial review, the very same distinction in rule of law theory all over again (Horwitz 1992, 250-2; Grisinger 2012). Louis Jaffe's 1965 *Judicial Control of Administrative Action* is a case in point.[14]

Contemporary jurisprudential theory reproduces this familiar binary. With the exception of the utilitarians, concerned with what works from a law and economics efficiency perspective rather than the legality of administrative processes, both libertarian and liberal legal "proceduralist" positions

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[9] The Supreme Court's decision in *Lochner v. New York* 198 U.S. 45 (1905), striking down state legislation regulating bakers' maximum working hours, has come to symbolize an era in constitutional law and American laissez-faire capitalism. In this case, judges developed the constitutional principles of freedom of contract and substantive due process to protect private property and business control over the contractual exchange. Where these doctrines came from (since they are not found in the constitution itself) has been a terrain of academic debate. In the field of temporary migrant labor regulation, I find that courts play a similar role.

[10] This, as Foucault (2004) argued in his 1978-9 lectures at the Collège de France (republished in English as *The Birth of Biopolitics* 1978-9), is related to the historical origins of classical liberal theory itself, which was oppositional to royal power and its raison d'état.

[11] Under this view, legal devices of the administrative state, such as the issuing of permits and licenses, rate-setting, price controls, and the controlling of "unfair competition" through antitrust law are viewed as interfering in the realm of the private.

[12] For, at the dawn of the 20th century, the rule of law as applied by courts in society had come under scrutiny in several ways: courts both lacked the technical expertise to make economic policy from the bench and had become insufficient to deal with the justice issues raised by industrialization. Law was not only inflexible, it was not impartial, as it produced the consolidation of enormous class power (Auerbach 1977, Gillman, 1993). Key court cases striking down both economic and socially-oriented statutes on constitutional grounds incensed reformers for their perceived partisanship to particular business interests at the expense of aggregate economic performance and society as a whole (read the working class).

[13] Daniel Ernst (2009) demonstrates that not all Progressives held this view. For example, Ernst Freund did not. In *Administrative Power over Persons and Property* (1928), Freund argued for the control of administrative discretion through law. According to Ernst (2009), Frankfurter "questioned Freund's formulation of the object of the inquiry as "whether private interests are adequately safeguarded."..."After all, we can't consider whether private interests are safeguarded without equally considering the public interests that are asserted against them" (quoted in Ernst 2009, 20).

[14] As a side note, theorists such as Kelsen (1967), Hart (1961), and Lon Fuller (1964) did not argue that regulation violated the rule of law. What was important to them was that rule of law principles (defined by Fuller as generality, publicity, prospectivity, clarity, logical consistency, feasibility, and stability) be brought to bear upon rule-making in administration. Fuller also went so far to say that the rule of law was not the only value to be considered in public policy writing "...yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources" (Fuller 1964, 176). Even while critiquing rights-based economic orders, Fuller posits the distinction between regulation and economic rights.

define the rule of law as consistent with private rights and judicial review.[15] The libertarian view, for example, resurrects the age-old stylized political theoretical point that economic rights, such as property and contract, exist *a priori* to state law. The state should not interfere with exchange, but merely enforce exchange outcomes through legal institutions (Barzel 2002). [16] Drawing inspiration from Friedrich Hayek, for example, Richard Epstein (2006) challenges public administration on the grounds that it always violates private rights, especially economic ones. He argues that "this nation has done well with the protection of people from arbitrary arrest and seizure of property. It has done far less well in setting the rules which allow the state to impose restrictions on the *use* and *disposition* of labor and property" (Epstein 2006, 495).

The problem of "administrative authority" is maintained within the "proceduralist" approach to the rule of law in the regulatory state. But, contrary to the above view, public power is a force to be constrained, not destroyed. For example, for Jeremy Waldron (2010), rule of law values mean that government cannot obstruct the operation of the courts, or preclude judicial review of executive action. Recent court cases legitimizing administrative discretion have prompted scholars to label administration a "Schmittian" bureaucracy, to the extent that discretion is increasing at the expense of the rule of law (Scheuerman 2000; Dyzenhaus 2006).[17]

Seeing the public-private relationship as antagonistic extends beyond jurisprudence and into histories of the administrative state, from managed into neoliberal capitalism. For example, Meyler's (2007) legal research investigated how the American New Deal and emergency state abrogated private contractual rights through the Supreme Court case *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1933). Similarly, scholarship conceptualizes the 1946 Administrative Procedure Act (APA), which brought judicial review to public administration and gave private parties standing to challenge administrative action through "bottom-up" adversarial litigation, as disciplining administration through procedure (Shapiro 1986). [18] Under this view, the institutionalization of "total justice" in regulatory state development until the 1970s empowered private rights in relation to public power (Friedman, 1985).[19] Welfare, for example, became "new property" as it could not be taken away without a formalized administrative, quasi-judicial hearing (Reich 1964).

Scholars also study the neoliberalization of the state through the above prism. Understood as a process of "contracting out", what was once in the realm of economic regulation, command and control, is now left to private exchange. [20] The "outsourcing" of government functions to the market

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[15] Posner's work brings the utilitarian concern with market efficiency to law and economic thought. In this way, it moves beyond the early neoliberal and Hayekian concern with liberty. For an account of a similar shift in economic thought see Angus Burgin (2012) *The Great Persuasion: Reinventing Free Markets Since the Great Depression.*

[16] Waldron (2007) has characterized the neoliberal view on the rule of law as "substantive" to the extent that it values certain norms, those consistent with the free market, over other rule of law concerns such as the separation of powers and the balance between state power and individual rights.

[17] Key cases in this regard are *Bismullah v. Gates* 514 F.3d 1291 (D.C. Cir. 2008) defining Combatant Status Review Tribunals (CSRTs) as outside the contemplation of the Administrative Procedure Act (1946) and *Norton v. Southern Utah Wilderness Alliance* (*SUWA)* 542 U.S. 55 (2004), which said that whole agency programs are not covered by the APA. Similarly, *Jifry v. FAA* 370 F.3d 1174 (D.C. Cir. 2004) held that FAA had complete discretion to revoke alien pilot licensing.

[18] The development of the application of judicial review to administration was not without its own political and class-based politics. As scholars have argued, both the capitalist class and the professional bar lobbied to infuse more proceduralism into administration (Horwitz 1992; Shamir 1995). While Horwitz (1992) locates these reforms within the realm of academic legal elites, Shamir (1995) points to the elective affinity between the capitalist class' call for more law, with the professional bar's interests in maintaining a monopoly over disputing through the provision of legal services.

[19] As Kagan (2001) has shown, as Congress passed statute after statute creating more administrative agencies, public interest and rights-based mobilizations pushed for even more judicial control of regulatory rule-making and more adversarialism (again more judicial review).

[20] The poster child for neoliberalization is The Airline Deregulation Act of 1978 signed by President Carter. This Act removed government control over fares, routes, and market entry (of new airlines) as well as public utility deregulation. "Contracting out" requires agencies, such as the Department of Defense (DOD), the Department of Energy (DOE), and the Department of Homeland Security (DHS), increasingly to draw upon the private sector to fulfill public

leads to the proliferation of economic rights and their enforcement through "bottom-up" legal institutions (Verkuil 2007, 159). As the legal philosopher Alan Supiot (2007) has written: "this trend—proceduralization—transfers the concrete and qualitative questions that were previously settled by the State into the sphere" of the market and the law (Supiot 2007, 103).[21] Research on this market and law interstice also suggests, however, that there is increasing administrative discretion over economic rights, that is, the subsumption of private rights to public power.[22]

But, if we view the managed capitalist state in reverse form as a creator and enforcer of economic rights, such as contractual rights in administrative practice, a new genealogy of the administrative state into neoliberalism is made possible.[23] The case of temporary labor migration regulation, which moved from a publicly-backed "alien labor" contract to market-driven "temporary alien" employment rights, allows us to begin this project. We can henceforth re-conceptualize questions of contract under economic planning in New Deal and wartime agencies such as the Works Progress Administration, the Public Works Administration, the Civilian Conservation Corps, the War Labor Board, the War Food Administration, and the War Manpower Commission. For such agencies were not just aberrations from the normal private world of exchange, but sites of contracting and administrative justice which remain little understood. What we might be able to do with such research is to build a theory of how values espoused by recent rule of law theory, such as private contractual rights and enforcement, have taken alternative state-led forms, how such forms have changed over time, and to what effect. Deconstructing the stylized vision of economic rights as consistent only with market exchange, and inconsistent with planning, is already being done in the case of the Soviet Union (Belova 2001). Contracts, in form and process, are not essential objects, they are given meaning in historically specific institutional environments.

II. The Case of Temporary Labor Migration Regulation

The temporary labor migrant as a juridical subject is a product of the modern administrative and regulatory state. Created by administrative fiat within the Bureau of Immigration in 1917 to supply the WW I war economy with emergency labor, pre-arranged employment-based labor immigration had been barred from the polity via legislative statutes since the 1880s. For organized labor had lobbied

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goals. Between FY 2000 and 2005, for example, the value of federal contracts increased 86 percent, while noncompetitive contracts increased by 115 percent (Verkuil 2007, 140). Companies such as Blackwater, dedicated to military security, were unheard of 10 years ago, and now capitalize at $100 billion (Ibid, 26).

[21] We can empirically see the above on display in the American context in several areas. For example, anti-trust law expands as a state tool to manage market competition (Levi Faur 2005). The Federal Trade Commission (FTC) and the Antitrust Division in the Department of Justice operate not by commanding and controlling conditions or entry and exit into a market *ex ante* (as in the past with the Civil Aeronautics Board), but in engaging in *ex-post* government of market activity, re-regulating from the bottom-up. Concomitantly, we see statutes such as the 1946 Walsh-Healey Act and the 1941 Defense Base Act, both respectively passed to regulate civilian and military contracting, assume a larger place in the Department of Labor's litigation docket (Office of Administrative Law Judges Docket, 2013). Public employment is whittled down from one of direct control of production and the labor process to *ex post* enforcement of workplace standards.

[22] For example, in the regulatory rule-making making domain, cases such as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc* 435 U.S. 519 (1978) and *Chevron USA Inc v. National Resources Defense Council, Inc* 467 U.S. 837 (1984) rolled back the "hard look" doctrine and articulated a judicial principle of administrative deference. Similarly, judicial review of the Negotiated Rulemaking Act of 1990 (NRA), an amendment to the APA, has been found to have consolidated administrative discretion by pulling rule-making away from judicial oversight. Harrington and Turem (2006), for example, found that in several domains of administrative law the call for increased participation and transparency in the regulatory rule-making process embodied in the Negotiated Rulemaking Act of 1990 (NRA) was coupled with a paradoxical decrease in procedural rights (law). For example, several court decisions stipulated that there is 1) no procedural mandate to establish a negotiated rulemaking process under the NRA; 2) there is no right to participate in a negotiated rulemaking; and 3) there is no right to contest the outcome of negotiated rulemaking.

[23] Beginning from this perspective is orthogonal to scholarship that recovers the New Deal and wartime expansion of civil rights in the name of historicizing subsequent rights-based legal reforms (Frymer 2008; Tani 2012). Instead, my aim is to understand how economic rights, such as those of contract, changed in kind and process across regulatory regimes in the United States.

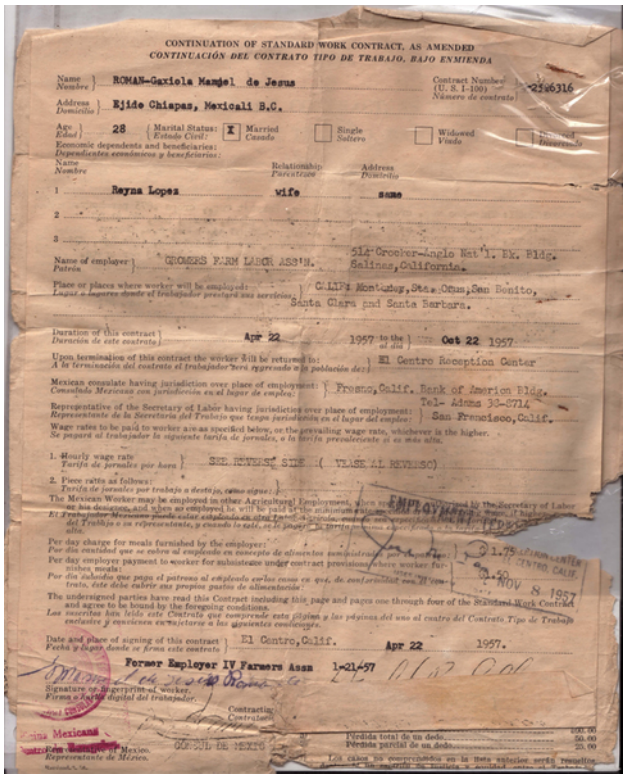
against contract labor migration. [24] Under the emergency authority of the United States Employment Service (USES) in 1917, temporary exceptions were made to the overall ban in the name of labor mobilization and economic planning. Employers were permitted to import 70,000 workers from Mexico, the Caribbean, and Canada for work in agriculture, railroad, and mining sectors (Briggs 1983).

This early wartime exception laid the groundwork for the rise of state-led migration in WW II under Roosevelt's managed capitalist state. In the inter-war period, the Farm Security Administration (FSA) had been established to run a transportation and labor supply program to address the mal-distribution of agricultural labor across localities. And, in response to the American entry into WW II, the United States Employment Service (USES) was re-established under the authority of a new executive agency, the War Manpower Commission (WMC), to address labor market needs for wartime production. Both agencies collaborated with the Immigration & Naturalization Service, in 1942 and 1943, to sign bilateral international labor agreements with Mexico, Jamaica, British Honduras, Barbados, and Newfoundland. Foreign workers would, like their American counterparts, be transported and placed across American labor markets until wartime demobilization in 1947. The "Bracero" agricultural labor program created through Public Law 78 (1951-1964) persisted past the war, under the authority of the Bureau of Employment Security in the US Department of Labor and the Immigration & Naturalization Service. In the name of agricultural labor market stabilization, the government continued to transport workers into state-run contracting centers and to monitor their placement (Calavita 1992). It was only in 1964 that temporary labor migration was deregulated, as the state pulled out of managing migration directly.

State-led migration was based upon the "alien labor" contract, seen in Figure 1 on page 7. The contract was formal, guaranteeing rights and duties between the parties. As a state-backed contract, such rights and duties were enforced administratively, as the state could not take away contractual rights without due process of law. Under the contract, employers were guaranteed labor power for a specified time-frame (generally 6 months), while workers were entitled to certain employment standards, such as wage-minimums, a 3/4 work guarantee (to be paid, regardless of the availability of work for 3/4 of the contract's duration), and transportation home (provided the time-frame specified in the contract was completed). Sanctions for breach of contract included debarment from the labor mobilization program (brought to bear upon employers) or deportation (against the worker). In the last instance, it was the state that would provide the respective parties new laborers (for employers) or payment upon employer default (for workers). This is not the "night watchman" state of classical liberal theory guaranteeing contractual exchange, but a state that assumes risks and liabilities alongside private parties.

While the state continues to create the conditions for private foreign labor contracting through visa-issuance today, it takes no role in transportation or placement. At the same time, the state-backed "alien labor" contract is a legal form that is now completely absent. Employers and employees exchange wages for labor in a private market, while a formalized labor contract stipulating the length, conditions of employment, or sanctions upon breach is voluntary. Contract law has been deformalized. Concomitantly, what process is due employers and employees in administration has shrunk, as the state is no longer shares risks and liabilities under the contract. As the state is no longer the guarantor of contractual rights between parties, issues such as termination and employment standards are not questions of administrative due process at all. The federal government does, however, issue regulations governing labor market standards under the rubric of "temporary alien" employment law that can be mobilized as rights-claims from the "bottom-up". Due process questions arise only as issues of appeal after agency rulings.

[24] Organized labor's argument was that "alien labor" contracts brought down working conditions for all.



CONTINUATION OF STANDARD WORK CONTRACT, AS AMENDED
CONTINUACIÓN DEL CONTRATO TIPO DE TRABAJO, BAJO ENMIENDA

Name / Nombre: ROMAN-Gaxiola Mangel de Jesus — Contract Number (U. S. 1-100) / Número de contrato: 25-6316
Address / Domicilio: Ejido Chiapas, Mexicali B.C.
Age / Edad: 28 — Marital Status / Estado Civil: [X] Married / Casado; [ ] Single / Soltero; [ ] Widowed / Viudo; [ ] Divorced / Divorciado
Economic dependents and beneficiaries: / Dependientes económicos y beneficiarios:

	Name / Nombre	Relationship / Parentesco	Address / Domicilio
1	Reyna Lopez	wife	same
2			
3			

Name of employer / Patrón: GROWERS FARM LABOR ASSN. — 514 Crocker-Anglo Nat'l. Bk. Bldg. Salinas, California.
Place or places where worker will be employed: / Lugar o lugares donde el trabajador prestará sus servicios: CALIF: Monterey, Sta. Cruz, San Benito, Santa Clara and Santa Barbara.
Duration of this contract / Duración de este contrato: Apr 22 1957 to the / al día Oct 22 1957
Upon termination of this contract the worker will be returned to: / A la terminación del contrato el trabajador será regresado a la población de: El Centro Reception Center
Mexican consulate having jurisdiction over place of employment: / Consulado Mexicano con jurisdicción en el lugar de empleo: Fresno, Calif. Bank of America Bldg. Tel- Adams 33-5714
Representative of the Secretary of Labor having jurisdiction over place of employment: / Representante de la Secretaría del Trabajo que tenga jurisdicción en el lugar del empleo: San Francisco, Calif.
Wage rates to be paid to worker are as specified below, or the prevailing wage rate, whichever is the higher. / Se pagará al trabajador la siguiente tarifa de jornales, o la tarifa prevalecente si es más alta.
1. Hourly wage rate / Tarifa de jornales por hora: SEE REVERSE SIDE (VEASE AL REVERSO)
2. Piece rates as follows: / Tarifa de jornales por trabajo a destajo, como sigue:
The Mexican Worker may be employed in other Agricultural Employment, upon approval by the Secretary of Labor or his designee, and when so employed he will be paid at the prevailing wage rate for / El Trabajador Mexicano puede estar empleado en otro Empleo Agrícola, cuando sea aprobado por la Secretaría del Trabajo o su representante, y cuando lo sea, se le pagará la tarifa prevalecente para
Per day charge for meals furnished by the employer: / Por día cantidad que se cobre al empleado en concepto de alimentos suministrados por el patrón: 1.75
Per day employer payment to worker for subsistence under contract provisions where worker furnishes meals: / Por día subsidio que pague el patrono al empleado cuando en el contrato se estipule que el patrono debe cubrir sus propios gastos de alimentación:
The undersigned parties have read this Contract including this page and pages one through four of the Standard Work Contract and agree to be bound by the foregoing conditions. / Los suscritos han leído este Contrato que comprende esta página y las páginas del uno al cuatro del Contrato Tipo de Trabajo anterior y convienen en sujetarse a las siguientes condiciones.
Date and place of signing of this contract / Fecha y lugar donde se firma este contrato: El Centro, Calif. Apr 22 1957.
Former Employer IV Farmers Assn 1-21-57
Signature or fingerprint of worker. / Firma o huella digital del trabajador.
Contracting / Contratante
Mexican Consulate / Consulado Mexicano
Representative of Mexico. / Representante de México. CONSUL DE MEXICO
Pérdida total de un dedo 100.00
Pérdida parcial de un dedo 50.00 20.00
Los casos no comprendidos en la lista anterior serán resueltos

Fig 1. "Alien Labor" Contract

Below, I compare three contractual and rule of law questions across the two regimes: employment termination, standards, and access to the review of agency decisions. Findings are based upon the War Food Administration (WFA) (1942-47), the War Manpower Commission (1942-47) and the Bureau of Employment Security (BES) (1951-1964) files, agencies that governed temporary labor migrants under state planning. To study contemporary administration, I examine cases generated by the Department of Labor's Wage and Hour Division (WHD), the Office of Administrative Law Judges (OALJ), the Administrative Review Board (ARB) and the Federal Courts; legal cases that are unpublished (with the exception of those that go to court) and were made available to me via Freedom of Information Act requests. While aggregate level data was available from the WHD administration, case files were only available on appeal from the OALJ. These files, however, contained each case's entire history. I gathered 176 appeals cases (18 agriculture and 158 knowledge economy cases) out of a national world of 562 cases between 1995-2011.

a. The Law of Employment Termination

In any labor or employment contract, the issue of termination is part of the contractual labor exchange defining private rights between parties. Since 1895, employment termination in the United States has been "at-will", meaning that neither employers' right of dismissal nor employees' right to quit is controlled *ex-ante* by the legal process (Feinman 1976).[25] "At-will" presumptions were modified through "just cause" provisions beginning in public employment in 1912 via the Lloyd-LaFollette Act and in private collective bargaining agreements (CBAs) under the National Labor Relations Act

[25] The history of employment "at will" is conventionally understood as a shift consistent with the rise of liberal market capitalism in the late 19th century. Prior to this time, master-servant law mandated that common-law judges oversee employment termination. For example, as Jacoby (1982) found, "in colonial Rhode Island, a servant could not be dismissed without "reasonable and sufficient cause," and such dismissals had to be approved by the town's chief officer and three men from the Common Council. Similarly, " a master might bring a criminal action or seek either specific performance of damages if a worker failed to complete his contractual term of service" (90).

(1937). In both public and CBA-governed private employment, review of termination questions occur after dismissal.

In the period of state-led migration (1942-1964) and under the "alien labor" contract, termination questions were subsumed to "top-down" norms of administrative due process in the managed capitalist state. For the state-backed contract created and mandated state enforcement of an employer's right to labor power and an employee's right to employment. As such, an employer's right of dismissal and an employee's right to quit rested with the state.[26] Both parties had to submit their intent to state agents in either the WFA or WMC under the wartime plan, or to the field representative with the United States Bureau of Employment Security from 1951-1964. It was within an administrator's purview to release a worker only "after finding that good cause therefore exists in his case". [27] It was only after hearing parties' statements that state administrators decided whether "the agreement may forthwith be terminated".[28] This meant that the state controlled employer and laborers' obligations to one another under the contract as well as the imposition of sanctions for contract breach.

Overall, from the archival record, it appears that state administrators listened to evidence from both parties and complied with employers and employee wishes to be absolved of their obligations to one another. Thus, in practice this "top-down" bureaucratic procedure followed parties' private wishes. Administrative due process did not hinder employers and employees from ending their contractual commitments. For example, when a Massachusetts hydrant manufacturer in 1945 became dissatisfied with a Jamaican contract worker, Tycance Ducasse, on the grounds that he was physically unable to perform work, the administrator approved the termination (*Administrative Determination in the case of Tycance Ducasse*, May 14, 1945).[29] Similarly, in 1944, 22 workers who had been picking beans were dismissed and repatriated when their employer informed state agents of their poor work performance record, despite the fact that no production minimums were specified in the contract.[30] On the other hand, when a Jamaican worker, Walter Khouri (contract # J-01126), employed in the Plastics Division of the Monsanto Chemical Company, was "dissatisfied with the work, is homesick, and would like to return to Jamaica," the agency sent an investigator to the company where "an effort was made to persuade said Jamaican worker to fulfill his contract." But, as it was found that "he insists on returning to Jamaica and will refuse to work" the agency dissolved the contract. (*Administrative Determination in the case of Walter Khouri*, July 30, 1945).[31]

But, administrators sometimes enforced contractual rules more stringently. However, they did so only against workers, threatening sanctions for breach of contract. For example, in 1944, a group of Mexican workers in California went to the local WFA administrator seeking to dissolve their contract on the grounds that they were neither working nor getting paid. The WFA administrator responded that the state had no obligation to release them. The WFA agent countered that, despite the fact that there was neither work nor payment, the contract's 3/4 work guarantee was for a six-month

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[26] This requirement was adeptly noted by a state lawyer in the Office of General Counsel of the War Manpower Commission (WMC) in 1944 who wrote the following to a local agency representative: "A reading of the Contract to Employ and Transportation Agreement, which is entered into between the employer and the United States, and the individual work agreement, entered into between the United States and the worker, show that neither the employer nor the worker has the right to terminate employment at will, but such right rests with the Chairman of the War Manpower Commission acting through its authorized representative." Response of the Office of Legal Counsel to inquiry of the Chief of Bureau of Placement, September 30, 1944, Washington, DC, National Archives, Records of the War Manpower Administration, Records of the Legal Service, Record Group 211, Box 6, Entry 156.

[27] General Correspondence 1942-1946, Washington DC, National Archives, Records of the Bureau of Employment Security, Record Group 183, Box 6.

[28] General Correspondence 1942-1946, Washington DC, National Archives, Records of the Bureau of Employment Security, Record Group 183, Box 6.

[29] Waltham, MA, National Archives, Northeast Region, Records of the War Manpower Commission, Record Group 211, Group 533.191, Box 14.

[30] Letter of Fred Waite to Chief of Operations, July 15, 1944. Records of the Office of Labor, RG 224, General Correspondence, Aug 1943-December 1944, Entry 6, Box 12.

[31] Washington, DC, National Archives, Bureau of Employment Security Files, Record Group 183, Box 5.

period (Memo Chief of Operations, November 9, 1944).[32] Workers could not recuperate their right to be paid, or their transportation home, unless they remained with their employer. In this case, had the workers quit, they would have been deported at their own expense.

Sanctions, in the end, also appear to have been defined by the imperatives of planning, not the contract itself. Termination regulations under the state plan read: "Following a determination terminating the worker's employment, a regional office may find an employer in its region employing workers from the same country willing to employ the worker for the unexpired term of the contract."[33] Wartime planning, moreover, entailed a commitment to maximum employment in the name of production. As a WFA official wrote: "It is not our custom to send home anyone without fully exhausting all possibilities and employing them other than the first or even second unsatisfactory condition."[34] Thus, when Edward Forbes (contract # J-12076), a Jamaican foreign temporary worker laboring in Connecticut in foundry work, pulled a knife on a fellow employee on the shop floor and his employer sought to dismiss him against his will, the agency representative reviewing the worker's contract concluded: "The worker has requested an opportunity to prove to another employer that he is a good and conscientious worker and that this incident will never occur again. We have explained the entire situation to the Bassick Company, Bridgeport, Connecticut and they are willing to hire this worker immediately" (*Administrative Determination in the case of Edward Forbes*, June 21, 1945). Post-war planning did not evince such a commitment, however, state agents might still endeavor to place a worker elsewhere upon termination. They could not always find a new employer, however. For example, in the 1953 case of Joaquin Palacious-Cossio (L-790024), Andres Rodriguez-Marquez (L-806647), and J. Luz Terrazas-Malagon (L-768095), the employer argued that the workers were belligerent and uncooperative in the field, and, as such, should be repatriated. Mr. Figueroa, the Bureau of Employment Security's field officer, attempted to relocate the workers. However, not finding anything at the time, the workers were repatriated, losing their contractual right to work in the process.[35]

The regulation of work termination today is radically different. Because the role of the state in migration regulation is now minimal, and left to private exchanges in the market, the state no longer governs terminations through "top-down" procedures. The right to labor and the right to employment are no longer rights created by the state, subsumed to administrative due process norms. The employment relationship has become "at-will", such that neither employers nor employees must go in front of an administrator to effectuate termination. Far from constituting an area of ascendant private contractual rights (as rule of law theory might posit), here we observe a shift in kind and in process.

In contrast to the past, employers and workers are left to "bottom-up" legal processes in courts and administrative agencies. That termination issues now go either to courts or administrative agencies is evidence of legal fragmentation. Moreover, new market-based legal questions are being raised. Judges have been asked to rule on the status of the work visa and its relationship to the employment relationship, and the types of rights and obligations they co-constitute under common law. Such issues were, in the past, pre-defined *a priori* by the "alien labor" contract, as the formal contract and the "alien identification card" were issued together, by state agents at state-run contracting centers. Today, the visa is issued independently of any contract a worker may sign privately with the employer.

Administrative agencies now enforce only what is called the law of wrongful discharge.[36] The law of wrongful discharge allows workers to claim rights for a narrow range of issues, such as being fired as the result of a work-related injury and retaliation for complaining to state authorities about

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[32] Washington, DC, National Archives, Records of the War Food Administrator, Record Group 224, Entry 6, Box 18.

[33] Washington, DC, National Archives, Records of the War Manpower Commission, Bureau of Placement, Record Group 211, Entry 19.

[34] Letter to Herbert G. MacDonald, 19th August, 1944, Records of the War Food Administrator, Record Group 224, Entry 6, Box 12.

[35] San Francisco, CA, National Archives, Records of the Bracero Program, Record Group 174, Box 7, Folder 1

[36] Agricultural workers were afforded federal employment rights via statutory delegation in 1978, knowledge economy workers have only been extended such federal protection since 1990. Non-agricultural H-2 workers only gained such rights in 2009.

working conditions.[37] Workers can also argue that their termination was not a *bona fide termination.* Under the law, a *bona fide termination* mandates that an employer 1) write a letter to the Immigration Authorities, the USCIS, revoking the visa; and 2) inform the employee of their termination.[38] As the law of wrongful discharge is no longer subsumed to an economic plan, sanctions differ. Employers can be fined or mandated to reinstate a worker. The state does not re-employ a worker elsewhere in the market.

In response to litigation by workers who have come to the United States only to find themselves without a job (an effect of deregulation itself), courts have ruled that visas do not constitute any kind of contract between the employer and the individual under common law (*Geva v. Leo Burnett Co., Inc*., 931 F.2d 1220 (1991); *Van Heerden v. Total Petroleum, Inc*., 942 F. Supp. 468 (1996). For example, in *Van Heerden v. Total Petroleum, Inc*., 942 F. Supp. 468 (1996), a temporary migrant from South Africa travelling to Denver argued that the company induced him to quit his job and migrate to the US, after which they dissolved his position. Van Heerden argued that this had caused him much emotional duress, as he had moved expecting that his three-year visa meant employment for a fixed three-year period. In response, the United States District Court, D. Colorado concluded that "An individual hired for an indefinite period of time in Colorado is an "at will employee" whose employment may be terminated by either party without cause and without notice."

Courts have also been asked to decide whether an employment agreement can exist in the absence of a visa. In *Creighton University v. Ademola K. Abiose*, an Iowa state court judge ruled in favor of an employer that it can. Creighton University attempted to recover $115,090.60 (one-year's salary) from a Nigerian doctor who had left their employment after 3 years instead of 4. While the doctor's initial visa had been for three years, he had signed an agreement for four. Yet, the doctor received a new visa with another employer after 3 years. Creighton University argued that it had rights to his labor for the full 4 years, despite the fact that, when the agreement was signed, the visa itself did not allow the doctor to work in the US for this amount of time. The state court agreed with the employer on the grounds that it was reasonable to expect USCIS to renew the visa. Abiose could not leave employment early without paying a sanction of $115,090.60.

The law of wrongful discharge enforced by administrative agencies is also wholly different than termination regulation under the "alien labor" contract. Unlike in the past, when administrators reviewed all terminations, very few workers bring wrongful discharge suits into an administrative proceeding from the "bottom-up" at all. And, when they do, state administrators, rarely impose sanctions or provide remedies for terminated workers. The shift away from the logic of the plan, where terminated workers could become re-employed elsewhere, has therefore changed legal outcomes. A typical case is that of Marcos Sisfontes, an information technology worker from Costa Rica. Sisfontes had been working as a consultant with International Business Software Solutions Inc. (IBSS) for around six months when he was terminated. Sisfontes' claim to the WHD was that he was fired for participating in a Department of Labor wage investigation of his company, which resulted in 6 workers receiving back-wages and compensation. Sisfontes claimed that company executives identified him as the whistleblower, as he had also written directly to them complaining about non-payment/under-payment of wages, illegal deductions for visa fees, and substandard housing for workers. For reasons that are absent in the record, the WHD investigator decided not to investigate this claim. While Sisfontes received back-pay to compensate underpayment during his time spent with the company, he received none for termination nor reinstatement (*Marcos Sisfontes v. Pavan Kuchana,*

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[37] The former protection comes under the regulatory requirement to ensure health of agricultural workers (CFR 655.102 (b)(1). The latter protection reads: "Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e. whistleblower) (H1B Nonimmigrant Information Form, Employment Standards Administration, Wage and Hour Division, Form ES-WH4, Section 4, Box (k)).

[38] "An employer need not compensate a nonimmigrant if it has effected a *"bona fide termination"* 20 C.F.R. S 655.731(c) (7) (ii). The employer must notify the INS that is has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. S 214(h)(11); 8 C.F.R. 214.2(h)(4)(iii)(E); 20 C.F.R. S 655.731(c)(7)(ii).

President, International Business Software Solutions Inc, d/b/a/ IBSS, ARB Case 07-107, August 31, 2009).

Comparing termination questions under the "alien labor" contract and "temporary alien" employment law, we see that contract law and its administration has changed over time. What was once a "top-down" administrative regime, given meaning through due process under a state plan, has become a fragmented "bottom-up" order asked to answer new questions arising in a market, with fewer remedies. Similar findings arise from the analysis of how employment standards have functioned across systems of administrative justice.

b. Employment Standards

Like the law of employment terminations, workplace law has also changed in kind and as a process from state-led to deregulated migration. The shift from a "top-down" order subsumed to a plan, to a "bottom-up" process divorced from production imperatives, has meant changes in the contractual form, enforcement, and remedies.

Under the "alien labor" contract, for example, temporary workers did not have the right to unionize. Workers were permitted to appoint only members from amongst their own ranks to represent their needs and grievances to an employer. Under the state-led programs striking, and workers who refused to work as resistance, were systematically deported. For example, seven workers were repatriated from the US Sugar Corporation in 1944 for instigating strikes. Similarly, when ninety-three Jamaicans "refused to get off the buses" and go to work in Florida because they did not like the working conditions, the men were placed in the Dade city jail to await deportation (Hahamovitch 2011).[39]

Today, the state assumes no "top-down" role in regulating labor unionizing amongst temporary foreign workers, and does not make private bargaining in the market a violation of a work contract. While the overall unionization rate is low, temporary migrant farmworkers formed a union in North Carolina in 2004. The Farm Labor Organizing Committee (FLOC) and the North Carolina Growers Association (NCGA) signed a contract covering 8,000 labor migrants. Labor activists and scholars have credited this contract with raising wages over a period of three years in this state, a process that could not have happened under the "alien labor" contract, which fixed workplace standards within contract law itself.

Implementation practices have also shifted. In the period of the state plan, state agencies developed preventive compliance programs and worker surveying at state-run contracting centers as they were formal guarantors of contractual standards. Between July and December of 1960, the Bureau of Employment Security in San Francisco made 6,421 investigations in an area with 39,307 workers, a 15.8 percent investigation rate. 2,551 violations were found, suggesting that 6.5 percent of workers received a remedy from the state against their employer.[40] In 1964, payroll inspections were conducted in 47 percent of farms in California, with a violation rate of 3 percent. In contrast, preventative compliance and the surveying of workers prior to repatriation has waned, just as managed

[39] This rule was maintained in labor law decisions as well. For example, during the wartime economy, in December 1944, the United Mine Workers of America appealed to the National Labor Relations Board (NLRB) seeking to include employees imported from Newfoundland through the United States War Manpower Commission in their bargaining unit for the purpose of collective bargaining with their employer, Vermont Copper Company, INC. The Board, however, sided with the company, who sought to exclude such foreign workers *NLRB v Vermont Copper Company, INC* 59 No. 169, January 1, 1944. It also meant that foreign workers' desires to join an American union (regardless of the union's position on the matter) were easily dismissed. For example, in *Poor & Company Vermilion Malleable Iron Works* 63 NLRB No. 50, 1945, the employer and union were in agreement to exclude the Jamaican workers from their unit. The NLRB noted that "the parties agree that all 15 employees who normally reside on the Island of Jamaica, B. W. I., and who are classified as temporary employees on its pay roll be not permitted to vote in the election". They continued and concluded that "since it appears that the tenure of these employees will be of limited duration, we are of the opinion that these employees have an insufficient interest in working conditions in the plant to warrant their participation in the election. Accordingly, we shall adopt the agreement of the parties and shall not permit these employees to vote."

[40] Report of Operations of Mexican Farm Labor Program Made Pursuant to Conference Report No.1449 House of Representatives 84th Congress, First Session.

migration has. Employment standards enforcement now depends on private complaints. As state-contracting centers no longer exist, as an effect of deregulation, workplace issues are also no longer examined as workers leave the country. This has not boded well for workplace standards enforcement. In FY96, for example, according to a Government Accountability Office (GAO) report, the DOL received no complaints from any agricultural workers. In the knowledge economy, in FY 2000, the Department of Labor received 117 complaints from H-1B workers. At this time, we know that there were about 345,000 H-1B workers in the country. This means that investigations were commenced at a rate of .003 percent, a far cry from the 15.8 percent and 47 percent rates of the previous era.[41]

The presence and lack of state planning has created another difference in the implementation of workplace standards in the administrative process: how administrators handle private complaints from workers. Although the state's role under planning was, in part, to guarantee workplace standards, it cannot be said that workers' right to file a grievance under the contract was absolute. Workers filing unverifiable claims were deported as "resisters", suggesting that the state's role in securing a productive workforce under the plan compromised its rights-enforcing role. In 1944, a Jamaican worker wrote a note to the Chairman of the War Food Administration (WFA), and cc-ed the letter to the President of the United States. In his letter, he complained about the conditions at the General Cigar Corporation Farm, a tobacco farm in Connecticut. His letter read: "Jamaicans driven as dumb cattle working under intimidation. United Nations' fight for freedom. Justice. and Fair Play. We should have same. Copy of this sent to President Roosevelt" (Telegram of George Christie to WFA Administration and President Roosevelt, 30 Bissell Street, July 28, 1944).[42] The conclusions the investigator reached were that "while conditions get a little rough" in the camp, they are generally "ok". He further noted that the worker who had complained to the President should be repatriated to Jamaica, as he should never have gone over the head of the Jamaican government's liaison officer and written directly to President Roosevelt.[43] In consequence, George Christie was removed from the camp and sent to a labor reception center in Florida to await repatriation.

On the other hand, when problems were found in the period of the state plan, contractual remedies were diverse. Administrators took a problem-solving approach, either remedying the situation or finding workers employment elsewhere. For example, in 1943 the Mexican consul raised concerns about problems in California's Farm Production Council's Camps. They had already imported about 2,500 workers, and 5,000 were expected to come in at a later date; yet, the camps were having issues feeding the workers. The WFA investigator concluded that the meat rations were low, and that this situation had come about due to meat quotas in California. The investigator set about resolving the shortage immediately.[44] Similarly, in 1945, the Tampa United States Employment Service (USES) office received a complaint from a Barbadian worker employed at C. J. Jones Lumber Company alleging poor working conditions. After investigation, the USES investigator found that "the working and living conditions were actually unsatisfactory and inadequate" (*Administrative Determination in the case of Granville Daniel J-6580*, November 19, 1945).[45] Efforts were then made to transfer the worker to another location.

Today, complaints are either dismissed or a fine is issued, as the state's interests in production have been decoupled from its role as a rights-enforcer. In 2007, Majid Borumand, from Iran, filed a case against his employer with the Department of Labor's Wage and Hour Division. Despite the fact that state agencies had approved his appointment as a VP/quantitative analyst for Merryl Lynch at an annual salary of $111,446 dollars, Mr. Borumand complained that he was due

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[41] GAO Report 2006. Immigration authorities do not calculate the H-1B population as they count only entries and not exits. As visas are for three years, we can estimate the H-1B population to be three times allowed entry in any given year.

[42] Washington, DC, National Archives, Records of the War Food Administration, Record Group, 224, Entry 6, Box 17.

[43] Report of R. W. Whaples, Area Representative to Chief of Operations, August 5, 1944, Washington, DC, National Archives, Records of the War Food Administration, RG 224, Entry 6, Box 17.

[44] Letter of Regional Director of WFA to WFA Labor Division, November 6, 1943, Washington, DC, National Archives, Records of the War Food Administration, Office of Labor, Entry 6, Box 18.

[45] Washington, DC, National Archives, Records of the War Manpower Commission, RG 183, Box 1-7, C. J. Jones Lumber File.

anywhere between $300,000 and several million dollars. In response state agents dismissed the case, as the worker was not entitled to such high wages under the law. While the complaint was seen as groundless, the agency to no position as to whether Majid Borumand would remain in the US on a work visa or not (*Majid Borumand* v. *Merryl Lynch* 2007-LCA-00016) For the deregulated state is no longer in the business of directly judging whether a worker is a productive subject. The only action state agents perform is to offer a financial remedy. This can be seen in the case of the software engineer Jarod Motley, from Trinidad "(The little Caribbean Island that beat Bahrain to go to the World Cup)." He wrote to the Department of Labor that his employer had not paid him for over two months of project-based work. After his complaint, investigators issued back-wages to 13 workers totaling $122,298.01 (*Administrator v. Software Research Group* 2007-LCA-00032). Similarly, when Smitha Bhandary complained that she had been benched for 8 months without pay and forced to sign a personal leave of absence letter, she was compensated for the 8 months salary (*Administrator v. Saras* 2008-LCA-0015).

Employment standards, then, like the law of employment termination, show that contract rights have been defined differently across regulatory regimes and that administrative processes surrounding them have given them their meaning. We have moved from legalities imbricated with a state plan and to one independent of it, not from a period of rights-abrogation to one of rights-preservation as rule of law theory might suggest. Below, I discuss two final differences in law across state transformation, private rights to challenge agency action via administrative and judicial procedures.

c. Appeals under Administrative Justice across Regulatory Regimes

Jurisprudential theory stipulates that individuals should have an opportunity to request a hearing, make an argument, and confront the evidence before them before any sanction is applied. The procedural side of the rule of law in administration is a mode of governance that allows private individuals to intervene on their own behalf in confrontations with state power, via quasi-judicial or judicial processes in order to defend private rights against administrative discretion.

Under this view, New Deal and wartime agency processes, where discretion was built into the fabric of administration, appear antithetical to rule of law values. Indeed, under the "alien labor" contract, neither independent hearings nor judicial review existed. Issues of termination and employment standards from 1942-47 were governed by procedures common to Roosevelt's New Deal and wartime state as a whole, which only included minimal due process proceedings. While the WFA had no review procedure established to oversee investigatory outcomes, the WMC partnered with community members (as opposed to independent adjudicators) to handle workplace problems. Unresolved disputes travelled to a Regional Manpower Committee staffed by area representatives of business and labor. Review was final.

The Migrant Labor Agreement of 1951, which continued the wartime program for agricultural markets in peacetime, kept contractual issues within the realm of the administrative. Public Law 78, passed by Congress re-establishing the post-war migrant labor program, delegated the responsibility to design systems of administrative justice to the Secretary of Labor. While the Secretary of Labor established a more elaborate system of appeal than that which had existed during the war, adding two levels of opportunity for private parties to challenge agency action, independent quasi-judicial hearings and judicial review remained absent. What were known as regional joint determinations and final joint determinations in Washington, DC transpired in front of agency administrators and a representative of the Mexican government (not administrative law judges). Moreover, the decisions were absolutely binding on the Employer and Mexican Worker. "The action of the Secretary is unappealable."[46]

[46] Memo from Regional Solicitor to Bureau of Employment Security Field Staff, San Francisco, National Archives, Region X, Records of the Bracero Program, Region X, 1956, Record Group 174, Box 6.

Fig. 2

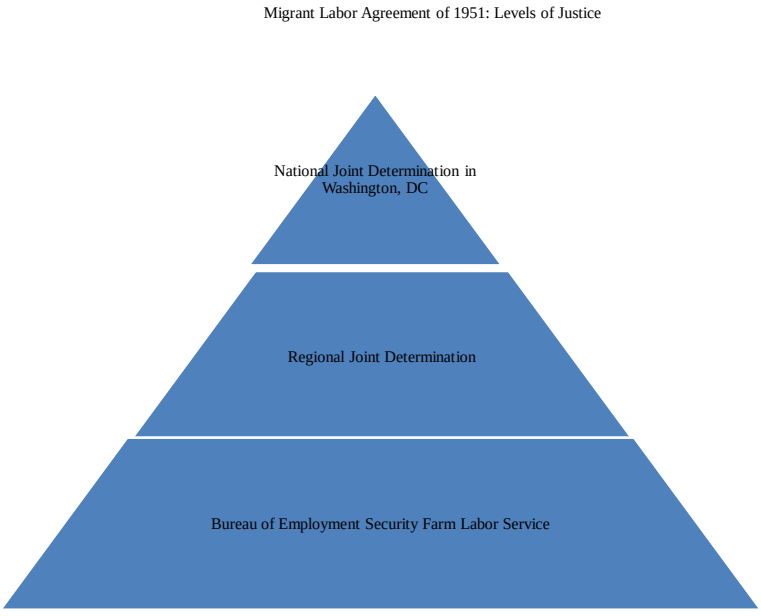

Fig. 3

In contrast, under "temporary alien" employment law today, administrative discretion is controlled through two quasi-judicial bodies within the Department of Labor, as well as the right of appeal into the Federal Courts, as shown in Figure 4. Both the Office of Administrative Law Judges (OALJ) and the Administrative Review Board (ARB) are staffed by judges who are independent from the lower administrative agency (in building space, salary, and tenure).

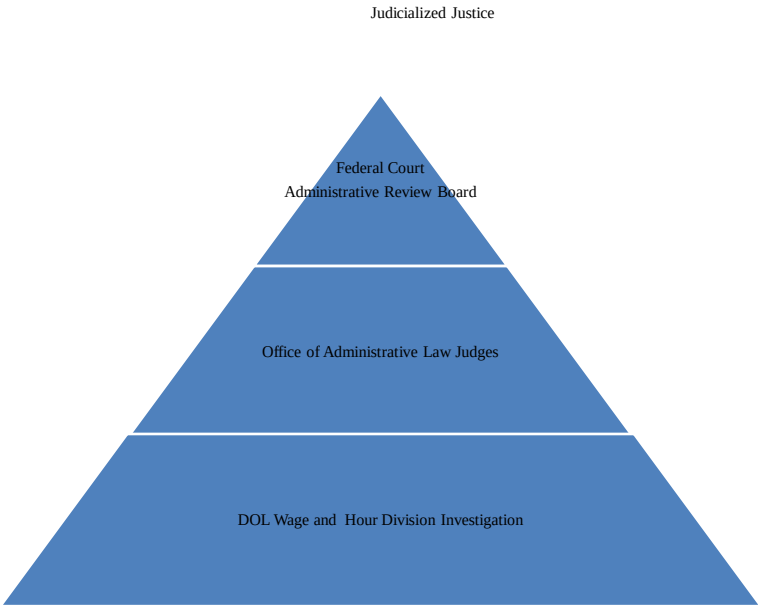

Fig.4

Contrary to what we might expect, however, quasi-judicial and judicial review of agency action has not curbed discretion, it has merely transformed it. At the same time, the new legal processes institutionalize new logics into the law: logics of administration (divorced from a plan) and of the enterprise. Overall but not entirely, both, taken together, empower employers at the expense of employees in a way that was absent under state plan's legalities.

To begin with, analysis of administrative courts in the Northeastern United States indicates that agricultural workers never appeal, despite heavy losses, while agricultural employers appeal administrative decisions 4% of the time.[47] In the knowledge economy, in contrast, employers and employees appeal 7% and 3% of the time. As Figure 5 (p.16) demonstrates, we see how the appeals process privileges one kind of actor, the employer, over employees.

Moving forward, formal administrative processes open up a new space of discretion in the post-appeal pre-trial period. Attorneys for the Department of Labor Solicitor's Office, who represent the Wage and Hour Division on appeal, are interested in settling cases before settlement judges as a first recourse in the handling of claims against agency action. Through this process, and through an empirical analysis of 176 appellate cases, I found that employers in agriculture are 100 % likely to have their liabilities decreased before the case even reaches trial, through settlement, while knowledge economy employers negotiate a settlement successfully 75% of the time, as demonstrated in Figure 6.

[47] More specifically, in agriculture employers appealed 9 out of 233 violations in the Northeast region from 1990-2008 (FOIA Wage and Hour Department of Labor Record, 2009). In contrast, in the knowledge economy, 26 cases out of 378 company violations were appealed, while for workers 2/76 losses were appealed, 7 % and 3% respectively. I came to these figures by comparing the aggregate number of cases from the regional Wage and Hour Division against filed appeals. I was only able to calculate a rate in the Northeast Region because my FOIA requests from the other DOL administrative regions failed to give me aggregate data on who won/lost cases. Spreadsheets received indicate that the agencies may not keep records evenly across the country.

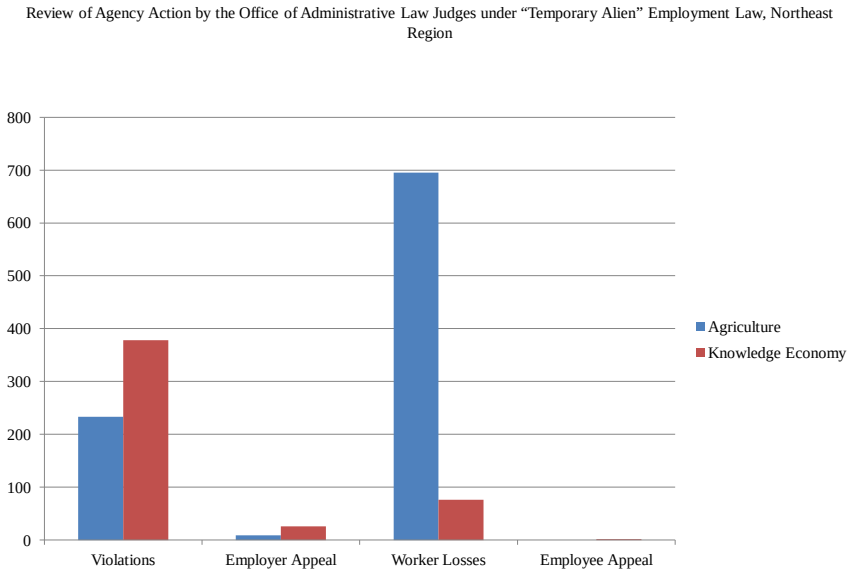

Fig. 5

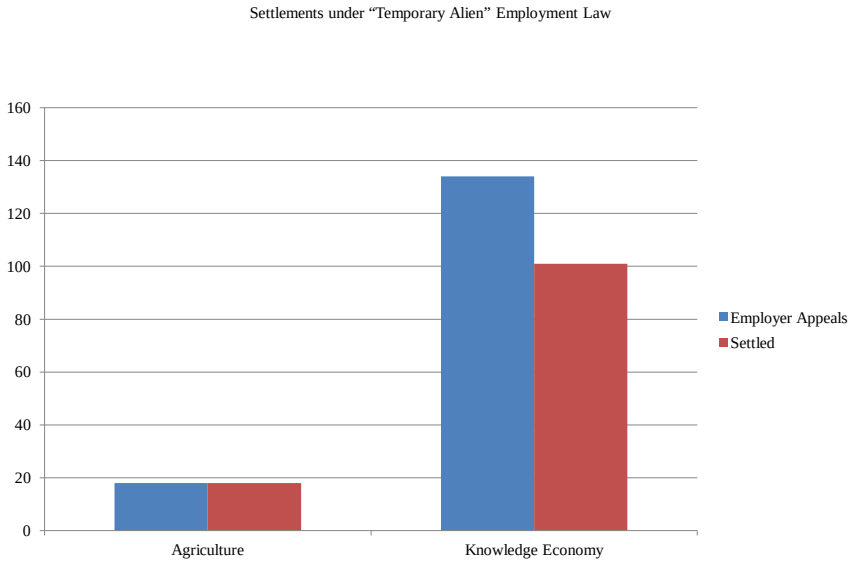

Fig. 6

What kinds of settlements are forged evince that the logic of the enterprise now maps onto a logic of administration, as employers negotiate down their liability to workers through settlement.[48] For example, in the case of *Administrator, Wage and Hour Division v. Eurofresh, INC* (2010—TAE—

[48] Scholars have shown elsewhere how the informalization of the formal truncates rights and justice (Harrington, 1985; Merry 1990).

0001), a settlement was reached wherein the bankrupt tomato processing company would allocate $949,940.00 to unpaid wages, when, in fact, they owed 587 workers $6,188,275.46 dollars (Consent Findings, *Administrator, Wage and Hour Division v. Eurofresh, INC*, 2010—TAE—0001). Claims of insolvency trumped claims of unpaid labor as the state and businesses negotiated employer liability.

On examination of the cases that do go to trial, it appears that the logic of administration and the logic of the enterprise constitute law, replacing the past legal culture of economic planning. For example, despite the fact that administrative trials are *de novo*, judges routinely dismiss workers' appeal on the grounds that they lack jurisdiction to consider factual issues if the administrator did not do so in the initial investigation, consolidating a logic of administration (and, for that matter, administrative discretion). For example, when Marcos Sisfontes, discussed above, was not given a remedy for termination, he brought his case to the Office of Administrative Law Judges (OALJ) and to the Administrative Review Board (ARB). However, neither the OALJ judge nor the ARB judge would address the conditions of his termination on the grounds that the DOL administrator had not (*Marcos Sisfontes v. Pavan Kuchana, President, International Business Software Solutions Inc, d/b/a/ IBSS* ARB Case 07-107). Similarly, when a foreign temporary worker working for Indiana University appealed the outcome of her case, seeking a heavier penalty be imposed for underpayment, the administrative law judge dismissed it, writing "While the fact that the Administrator declined to assess civil penalties may offend the Complainant as a citizen and member of the community, I do not interpret the term “interested party” so broadly, to include literally any person who wishes to challenge the Administrator’s findings...(*Administrator v. Indiana University*, Order of Dismissal, page 2, 2005---LCA---00021).

Logics of the enterprise, on the other hand, are emerging as judges draw upon company policies to resolve cases and make law. For example, in *Raghu Shashank Arramreddy v. IK Solutions*, Mr. Arramreddy appealed the outcome of an administrative finding wherein he had been awarded $3,200.00 in back-pay. He argued that the administrator had neglected to procure him $20,000 in back-pay for five months when he had been "benched" by his employer, a labor contractor, and had not been working. At trial, the company rebutted that Mr. Arramreddy had in fact not been available to work, as he had been incommunicado with their office during the period in contestation. While Mr. Arramreddy argued that he had been applying for jobs from home during the whole time, the company stipulated that, as a matter of company policy, job-seeking had to be done in the company’s office in order to count as remunerable time. This case ultimately turned on how the judge would interpret the meaning of Department of Labor regulations stating that workers be paid for non-productive time, i.e. time when an employee is not working due to employer's lack of work.[49] Interestingly, the judge in this case brought the company policy into the law, writing in the decision “The Respondent’s business consists of placing employees at client sites and billing clients for their services. It is evident that working at the client’s offices in Delaware would not amount to income producing work. However, it is within the discretion of the Respondent to determine where and how employees perform their work. It was not unreasonable to require the Complainant to report to the Respondent’s office in Delaware when not actively engaged on a project at a client site.” (*Raghu Shashank Arramreddy v. IK Solutions*, 2006--LCA--00020). With the judicial sanctioning of a company policy, the logic of the enterprise infiltrates the law.

The logic of the enterprise does not always disempower a worker. An administrative law judge brought company policy into the law in the case of *Amtel Group of Florida* v. *Rungvicit Yongmahapakorn* 2004--LCA--00006. This was a case of wrongful discharge wherein the judge expanded the protections afforded to the worker on the grounds that the company's employee handbook contained a "just cause" provision. While not written into "temporary alien" employment protections, which only require a *bona fide termination*, here the judge saw the company policy as

[49] As regulations stipulate: Employers are required to pay the employees for both productive and non-productive time. Employment-related non-productive time, or benching, results from lack of available work or lack of the individual’s license or permit 8 U.S.C. S 1182(n)(2)(c)(vii); 20 C.F.R. S 655.731(c) (7)(i). An employer need not pay wages for H-1B visa workers in nonproductive status due to conditions unrelated to employment or which render the employee unable to work. 20 C.F.R. S 655.731 (c)(7)(ii)

informing the law. As a result, the judge concluded that the worker was due the value of the time she would have worked if she had not been terminated, strengthening employer sanctions in the legal process.

d. Judicial Review of Agency Action

If the logics of administration and enterprise produce and color administrative discretion and law under today's "temporary alien" employment protections, judicial review is assuming a somewhat different role. To begin with, no case involving employer-employee conflict has gone to Federal court, indicating that the access to this procedure is theoretical rather than real. "Temporary alien" employment law remains largely administrative across regulatory regimes. But, what has ambled up the ladder is a conflict between the state and employers over the standards governing the private exchanges as a whole. And, here, rather than being a panacea of private right against state power as rule of law theory posits, what judicial review has accomplished is reminiscent of *Lochner* era jurisprudence. Judicial power continues to curb regulation, disfavoring workers as a class.

In *Administrator v. North Carolina Growers' Association* (2001—TAE---0003, 0004, 0005, 0006) Christmas tree growers in North Carolina challenged an agency finding that they owed $24,680.06 in back-pay and civil monetary penalties of $156,000 to temporary labor migrants in agriculture and the government (investigation between 1995-6). The Wage and Hour Division had calculated back-pay under new regulations, stipulating that Christmas tree workers were entitled to overtime pay under the Fair Labor Standards Act (FLSA). Previously, Christmas tree growers had been exempt from overtime regulations, as the Department of Labor categorized their workers as agricultural, thus not entitled to FLSA protections. In 2004, contravening the new Department of Labor regulations, the Fourth Circuit Court of Appeals ruled that Christmas tree workers were not entitled to overtime under FLSA because Christmas tree production is inherently agricultural, not non-agricultural 377 F.3d 345 2004. (*Notice of Withdrawal*, October 4, 2004, 2001---TAE---0004). Despite the proliferation of large-scale Christmas tree businesses, the pruning of trees, the judge stipulated, was quintessentially of the small farm since time immemorial. In consequence, when the regulation was over-turned, temporary labor migrants were no longer entitled to any back-pay from their employers for worked over-time.

Conclusion

While normative jurisprudential debates about the rule of law and administrative justice today are divorced from empirical analysis of legal institutions, empirical studies of law in the administrative state do not generally compare the rule of law and administrative justice "in action" across regulatory periods.[50] This is because we would have to dig into the trenches of all routinized bureaucratic operations across substantive areas, something that is not often done in administrative legal research at all. The sites of administrative research tend to reproduce what Mashaw (2012) refers to as the judicio-centrism of the rule of administrative law itself, courts. Ironically, this bypasses the very subject of administration itself, that is, what courts are in fact controlling (Mashaw 2012). This article has made the conceptual point that studying the rule of law and administrative practice diachronically and synchronically in particular policy areas can refine both normative and empirical understandings of both in the regulatory state. As such, my focus has not been on the transition between legal institutions as matters of politics and causation, but upon the historical institutional study of legal practices.

I have shown that contract law and the administrative processes through which it is enforced, in the case of temporary labor migration, challenges dominant understandings of economic rights and administrative state development from managed capitalism to neoliberalism. From the case of temporary labor migration, we see that the state created the conditions for contracting and enforcement through a state-backed "alien labor" contract and "top down" administration in the name of an economic plan. The neoliberalization of the state in this area appears to be constituted through new

[50] However, see Mashaw (1981), Harrington (1985) and Moberly (2007) for insights into administrative justice beyond courts.

kinds of deformalized private exchanges and a fragmented "bottom-up" system of justice, where federal courts, state courts, and administration together are defining the rules in response to litigation. The judicialization of administration, moreover, cannot be said to expunge discretion, it has facilitated the appeals of the "haves" against the "have nots", while giving rise to the logic of administration and the enterprise in rights-enforcement, as opposed to an economic plan. Judicial review, on the other hand, when present, disfavors workers as a class in favor of a status quo.

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