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Constitutional Constraints on Redistribution through Class Power

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CONSTITUTIONAL CONSTRAINTS ON REDISTRIBUTION THROUGH CLASS POWER

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My comments will not be so much a critique as an elaboration of the two papers, especially Professor Neuman's paper on United States (U.S.) law,[1] since I am not an expert on German constitutional law. For those less familiar with U.S. law, my goal is to bring to light some additional elements of the U.S. constitutional tradition that impede the use of law to achieve economic equality—elements of U.S. constitutional law that reinforce the weak "general equality" principle of the Equal Protection Clause.[2] I will use U.S. labor law as my vehicle for showing the variety of constitutional principles that sustain actual economic inequality in the United States.

I start with two important points made in Neuman's paper. The first point is that the U.S. law of general equality does not use the language of social class when it discusses economic inequality but instead speaks of poverty, income and welfare entitlements. The second point is that the New Deal constitutional revolution of the 1930's only ended the constitutional prohibition of redistributive legislation; it did not affirmatively mandate a redistributive social state.

I want to distinguish three ways in which the social state may try to implement redistributive policies: first, by taxation and transfer payments, or taxation and spending; second, by direct regulation of the outcomes of social interaction; and third, by changing the background entitlements and endowments of social groups in order to change their relative bargaining power in the group struggle to divide social wealth and social goods more generally. The first two modes of redistribution occur through representative politics and through technocratic implementation. The third mode implements redistribution through direct participation in a restructured social setting. The leading example is legal reform that restructures the social setting of labor markets by replacing individual employment contracts with collective bargaining. The law gives employees new rights of association and new rights to collectively withdraw their labor (or strike) and thereby participate in the redistributive process of which they themselves are the beneficiaries.

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[1] See Gerald Neuman, Equal Protection, "General Equality," and Economic Discrimination from a U.S. Perspective, 5 Colum. J. Eur. L. 281 (1999).

[2] Id. at 294 (explaining the weakness of the general equality principle in US constitutional law); U.S. Const. Amend. XIV, §1.

The social institution of the labor market was at the center of the two great moments of change in the constitutional principles of general equality. First, the Civil War amendments—the amendments that give us the Equal Protection principle—marked the replacement of slavery with sharecropping and wage labor. Up to the 1930's, these labor market institutions were constitutionally protected by the *Lochner* doctrine, which prohibited legislative interference with individual employment contracts.[3] (It is significant that many of the landmark cases of the *Lochner* era arose from the politically burning "labor question," in response to which courts struck down laws to protect trade union activity or to mandate labor standards.)[4] Second, the New Deal ended this constitutional mandate of laissez-faire in the labor market and *permitted* but, as Neuman emphasizes, did not *require* legislative encouragement of collective bargaining for purposes of participatory redistribution among social classes.[5]

The federal legislature *did* in fact exploit its new constitutional authority and, in the 1930's, enacted legislation to prohibit companies from firing workers for organizing unions or strikes and legislation that established minimum wages and unemployment benefits.[6] (In the 1960's and afterward, Congress passed legislation prohibiting private employers from discriminating against employees based on race, gender, national origin, religion, age, and physical disability. Professor Kendall Thomas's contribution to this symposium discusses this law.[7] I will only note that before the 1930's, this antidiscrimination legislation, just like the collective bargaining law, would have been an unconstitutional interference with the employer's liberty of contract.)

What I would like to point out is that the legislative effort at "class-based general equalitization"—or participatory redistribution through collective bargaining—still faced constitutional obstacles even after the 1930's. Some of these obstacles to economic equalization (or "class-based general equality") were rooted in the Supreme Court's weak interpretation of the Equal Protection principle. Some came from other constitutional doctrines.

I have time to discuss three or four of these constitutional obstacles, although several others could be catalogued.

First, the weak interpretation of Equal Protection itself has multiple consequences that indirectly limit the redistribution of bargaining power from capital to labor through collective bargaining. Labor's bargaining power is weakened in a society that affords a low "social wage"—that is, low welfare benefits, low unemployment benefits, low minimum wage, low health-care

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[3] Lochner v. New York, 198 U.S. 45 (1905).

[4] See, e.g., id.(striking down maximum hours law); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage law); Coppage v. Kansas, 236 U.S. 1 (1915) (striking down a law protecting unionization); Adair v. United States, 208 U.S. 161 (1908) (same).

[5] See Neuman, supra note 1 at 284.

[6] Fair Labor Standards Act of 1938, 29 U.S.C. 201 et seq. (imposing minimum wages and overtime pay); National Labor Relations Act of 1935, 29 U.S.C. 151 et seq. (protecting union organizing and collective bargaining).

[7] See Kendall Thomas, The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A., 5 Colum. J. Eur. L. 329 (1999).

entitlements, low provision for worker-retraining, and so on. If workers face destitution when they are out of work, they have less determination to organize unions, to hold out during strikes, and to demand and achieve higher wages. The weak principle of general equality in the United States—in contrast to equality principles that affirmatively mandate social provision across multiple social contexts—entails a cumulatively diminished social wage and therefore cumulatively diminished bargaining power for labor.

In addition, the United States Supreme Court, applying the same weak principle of general equality, has ruled that the legislature does not violate Equal Protection if it denies specifically to strikers even the cumulatively diminished social wage that the state provides to workers who are impoverished or unemployed for reasons other than the exercise of their associational right to collective bargaining.[8] In other words, the weak principle of general equality in U.S. constitutional law allows the state explicitly to discriminate against strikers and union members in state programs that provide social benefits.

A second constitutional obstacle to class-based redistribution comes from U.S. principles of Federalism. The fifty states of the United States have great authority to provide different social wages, and the states have used that authority in fact to provide widely different levels of welfare payments, unemployment compensation, minimum wages, and so on. The states also have authority to prohibit collective bargaining agreements that require workers to pay dues to the majority-elected union. These are the so-called "right to work"states.[9] The fifty states and their local subdivisions also compete among each other to attract capital investment by offering tax incentives and subsidies to mobile businesses and by lowering the social wage and the business taxes that finance the social wage.[10]

Here is where constitutional law comes in. The Commerce Clause of the U.S. Constitution explicitly grants Congress authority to regulate interstate commerce.[11] The Supreme Court has found that this clause implicitly prohibits the state governments from excessively regulating interstate commerce.[12] This doctrine is called the "Negative Commerce Clause." This constitutional doctrine is an obstacle to class-based redistribution because it prohibits states that want to follow a strategy of maintaining high private wages, high social wages and high labor-standards from taking action against goods from states that follow a deliberate strategy of suppressing labor standards. In the period after World War II, capital investment fled from high-wage, unionized states of the Northeast and Midwest to the low-wage, non-union states of the South and Southwest. The negative commerce clause disempowered the high-wage states from taking the various kinds of unilateral or coordinated action that the U.S. federal government, through its trade law, takes against foreign low-wage countries that

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[8] Lyng v. United Automobile Workers, 108 S.Ct. 1184 (1988).

[9] See Grodin & Beeson, State Right-to-Work Laws and Federal Labor Policy, 52 Calif. L. Rev. 95 (1964).

[10] See, e.g., Robert Crandall, Manufacturing on the Move (1993).

[11] U.S. Const. art. I, §8, cl. 3.

[12] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

suppress labor standards. The flight of capital from unionized to non-unionized states has severely weakened the effectiveness of class-based redistribution in the United States since the 1930's.

The third constitutional obstacle to class-based redistribution comes from the First Amendment and the Supreme Court's jurisprudence of free speech. Under U.S. labor law, workers who wish to form a union must win a majority-rule election in their work unit.[13] In the 1930's, the National Labor Relations Board prohibited companies from participating in the campaigns leading up to these elections among the workers, on the plausible grounds that employer campaigns intimidated employees and that the relevant voting community was the employees not the employer.[14] But the Supreme Court reversed the Labor Board and ruled that employers had a constitutional right to communicate aggressive, daily propaganda about the evils of unions, including predictions of mass layoffs and plant closings, to the employees whose livelihoods depended on the employer.[15]

Since that time, the Supreme Court has ruled that union supporters have no constitutional right to communicate their message in shopping centers, parking lots, or other property that is used by employers for such captive audience propaganda campaigns.[16] In such cases, the Supreme Court has found no state action—the necessary predicate for constitutional protection of free speech—even though the police powers of the state are manifestly deployed in the state's enforcement of property law and in the background establishment of corporate and trade union entities.

The Supreme Court has also ruled that picketing for purposes other than labor protest is constitutionally protected speech activity, but picketing that conveys a message about labor disputes is not.[17] Federal and state legislatures may therefore suppress labor picketing even though they may not suppress similarly effective picketing about other social issues. When the Supreme Court allows such unequal treatment, it ignores the central principle of free-speech jurisprudence—that the state must not discriminate among speech activites on the basis of the content of the speech. The impact on redistribution is significant because legislatures are thereby permitted to prohibit picketing in support of secondary or sympathy strikes. This entails a dramatic weakening of labor's bargaining power, especially because U.S. labor law creates highly fragmented and decentralized units of collective bargaining.

Labor lawyers in the United States-including those who represent unions *as well as* those who represent companies—uniformly agree that these First Amendment and State Action doctrines severely distort the communication and

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[13] Linden Lumber v. NLRB, 419 U.S. 301 (1974).

[14] See A. Cox, et al., Labor Law 144 (12th ed. 1996).

[15] NLRB v. Virginia Electric, 314 U.S. 469 (1941).

[16] Hudgens v. NLRB, 424 U.S. 507 (1976).

[17] See NAACP v. Claibourne Hardware, 458 U.S. 886 (1982) (state regulation of non-labor picketing subject to strict constitutional scrutiny afforded protected speech); Teamsters v. Vogt, 354 U.S. 284 (1957) (state regulation of labor picketing not subject to constitutional scrutiny afforded protected speech).

democratic deliberation among employees participating in a union election, and give an overwhelming advantage to anti-union employers.[18]

To summarize my basic point: The Supreme Court's approach to Equal Protection and Due Process changed in the 1930's in a way that formally permitted federal and state legislatures to restructure markets in order to redistribute power among social classes, in the service of a particularized conception of general economic equality. This mode of legislative redistribution required new rights of association and communication among workers, precisely because it was a participatory mode of redistribution among social groups. But since the 1930's, the Supreme Court's jurisprudence of general equality, social provision, federalism, free speech, and state action has limited the capacities and incentives for association and communication among workers. To that extent, U.S. Constitutional law continues to weigh against participatory redistribution. The resulting erosion of wage-setting institutions in the United States helps explain (to that extent) one of the salient differences between United States and German societies in the last quarter-century, and the astonishing increase in general economic inequality in the United States.

[18] See, e.g., Martin Levitt, Confessions of a Union Buster (1993).