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REIMAGINING LABOR AS A PUBLIC GOOD: DE- PRIVATIZING ASPECTS OF WORK

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The world has never had a good definition of the word liberty, and the American people just now are in need of one. We all declare for liberty: but in using the same word, we do not mean the same thing . . . Here are two, not only different but incompatible things, called by the same name, liberty.

Abraham Lincoln¹

INTRODUCTION

Reacting to U.S. indecision to enter World War II, Henry Luce famously predicted that the twentieth century would be the American Century.² But what America did he have in mind? The turn-of-the-century economic liberalism of *Lochner*'s America?³ The mid-century Keynesian

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¹ See FRIEDRICH A. HAYEK, CONSTITUTION OF LIBERTY 11 (1960).

² Editorial, The American Century, Life Magazine, Feb. 17, 1941, reprinted at <https://news.harvard.edu/wp-content/uploads/2015/03/luce.pdf>.

³ See *Lochner v. N.Y.*, 198 U.S. 45, 57–8 (1905) (“It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract . . . [t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”).

welfare state?⁴ Reagan's late-century neo-liberalism?⁵ Jim Crow's America⁶ or Martin Luther King's America?⁷ Phyllis Schlafly's America⁸ or Ruth Bader Ginsberg's?⁹

Under the whiggish version of twentieth-century world history, the United States entered World War II, joined forces with the former Soviet Union, a communist dictatorship, to defeat fascism, and the two emerged world superpowers.¹⁰ The post-WWII narrative created opposing forces between the free and communist worlds.¹¹ The free world meant free markets, free speech, a free press, religious freedom, democratic voting—essentially a world captured by Harvard philosopher John Rawls's conception of the liberty principle.¹² By contrast, the communist world meant the absence of freedom—a planned economy, censorship, religious suppression, and a one-party system in which there was no political opposition.¹³

⁴ See Sanford M. Jacoby, *Econ. Ideas and the Lab. Mkt: Origins of the Anglo-American Model and Prospects for Glob. Diffusion*, 25 COMP. LAB. L. & POL'Y J. 43, 48-53 (2003).

⁵ See David Singh Grewal & Jedediah Purdy, *Introduction: L. and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 19–20 (2014).

⁶ See *Jim Crow Laws and Racial Segregation*, VCU LIBR. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/> (last visited July 23, 2022).

⁷ See Martin Luther King, *I Have a Dream* (Aug. 28, 1963) (transcript available at <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety>).

⁸ Phyllis Schlafly was the paleoconservative posterchild opposing the Equal Rights Amendment. See generally DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE (2005).

⁹ Ruth Bader Ginsburg, the second woman to be appointed to the United States Supreme Court, is credited with shaping the legal theories applying the Equal Protection Clause to women. See generally RUTH BADER GINSBURG, MY OWN WORDS (2016); IRIN CARMON & SHANA KNIZHNIK, THE NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (2015).

¹⁰ See Kristen D. Burton, *Cold Conflict*, THE NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/cold-conflict> (last visited Aug. 2, 2022).

¹¹ See *id.*

¹² JOHN RAWLS, A THEORY OF JUSTICE (1971). John Rawls recognized the shortcomings of this post-war vision, which he attempts to remedy with his second principle of justice, the difference principle.

¹³ See *Lessons from a Century of Communism*, N.Y. TIMES (Nov. 7, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/07/lessons-from-a-century-of-communism/>.

Of course, these depictions are grossly cartoonish and misleading. Post-WWII U.S. American democracy was hardly free for everyone. This absence of liberty for some is chronicled in every first-year constitutional law course, which exposes race,¹⁴ gender,¹⁵ and class¹⁶ barriers to basic liberties. We know from these cases that the free market's invisible hand did nothing to stop white restaurant owners from refusing to serve black customers¹⁷ or white hotel owners from refusing to accommodate black patrons.¹⁸ We know from these cases that states could refuse to name a mother as administrator to her son's estate because she was a woman¹⁹ and that the federal military could make a female prove that her husband was a dependent while automatically approving wives as their husbands' dependents.²⁰ But socio-economic class has spun a different story. Neither poverty nor wealth are suspect classes.²¹ Instead, a different narrative has been weaved to explain why poverty still exists in some of the richest countries in the world. The modern narrative has roots from four centuries ago in England and entails the trope of the deserving poor and its foil of the undeserving poor.²² The socio-economic narrative contrasts those hardworking individuals who, because of

¹⁴ See, e.g., *Evans v. Newton*, 382 U.S. 296, 299 (1966) (applying equal protection clause to land willed to a city for use as a public park on the condition that it exclude nonwhites); *Terry v. Adams*, 345 U.S. 461, 477 (1953) (holding that white-only pre-primary elections are unconstitutional); *Shelley v. Kramer*, 334 U.S. 1, 23 (1948) (refusing to enforce racially restrictive housing covenants).

¹⁵ See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 689–91 (1973); *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974); *Orr v. Orr*, 440 U.S. 268, 283–84 (1979) (alimony).

¹⁶ *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) (holding that a state cannot condition appeals following a termination of parental rights on the parent's ability to pay record preparation fees).

¹⁷ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding as constitutional Title II of the Civil Rights Act, which prohibits racial discrimination in public accommodations, and forbidding racial discrimination in restaurants).

¹⁸ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 360–62 (1964) (forbidding racial discrimination in hotel occupancy).

¹⁹ *Reed v. Reed*, 404 U.S. 71, 71–72 (1971).

²⁰ *Frontiero*, 411 U.S. at 678–79.

²¹ See, e.g., *James v. Valtierra*, 402 U.S. 137, 142–43 (1971).

²² *1834 Poor Law*, THE NAT'L ARCHIVES, <https://cdn.nationalarchives.gov.uk/documents/education/poor-law.pdf> (last visited Aug. 19, 2022); *Poverty and the Poor Law*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/poverty/> (last visited Aug. 2, 2022).

misfortune, have become poor with those lazy, idle individuals who refuse to contribute to society and instead try to live off the backs of the rest of us.²³

Accordingly, the late twentieth-century western world witnessed a battle for the soul of capitalism—a battle that continues to rage to this day. On the one extreme is neoliberalism, on the other is social democracy. This article does not purport to resolve that battle. Rather, it seeks to show that throughout U.S. history, capitalism has been both a blessing and a curse for human laborers. Moreover, it seeks to show that if we can reimagine human labor as a public good rather than the private good that neo-liberalism considers it, then we might be able to solve at least some of the problems that extreme versions of capitalism pose for the human rights of workers while retaining a capitalist framework. This article accomplishes that goal in four sections. Section I discusses a brief history of economic theory and industrialization in relationship to capitalism. Section II examines the economic theory of neoliberalism and critiques of it; that section then shows how neo-liberalism does not adequately describe U.S.-brand capitalism. Section III discusses historical attempts to curb the excesses of capitalism in the late nineteenth and early twentieth centuries, including a brief sketch of President Theodore Roosevelt's progressive policies and President Franklin Delano Roosevelt's New Deal policies. Section IV then looks at public goods theory and flourishing economics, and it suggests ways in which labor can be reimaged as a public good to curb the excesses and unduly harsh effects that a neo-liberal view of capitalism has on workers.

I. BACKGROUND

This background section shows that the concept of labor has been central to the thinking of economic scholars since the inception of economics as a separate intellectual discipline.²⁴ Section IA discusses the background of early economic theory beginning with Adam Smith's observation in *The Wealth of Nations* that labor creates wealth. Almost immediately after Smith published his masterpiece in 1776, the United States would enter the

²³ 1834 *Poor Law*, THE NAT'L ARCHIVES, <https://cdn.nationalarchives.gov.uk/documents/education/poor-law.pdf> (last visited Aug. 19, 2022).

²⁴ See Amartya Sen, *Adam Smith and the Contemporary World*, 3 ERASMUS J. PHIL. & ECON. 50, 51 (2010) (stating that "Smith is standardly accepted as 'the father of modern economics,' and it is widely acknowledged that he has contributed more than almost anyone else to the emergence of the scientific discipline of economics.").

Industrial Revolution—an era characterized by labor exploitation.²⁵ During that time, much of what we see as modern capitalist theory became dogma. Section IB tells the story of how industrialization, combined with unregulated capitalism, contributed to workplace disasters, such as industrial fires and coal mining explosions. Section IC briefly introduces Keynesian economic theory to explain the economic phenomena of structural unemployment and to show how New Deal policies were used to correct market failures that had result because of unregulated capitalism.

A. In the Beginning, There Was Adam Smith: A Brief and Simplified History of Early Economic Theory

The United States was born into a world where mercantilism—the theory that nation states needed to be wealthy and self-sufficient—dominated.²⁶ Mercantilism’s defining features included a spirit of nationalism²⁷ and a high degree of self-sufficiency (especially regarding food supply and raw materials for essential industries and war) as opposed to dependence on foreign trade.²⁸ Policies supporting mercantilist states included efforts to increase the King’s treasury with gold or silver²⁹ and to create a favorable balance of trade.³⁰ Because no nation was completely self-sufficient, nations such as Great Britain mined their colonies for raw materials, which Britain converted to finished goods to be sold abroad.³¹

²⁵ See *Rise of Industrial America*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/overview/> (last visited Aug. 19, 2022) (explaining that during this time the labor force was made up of, among others, newly arrived immigrants working for low wages).

²⁶ Curtis P. Nettels, *British Mercantilism and the Economic Development of the Thirteen Colonies*, 12 J. ECON. HIST. 105, 106–07 (1952).

²⁷ *Id.* at 105.

²⁸ *Id.*

²⁹ See generally THOMAS MUN, ENGLAND’S TREASURE BY FORRAIGN TRADE (1664), reprinted in ECON. CLASSICS (W. J. Ashley ed., 1895) (spelling as original).

³⁰ *Id.* at 7 (explaining that the “ordinary means . . . to encrease our wealth and treasure is by *Forraign Trade*, wherein wee must ever observe this rule; to sell more to strangers yearly than wee consume of theirs in value”); THOMAS MUN, A DISCOURSE OF TRADE FROM ENGLAND UNTO THE EAST INDIES 2 (1621), reprinted in EARLY ENGLISH TRACTS ON COMMERCE 24–26 (J.R. McCulloch ed. 1970) (1856).

³¹ Nettles, *supra* note 26, at 105.

By the mid-eighteenth century, Britain was already liberalizing markets in its American colonies.³² It was during this period, in 1776, that Adam Smith wrote his magnum opus, *An Inquiry into the Nature and Causes of the Wealth of Nations*.³³ In *The Wealth of Nations*, Smith put forward the main tenets of liberal economic theory.

Notably, Smith commenced his masterpiece not with supply and demand curves—those would come much later³⁴—but with the significance that labor played in raising or maintaining a nation's wealth:

The annual *labour* of every nation is the fund which originally supplies it with all the necessaries and conveniencies of life which it annually consumes, and which consist always either in the immediate produce of that labour, or in what is purchased with that produce from other nations.

According, therefore, as this produce, or what is purchased with it, bears a greater or smaller proportion to the number of those who are to consume it, the nation will be better or worse supplied with all the necessaries and conveniencies for which it has occasion.

But this proportion must in every nation be regulated by two different circumstances: first, by the skill, dexterity, and judgment with which

³² Matthew Lange, James Mahoney, & Matthias vom Hau, *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 AM. J. SOC. 1412, 1421 (2006) (explaining that “the vast majority of British colonialism occurred after the mid-18th century, by which time Britain was characterized by a liberal economic model that explicitly advocated free trade and that conceptualized the state as a tool for ensuring law and order”); D.K. FIELDHOUSE, *THE COLONIAL EMPIRES: A COMPARATIVE SURVEY FROM THE EIGHTEENTH CENTURY* (1965).

³³ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), available at <https://www.gutenberg.org/files/3300/3300-h/3300-h.htm> [hereinafter SMITH, *WEALTH OF NATIONS*].

³⁴ French mathematician and philosopher Antoine Augustin Cournot is widely regarded as the founder of mathematical economics and the first to depict the laws of supply and demand in graphic form in his 1838 book, *Research on the Mathematical Principles of the Theory of Wealth*. However, as Yale Professor of Political Economy Irving Fisher pointed out, those curves were largely forgotten until “independently obtained by Fleeming Jenkin.” See Irving Fisher, *Cournot and Mathematical Economics*, 12 Q. J. ECON. 119, 127 (1898). Fisher further indicated that by the turn of the century, these curves were “in almost universal use in text-book and class-room.” *Id.* It is not until then that the modern supply-and-demand curves intersection at the market equilibrium point come into fashion. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (1890).

its labour is generally applied; and, secondly, by the proportion between the number of those who are employed in useful labour, and that of those who are not so employed. Whatever be the soil, climate, or extent of territory of any particular nation, the abundance or scantiness of its annual supply must, in that particular situation, depend upon those two circumstances.³⁵

Notice—“labour” is the third written word in *The Wealth of Nations*.³⁶ In these first few sentences, Smith observed that a nation’s workers were the original productive factor to supply a nation with all the necessities that a nation would consume in that labor acts as both producer and consumer.³⁷ It is the proportion of producers and consumers that dictates and reveals a nation’s wealth.³⁸ That proportion depends on the skill of the nation’s labor and the ratio between the employed and unemployed.³⁹ In the following passages, Smith completed the thought, explaining that skilled labor is even more important than the ratio because skilled workers can provide a higher standard of living for others, even those who do not work.⁴⁰

Smith’s brilliant insight is this: Labor creates wealth.⁴¹ Therefore, a nation can create wealth through the efforts of its own people.⁴² This insight shatters the basic foundation of mercantilism—that wealth is fixed. No longer must trade be viewed as a zero-sum game⁴³

Throughout the nineteenth century, political economists and economic theorists would work out the various important economic laws that

³⁵ SMITH, WEALTH OF NATIONS, *supra* note 31, at Chapter I ¶¶ 1–3.

³⁶ *Id.* ¶ 1.

³⁷ *Id.*

³⁸ *Id.* ¶ 2–3.

³⁹ *Id.* ¶ 3.

⁴⁰ *Id.* ¶¶ 4–6.

⁴¹ SMITH, WEALTH OF NATIONS, *supra* note 31, at Book I, Chapter V (“It was not by gold or by silver, but by labour, that all the wealth of the world was originally purchased; and its value, to those who possess it, and who want to exchange it for some new productions, is precisely equal to the quantity of labour which it can enable them to purchase or command.”).

⁴² *Id.*

⁴³ See S.G.B. Johnson, J. Zhang, & F.C. Keil, F. C., *Win–Win Denial: The Psychological Underpinnings of Zero-Sum Thinking*, 151 J. EXPERIMENTAL PSYCH.: GEN. 455–56 (2022) (explaining that economics is built on the commonsense insight that trade benefits both parties and crediting Adam Smith), <https://doi.org/10.1037/xge0001083>.

would eventually become the foundations of capitalist economic theory. Classical economics featured the following characteristics:

- Self-regulating free markets;⁴⁴
- Free trade;⁴⁵
- Consensus that a nation's wealth would be measured by what is today called its gross national product (GNP), defined as the total sum of goods produced by that nation;⁴⁶
- Theory of comparative advantage.⁴⁷

By the turn of the nineteenth century, these concepts were dogma.⁴⁸

B. The Tragedies of Capitalism Combined With Industrialization

Industrialism, the main creative force of the nineteenth century, produced the most degraded urban environment the world had yet seen. . . . The political base of this new type of urban aggregation rested on three main pillars: the abolition of guilds and the *creation of a state of permanent insecurity for the working classes: the establishment of the competitive open market for labor* and for the sale of goods: the maintenance of foreign dependencies as a source of raw materials, necessary to new industries, and as a ready market

⁴⁴ See, e.g., SMITH, WEALTH OF NATIONS, *supra* note 31, at Chapter VII ¶ 3.

⁴⁵ See, e.g., *id.* ¶¶ 5–6.

⁴⁶ See, e.g., *id.* at Chapter III ¶ 12.

⁴⁷ See, e.g., DAVID RICARDO, ON THE PRINCIPLES OF POL. ECON. AND TAXATION 85–104 (1817), *available at* <https://socialsciences.mcmaster.ca/econ/ugcm/3113/ricardo/Principles.pdf>. Ricardo's theory was further refined by John S. Mill, *Of the Laws of Interchange between Nations; and the Distribution of the Gains of Commerce among the Countries of the Commercial World*, Essay I, in ESSAYS ON SOME UNSETTLED QUESTIONS OF POLITICAL ECONOMY ¶ 2 (1844) (Ricardo “shewed, that the advantage of an interchange of commodities between nations . . . enables each to obtain, with a given amount of labour and capital, a greater quantity of all commodities taken together. This it accomplishes by enabling each, with a quantity of one commodity which has cost it so much labour and capital, to purchase a quantity of another commodity which, if produced at home, would have required labour and capital to a greater amount.”), *available at* <https://www.marxists.org/reference/archive/mill-john-stuart/1844/unsettled.htm>.

⁴⁸ See Donald J. Harris, *The Classical Theory of Economic Growth* (2007), *available at* [http://web.stanford.edu/~dharris/papers/The%20Classical%20Theory%20of%20Economic%20Growth%20\[pre-print\].pdf](http://web.stanford.edu/~dharris/papers/The%20Classical%20Theory%20of%20Economic%20Growth%20[pre-print].pdf).

to absorb the surplus of mechanized industry. Its economic foundations were the exploitation of the coal mine, the vastly increased production of iron, and the use of a steady, reliable—if highly inefficient—source of mechanical power: the steam engine.⁴⁹

It is well-documented that nineteenth and early-twentieth-century industrialization had profound effects on workers' health and safety.⁵⁰ During that time, capitalism expanded the marketplace, converting “every part of the city into a negotiable commodity.”⁵¹ Meanwhile “the human beings whose labor made these achievements possible were crippled and killed almost as fast as they would have on a battlefield.”⁵²

Along these lines, cases of large-scale industrial accidents abounded. For example, on a winter's Monday morning in 1850, a boiler exploded in the basement of the A.B. Taylor and Company printing press factory on Hague Street in lower Manhattan, which caused the building to collapse, claiming the lives of sixty-seven workers and injuring another fifty individuals.⁵³ The blast was so powerful that it “reduced the building to a ‘mass of ruins in less than one minute.’”⁵⁴ According to newspaper accounts of that time it was the “most terrible catastrophe . . . involving a greater loss of life than ever before afflicted [New York] City from a similar cause.”⁵⁵ An investigation uncovered several likely causes of this tragedy. These included: faulty design, faulty manufacturing, the boiler's age and checkered history, inadequately repaired cracks in the boiler, excessively low water level and excessively high pressure in the boiler on the day of the accident, and uncharacteristic carelessness of the engineer responsible for ensuring the

⁴⁹ LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS*, 447 (1961).

⁵⁰ Judson MacLaury, *Government Regulation of Workers' Safety and Health*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/monoregsafeintroto> (last visited Aug. 19, 2022) (emphasizing that “dangerous and unhealthy working conditions and frequent serious accidents” later prompted government action, in large part due to the efforts of labor groups).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, e.g., Scott Gabriel Knowles, *Lessons in the Rubble: The World Trade Center and the Hist. of Disaster Investigations in the U.S.*, 19 *HIST. & TECH.* 9, 17 (2003). Hague Street no longer exists. See *Hague St., Two Bridges*, FORGOTTEN N.Y. (Nov. 3, 2018), <https://forgotten-ny.com/2018/11/hague-street-two-bridges/>.

⁵⁴ See, e.g., Scott Gabriel Knowles, *supra* note 47, at 17.

⁵⁵ *Id.* (quoting *Awful Catastrophe! Explosion and Dreadful Loss of Life!* N.Y. DAILY TRIBUNE, Feb. 5, 1850, at 2).

boiler's daily functioning (including failing to heed co-workers' warnings about the boiler, being distracted by an argument with a co-worker, and allegedly drinking two small glasses of brandy that morning).⁵⁶ A confluence of these factors at a time when the workplace was unregulated likely caused the accident.

Fires have created some of the most memorable industrial disasters. For example, on a cold winter afternoon, on January 10, 1860, the Pemberton Mill, "one of the new 'monster mills' along the Merrimack River[,] collapsed in not much longer than a heartbeat" while more than 600 people were at work.⁵⁷ The workers were mainly British, Irish, and Canadian immigrants, over half of whom were women and pre-pubescent girls.⁵⁸ While rescuers searched for survivors, a lantern broke, igniting the cotton and machine oil in the rubble thereby burning alive those who had survived. In the end, there were more than 400 casualties.⁵⁹

Coal mine disasters were common at the turn of the twentieth century. Between 1891 and 1900, there were 38 major explosions (defined as five or more killed), amounting to a total of 1,001 deaths.⁶⁰ When including all other explosions, coal-mining deaths rise to 1,473 for the decade⁶¹—an average of 147 annual deaths from mining explosions.⁶² While the worst mining disaster of the nineteenth century occurred in 1884 at Laurel Mine in Pocahontas, Virginia, where 112 souls perished in a mining explosion caused by black blasting powder,⁶³ the second worst mining disaster occurred in the last decade of the nineteenth century, the 1891 explosion at the Mommouth No. 1 Mine in Mount Pleasant, Pennsylvania, killing 109 miners.⁶⁴

⁵⁶ *Id.*; *Libel Suit about the Hague Street Explosion*, 5 SCI. AM. 210 (1850) (reporting that the boiler's designer claimed that the manufacturer failed to build the boiler to design), available at <https://www.jstor.org/stable/24930529?seq=1>.

⁵⁷ See ALVIN F OICKLE, *DISASTER IN LAWRENCE: THE FALL OF THE PEMBERTON MILL 1* (2008).

⁵⁸ *Id.*

⁵⁹ *Id.*; see generally Pub. Health Museum, *When the Walls Trembled: The Fall of the Pemberton Mill*, YOUTUBE (Aug. 18, 2021), https://www.youtube.com/watch?v=6W_HSE2-L1k.

⁶⁰ See H.B. HUMPHREY, U.S. BUREAU OF MINES, BULLETIN 586, *HISTORICAL SUMMARY OF COAL-MINE EXPLOSIONS IN THE UNITED STATES: 1810–1958*, at 17 (U.S. Gov. Printing Office 1960) (hereinafter "HUMPHREY").

⁶¹ See HUMPHREY, *supra* note 60, at 17.

⁶² See HUMPHREY, *supra* note 60, at 21.

⁶³ See HUMPHREY, *supra* note 60, at 7.

⁶⁴ See HUMPHREY, *supra* note 60, at 18.

On the other side of the century, between 1901 and 1910, there were nearly three times as many major disasters at 110, amounting to a total of more than three times as many (3,316) fatalities.⁶⁵ When including all other explosions, coal-mining deaths rise to 3,912—an average of 391 annual deaths from all coal mining explosions, amounting to a 166% increase in deaths.⁶⁶ The worst mining disaster of the early twentieth century, occurred at the Monongah Mine, West Virginia, in 1907, killing 362 miners, more than triple the number of fatalities at the deadliest disaster of the entire nineteenth century.⁶⁷ During that same period, the number of mines, coal production (270 million to 500 million tons), and the number of miners (448,000 to 725,000) did not quite double.⁶⁸ Whereas coal production increased 85.2%, the number of miners increased by 61.8%.⁶⁹ The increased efficiency (productivity per worker) likely resulted from technological advances. By 1910, machine-cut coal increased to 45 percent, up from 25 percent in 1900⁷⁰ and up from 5 percent in 1890.⁷¹ Simply put, as coal mining became more productive, it also more profitable, but it also more dangerous.

Year 1907 witnessed the worst coal mine explosion in U.S. history with 362 deaths at the Monongah Mine in West Virginia.⁷² The following chart summarizes this explosion and the other United States coal-mine explosions that killed 100 or more miners (“high-fatality explosions”) between 1884 and 1910. Notice, although there are three explosions between 1884 and 1892, there are 13 high-fatality explosions between 1900 and 1914.

⁶⁵ *Id.* at 21; Richard J. Mainiero & Harry C. Verakis, *A Century of Bureau of Mines/NIOSH Explosives Rsch.*, 1 CTR. FOR DISEASE CONTROL AND PREVENTION (2010), <https://www.cdc.gov/niosh/mining/works/coversheet136.html>. [hereinafter “MAINIERO”].

⁶⁶ *See* HUMPHREY, *supra* note 60, at 21. This is up from 147 average annual deaths. *See id.* at 17, 21.

⁶⁷ *See* HUMPHREY, *supra* note 60, at 21.

⁶⁸ *See* HUMPHREY, *supra* note 60, at 21.

⁶⁹ Professor Lofaso calculated the percent increase in coal production using the following formula: (total tons of coal from 1901–1910 minus total tons of coal from 1891–1900) divided by total tons of coal from 1891–1900. Plugging in the numbers: $(500 - 270)/270 = 85.2$. Professor Lofaso used a similar formula to calculate the percent increase of miners: $(725 - 448)/448 = 61.8$.

⁷⁰ *See* HUMPHREY, *supra* note 60, at 21.

⁷¹ *See* HUMPHREY, *supra* note 60, at 17.

⁷² *See* HUMPHREY, *supra* note 60, at 27–28; *see generally* DAVITT MCATEER, *MONONGAH: THE TRAGIC STORY OF THE WORST INDUSTRIAL ACCIDENT IN U.S. HISTORY* 115–16 (2007).

**Table 1. Coal Mine Explosions, 1884–1928
100 or More Killed⁷³**

Year	Deaths ⁷⁴	Mine Name and Location	Company Name	Succinct description of Event
1884	112	Laurel Mine, Pocahontas, VA	Southwest VA Improvement Co.	Explosion probably from fine coal dust coupled with firing heavy charges of black blasting powder. ⁷⁵
1891	109	Mommouth No. 1 Mine, Mount Pleasant, PA	H.C. Frick Coke Co.	Primarily caused by firedamp (combustible methane gas mixture) ignited by a miner's oil lamp intensified by fine coal dust. Most of the miners died from asphyxiation. ⁷⁶

⁷³ See generally HUMPHREY, *supra* note 60; *Coal Mining Fatality Statistics: 1900–2019*, U.S. DEP'T OF LAB., <https://arlweb.msha.gov/stats/centurystats/coalstats.asp> (last visited July 27, 2022); Michael J. Brnich, Jr. & Kathleen M. Kowalski-Trakofker, *Underground Coal Mine Disasters 1900–2010: Events, Responses, and a Look to the Future*, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 2010), <https://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/ucmdn.pdf>.

⁷⁴ Where the death count is in dispute, I am using the official count published by the U.S. Bureau of Mines. See generally HUMPHREY, *supra* note 60, at 7. Non-fatal injuries are not included in these counts.

⁷⁵ See *id.* at 7; *Improvement Co. Laurel Mine Explosion*, U.S. MINE DISASTERS, <https://usminedisasters.miningquiz.com/saxsewell/laurel.htm> (last visited July 27, 2022).

⁷⁶ See HUMPHREY, *supra* note 60, at 18; *Over One Hundred Killed*, N.Y. TIMES, Jan. 27, 1891, available at <https://timesmachine.nytimes.com/timesmachine/1891/01/28/103292818.pdf>. These miners were Eastern European immigrants. See Milan Simonich, *118 Killed in 1891 Frick Massacre and Mine Explosion To Get Markers*, PITTSBURGH POST-GAZETTE, Sep. 24, 2000, available at <http://old.post->

1892	100	Krebs Mine No. 11, Krebs, OK	Osage Coal & Coke Co.	Fine coal dust ignited. ⁷⁷
1900	200	Scotfield Mine Scotfield, UT	Pleasant Valley Coal Co.	Coal dust ignition resulting in death by explosion, falling debris, or asphyxiation. ⁷⁸
1902	112	Rolling Mill Mine Johnstown, PA	Cambria Steel	Miner's open lamp ignited firedamp. The explosion killed seven by force or blast; the other 105 died by suffocation. ⁷⁹ Many of the miners were Polish or Slovak immigrants. ⁸⁰
1902	184	Fraterville Mine Coal Creek, TN	Coal Creek Coal Co.	Open lights ignited gas that had accumulated because of

gazette.com/neigh_westmoreland/20000924markers6.asp. A discussion of the history of this explosion can be found at *Mammoth Mine Explosion Historical Marker*, EXPLOREPAHISTORY.COM, <http://explorepahistory.com/hmarker.php?markerId=1-A-2CA> (last visited July 27, 2022).

⁷⁷ See HUMPHREY, *supra* note 60, at 18; *Mine Explodes in Oklahoma*, HISTORY.COM (Nov. 13, 2009), <https://www.history.com/this-day-in-history/mine-explodes-in-oklahoma>. According to History.com, the miners were predominantly Italian and Russian immigrants.

⁷⁸ See ALLAN KENT POWELL, *THE NEXT TIME WE STRIKE: LABOR IN UTAH'S COAL FIELDS 27-35* (1985); HUMPHREY, *supra* note 60, at 20.

⁷⁹ See HUMPHREY, *supra* note 60, at 24; Ronald Fisher, *Rolling Mill Mine Disaster*, JOHNSTOWN TRIBUNE-DEMOCRAT, Oct. 28, 2017, available at <https://paconservationheritage.org/stories/rolling-mill-mine-disaster/>; Walter Hutsky Jr., *Investigation O7-1: The Rolling Mill Mine Disaster*, <https://walterhutskyjr.com/the-rolling-mill-mine-disaster/> (last visited July 27, 2022) (gathering newspaper clippings of the disaster).

⁸⁰ See HUMPHREY, *supra* note 60, at 24; *Twenty-Two Rescued from Mine Disaster*, N.Y. TIMES, July 12, 1902, available at https://usminedisasters.miningquiz.com/saxsewell/rolling_mill_07121902.pdf.

				inadequate ventilation. Most miners died on impact, but some survived for about seven hours until suffocating. ⁸¹
1903	169	Hannah Mine Hannah, WY	Union Pacific Coal Co.	Two explosions about two seconds apart, one from blasting, the other from gas ignition. Explosion resulted in a fire. ⁸²
1904	179	Harwick Mine Cheswick, PA	Allegheny Coal Co.	Explosion: "bodies ... were strewn about the mine in all directions where the force of the explosion had blown them." ⁸³
1905	112	Virginia City Mine, Virginia City, AL	George Schuler and Everett Schuler ⁸⁴	Dust explosion caused by too much dynamite or power in a planned blast. ⁸⁵

⁸¹ See HUMPHREY, *supra* note 60, at 24; Allen Coggins, *Fraterville Mine Disaster*, TN ENCYCLOPEDIA OF HIST. & CULTURE (Mar. 1, 2018), <https://tennesseencyclopedia.net/entries/fraterville-mine-disaster/>.

⁸² See HUMPHREY, *supra* note 60, at 24; JAY ROBERT NASH, *DARKEST HOURS* 230 (1976).

⁸³ DEP'T OF MINES, ANN. REP., *HARWICK EXPLOSION INVESTIGATIVE REPORT XIII*, available at https://usminedisasters.miningquiz.com/saxsewell/harwick_1904.pdf; see HUMPHREY, *supra* note 60, at 24–25.

⁸⁴ See *U.S. Mine Rescue Ass'n, Coal Mine Disasters in the United States – By Company*, U.S. MINE DISASTERS, https://usminedisasters.miningquiz.com/Mine_Disasters/search_coal_company.asp (last visited July 27, 2022).

⁸⁵ See HUMPHREY, *supra* note 60, at 24; *Virginia Mines Horror*, MINERAL BELT GAZETTE, Feb. 25, 1905, available at

1907	362	Monongah Mine Monongah, WV	Fairmont Coal Co.	Iron coupling pin snapped causing nineteen cars, each carrying two tons of coal, to break loose and crash at the mine portal bottom, creating an explosion so loud it was heard eight miles away. ⁸⁶ Fire and smoke shot up into the sky more than sixty feet
1907	239	Darr Mine Jacobs Creek, PA	Pittsburgh Coal Co.	Possibly caused by a flame projected “into a gaseous and dusty atmosphere . . . by an open light or a blown-out shot.” ⁸⁷ All but one miner killed.
1908	154	Rachel and Agnes Mine Marianna, PA	Pittsburgh- Buffalo Coal Co.	A blown-out shot caused the initial explosion with a secondary explosion occurring where gas had accumulated. ⁸⁸

<https://www.newspapers.com/clip/26897176/virginia-mines-disaster-birmingham-al/>.

⁸⁶ See HUMPHREY, *supra* note 60, at 27–28; see generally DAVITT MCATEER, *MONONGAH: THE TRAGIC STORY OF THE WORST INDUSTRIAL ACCIDENT IN U.S. HISTORY* 115–16 (2007).

⁸⁷ See HUMPHREY, *supra* note 60, at 28–29; *Mine Explosion Entombs 250 Men*, THE N.Y. TIMES, Dec. 20, 1907, at 1, available at <https://timesmachine.nytimes.com/timesmachine/1907/12/20/101732038.pdf>.

⁸⁸ See HUMPHREY, *supra* note 60, at 29–30; *Pittsburg-*Buffalo Coal Company Rachel and Agnes Mine Explosion**, U.S. MINE DISASTERS, https://usminedisasters.miningquiz.com/saxsewell/rachel_and_agnes.htm (last

1909	259	Cherry Mine Cherry, IL	St. Paul Coal Co.	Fire caused by burning kerosene dripped onto hay used to feed the mules. ⁸⁹
1911	128	Banner Mine Littleton, AL	Pratt Consolidated Coal Co.	The Bureau of Mines Report identified three plausible causes of explosion with the most probable cause being gas ignition. ⁹⁰
1913	263	Stag Cañon Mine No. 2 Dawson, NM	Phelps Dodge & Co.	Coal dust explosion that killed 263 men. ⁹¹
1914	181	Eccles Nos. 5 & 6 Mines Eccles, WV	New River Collieries Co.	Two explosions occurred in the No. 5 mine, the first

visited July 22, 2022); *Marianna Mine Explosion Gets Historic Marker*, OBSERVER-REP., Sep. 29, 2019.

⁸⁹ See *How Regulation came to be: The Cherry Mine Disaster—Part I*, DAILY KOS (May 3, 2009), <https://www.dailykos.com/stories/2009/5/3/727456/-How-Regulation-came-to-be-The-Cherry-Mine-Disaster-Part-I>; *How Regulation came to be: The Cherry Mine Disaster—Part II*, DAILY KOS (May 10, 2009), <https://www.dailykos.com/stories/2009/05/10/729963/-How-Regulation-came-to-be-The-Cherry-Mine-Disaster-Part-II>; *The 1909 Cherry Mine Disaster*, ARCHIVE.TODAY, https://archive.ph/20150106223656/http://webra.cas.sc.edu/hvri/feature/nov2013_dom.aspx (last visited July 27, 2022); *A Pictorial Walk Through the Twentieth Century: Eight Days In A Burning Mine*, THE WORLD MAG. Oct. 1911, available at <https://web.archive.org/web/20150228072345/http://www.msha.gov/century/mag/magevtr.asp>; KAREN TINTORI, TRAPPED: THE 1909 CHERRY MINE DISASTER (2002).

⁹⁰ See HUMPHREY, *supra* note 60, at 45–49; *Pratt Consol. Coal Co. Banner Mine Explosion*, U.S. MINE DISASTERS, https://usminedisasters.miningquiz.com/saxsewell/banner_explosion.htm (last visited July 27, 2022); FINAL INVESTIGATION REP. OF EXPLOSION AT BANNER MINE NEAR LITTLETON, ALABAMA 41 (1911), available at https://usminedisasters.miningquiz.com/saxsewell/04-08-1911_banner.pdf.

⁹¹ See HUMPHREY, *supra* note 60, at 59; Tom Sharpe, *Remembering the Dawson Mining Disaster, 100 Years Later*, SANTA FE NEW MEXICAN (Oct. 25, 2013), https://www.santafenewmexican.com/news/local_news/remembering-the-dawson-mining-disaster-years-later/article_446074ce-ea6b-54cf-a818-992408f6a398.html.

				being stronger and more violent. These explosions blew a significant amount of water (and debris/mud) up the shaft, which quenched the flame and prevented its spread to the No. 6 mine, where rescuers were able to enter. ⁹²
1915	115	Layland No. 3 Layland, WV	New River and Pocahontas Consolidated Coal Co.	An explosion that killed approximately 115 men, strong enough to shake buildings and break windows in the vicinity. ⁹³
1917	121	Hastings Mine Hastings, CO	Victor-American Fuel Co.	Explosion caused by a mine inspector striking a match to relight his safety lamp. Gas and dust spread the explosion to every section of the mine, and 121 men were killed. ⁹⁴
1924	172	Castle Gate No. 2 Mine Castle Gate, UT	Utah Fuel Co.	Three explosions caused by the accumulation of dust. The second occurred

⁹² See HUMPHREY, *supra* note 60, at 67, 71.

⁹³ See HUMPHREY, *supra* note 60, at 72–74.

⁹⁴ See HUMPHREY, *supra* note 60, at 81.

				approximately a minute after the first, and the third occurred about 20 minutes after the second. ⁹⁵
1924	119	Benwood Mine Benwood, WV	Wheeling Steel Corp.	Explosion caused by a miner igniting gas above an area he mistakenly believed had been cleared. The mine was dry and dusty, prompting the explosion to carry throughout the entire mine. ⁹⁶
1928	195	Mather No. 1 Mine Mather, PA	Mather Collieries Co.	Explosion believed to be caused by an accumulation of gas ignited by trolley wire. ⁹⁷

While it is clear that industrialization did prove to be a “main creative force of the nineteenth century,”⁹⁸ the factory explosions, fires, and coal mine disasters illustrated above also show that this era of U.S.-American innovation took countless lives and was costly to the average worker’s health and welfare. Though a grievous price to pay, tragedies like these eventually prompted intervention by labor groups and policymakers, which are addressed in the following sections.⁹⁹

⁹⁵ See HUMPHREY, *supra* note 60, at 97.

⁹⁶ See HUMPHREY, *supra* note 60, at 97, 99–100.

⁹⁷ See HUMPHREY, *supra* note 60, at 114, 115.

⁹⁸ MUMFORD, *supra* note 49 at 447.

⁹⁹ *Rise of Industrial America*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/overview/> (last visited Aug. 19, 2022) (explaining that during this time the labor force was made up of, among others, newly arrived immigrants working for low wages).

C. Keynesian Economic: A Response to Capitalism's Excesses

The previous section described how unregulated businesses resulted in tragedy, by sketching the most appalling disasters of the late nineteenth and early twentieth centuries. While tragedy is most effectively demonstrated through loss of life or limb, economic loss resulting from unregulated markets also resulted in appalling outcomes.¹⁰⁰ Perhaps the best example of economic tragedy is the loss of jobs created by the business cycle, known as cyclical employment, or worse yet, the structural unemployment resulting from unfettered capitalism.¹⁰¹ Twentieth-century Keynesian economists characterized these outcomes as market failures and aimed to create government policies to correct unemployment and other market failures.¹⁰²

Keynesian policies were viewed as necessary to smooth the bust-and-boom business cycle created by an unregulated capitalist economy.¹⁰³ During the Great Depression (1929–1939), this focus on the business cycle and unemployment associated with the bust-end, resulted in popular support

¹⁰⁰ Thomas Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Econ.* 7–8 (2004) available at https://dlwqtxts1xze7.cloudfront.net/33835733/keynesianism_to_neoliberalism-with-cover-page-v2.pdf?Expires=1660945773&Signature=XjF0JnTRoRh0EsmqwnIlgXlqDOJCr7nTIZzLSotGozzRgLYWL2I39eW7PG1aQTWjxEY19i6itbAslIQDpXZHY8MDD0VOMgjcMTdZhXojlCVLJLlOx-AeG-CiPfLawEHv3Xzj4QaLZJRt0objUkpi5iLhaUf0iCqpgWDTtEKiY~uKSUexV9qXZmVQeiLTDpLfMIAatazA~khT1sibE7-Q6GocovD98I9aq0da9lJcWEtc9i5bvwbK0eLzYGdyFiwgGajipt6wb3~c4MqUDLGDJChSk6maTkCP0d3Pxhw7Hod6pjRr.JhMQZ9YNWPqrb1xwE74121KdkyaqhC9lvqBwZg_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA. (illustrating, as an example, that unregulated markets tend to produce bribery, which is economically destructive).

¹⁰¹ Majid H. Jafar, *What's Wrong with Capitalism?*, in PERFORMANCE AND PROGRESS: ESSAYS ON CAPITALISM, BUSINESS, AND SOCIETY 11 (Subramanian Rangan ed., 2015).

¹⁰² Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 434 (2008) (explaining that Keynes thought that government policy could “bridge the gap between inadequate supply and demand in order to stave off future economic turmoil”).

¹⁰³ Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 434 (2008) (explaining that Keynes thought that government policy could “bridge the gap between inadequate supply and demand in order to stave off future economic turmoil”).

for government policies to alleviate cyclical unemployment.¹⁰⁴ By keeping workers working, such government policies also tended to alleviate structural employment—a type of involuntary unemployment in which the economy presents a mismatch between supply of skills (workers' skills) and the employer's demand for skills.¹⁰⁵ This type of long-term, and sometimes permanent, job loss results from, for example, the following two main scenarios: an individual has left the labor market for any reasons (e.g., layoff, illness, disability, pregnancy, child rearing) for a sufficient time that the worker's skills have become rusty or obsolete; or technological advances have made the worker's skills obsolete.¹⁰⁶ In the aggregate, the prospects of finding a job for those who have fallen victim to structural unemployment becomes increasingly improbable with the passage of time.¹⁰⁷ Accordingly, other Keynesian policies, such as retraining programs, were eventually viewed as a necessary component to reduce overall unemployment.¹⁰⁸

II. NEOLIBERALISM AND ITS EFFECT ON LABOR

A. Neo-liberalism: Meet Nobel Prize Winners Friedrich Hayek and Milton Friedman

No two economists had more influence on late twentieth century economic policies in the Anglo-American world than Friedrich Hayek and Milton Friedman. It is not an exaggeration to state that their contributions to economic theory put them among the ranks of Adam Smith, Karl Marx, and John Maynard Keynes. This section explains their contribution to the dominant economic theory of the late twentieth century—neoliberalism. It

¹⁰⁴ See Richard J. Jensen, *The Causes and Cures of Unemployment in the Great Depression*, 19 J. INTERDISC. HIST. 554, 571 (1989) (“A striking feature of the 1930s was the variety of serious and energetic attempts made to combat unemployment.”).

¹⁰⁵ See, e.g., William H. Hierny, *British and American Approaches to Structural Unemployment*, 12 INDUS. & LAB. RELS. REV. 3 (1958).

¹⁰⁶ See Kevin S. Dubina, *Full Employment: An Assumption Within BLS Projections*, U.S. BUREAU OF LAB. STAT. (Nov. 2017), <https://www.bls.gov/opub/mlr/2017/article/full-employment-an-assumption-within-bls-projections.htm>.

¹⁰⁷ Gary Burtless, *Long-Term Unemployment: Anatomy of the Scourge*, BROOKINGS (July 27, 2012), <https://www.brookings.edu/articles/long-term-unemployment-anatomy-of-the-scourge/>.

¹⁰⁸ John Cornwall & Wendy Cornwall, *The Unemployment Problem and the Legacy of Keynes*, 19 THE J. OF POST KEYNESIAN ECON. 525, 540–41 (1997).

then assesses critiques of neoliberalism and argues that neoliberalism does not accurately describe today's economy in the United States.

Dr. Frank Wilkinson, a Cambridge-educated economist who founded the Institute of Employment Rights, the Centre for Business Research at the University of Cambridge, UK, and the *Cambridge Journal of Economics*,¹⁰⁹ captured neo-liberalism's defining features with the following definition:

Neo-liberalism is a reassertion of the core beliefs of liberal economics, which evolved with capitalism as its apologia. It is a Utopian vision of self-regulating markets transforming the inherent selfishness of individuals into general good. The market is seen as providing opportunities and incentives for individuals to exploit fully their property (labour in the case of workers), whilst preventing them from exploiting advantages ownership might afford them by throwing them into competition with others similarly endowed. By these means, markets provide forums where the values of individual contributions are collectively determined by the expressed choices of buyers and sellers. These judgements are delivered as market prices, which serve to guide labour and other resources to their most efficient use. Competitive markets therefore function as equilibrating mechanisms delivering both optimal economic welfare and distributional justice. Consequently, neo liberals assert that man-made laws and institutions need to conform to the laws of the market if they are not to be in restraint of trade and therefore economically damaging.¹¹⁰

This definition of neo-liberalism idealizes the market, whose “invisible hand”¹¹¹ transforms “the inherent selfishness of individuals into

¹⁰⁹ S.F. Deakin & K.D. Ewing, *Frank Wilkinson 1934-2021*, INST. OF EMP. RTS. (Apr. 15, 2021), <https://www.ier.org.uk/news/frank-wilkinson-1934-2021/#:~:text=Frank%20Wilkinson%2C%20leading%20labour%20economist%20of%20the%20Cambridge,of%20the%20Centre%20for%20Business%20Research%20in%201994.>

¹¹⁰ Frank Wilkinson, *Neo-liberalism and New Lab. Pol'y: Econ. Performance, Hist. Comparisons and Future Prospects*, 31 *CAMBRIDGE J. ECON.* 817, 817–18 (Nov. 2007) [hereinafter “Wilkinson, *Neo-liberalism*”].

¹¹¹ This expression first appears in ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 165 (6th ed. 1790) [hereinafter “SMITH, *MORAL SENTIMENTS*”].

general good”¹¹² by “providing opportunities”¹¹³ for and “incentiviz[ing]”¹¹⁴ people “to exploit fully their property.”¹¹⁵ This definition of neo-liberalism highlights its values:

- individual liberty, defined as “the absence of restraint or coercion,¹¹⁶ but from the owner’s or employer’s perspective;
- individual responsibility for one’s actions and one’s own fate;¹¹⁷
- individual property ownership;¹¹⁸
- wealth accumulation and maximization;¹¹⁹
- economic inequality;¹²⁰
- personal economic initiative;¹²¹
- competition.¹²²

¹¹² Wilkinson, *Neo-liberalism*, *supra* note 110.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Hayek, *supra* note 1, at 17. Hayek explains his conception of liberty as “[t]he state in which a man is not subject to coercion by the arbitrary will of another or others.” *Id.* at 11. He later adds that the original European meaning of liberty, which happens to be consistent with his definition, is “the possibility of a person’s acting according to his own decisions and plans” and contrasts that to the person who is “irrevocably subject to the will of another, who by arbitrary decision could coerce him to act or not act in specific ways.” *Id.* at 12. He concludes, “[t]he task of a policy of freedom must . . . be to minimize coercion or its harmful effects, even if it cannot completely.” *Id.*

¹¹⁷ For Hayek, liberty requires the individual to “bear the consequences of his actions” *Id.* at 71.

¹¹⁸ See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

¹¹⁹ For Hayek, wealth accumulation is an instrumental good important to increase the options available to free men. Liberty, however, is the higher good. Hayek, *supra* note 1, at 18. I am intentionally using the gendered term men here because it is likely that Hayek meant men and not women, given the time in which he wrote.

¹²⁰ Liberty is “bound to produce inequality in many respects.” *Id.* at 87. Although Hayek purports to support equality before the law, he also states in that “economic inequality is not one of the evils which justify our resorting to discriminatory coercion or privilege as a remedy.” *Id.* at 87–88.

¹²¹ NOZICK, *supra* note 118, at 331.

¹²² See Hayek, *supra* note 1, at 320–21; Friedrich A. Hayek, *Competition as a Discovery Proc.*, 5 Q. J. AUSTRIAN ECON. 9 (Marcellus S. Snow trans., 2002).

Neo-liberalism further sees the market as a natural, spontaneous order¹²³ that is morally neutral.¹²⁴ This is a key feature of neo-liberalism. Because the market naturally appears, with no causal agent, neo-liberal thinkers can separate the adverse consequences that coincide with a free market as unlinked to that market.¹²⁵ Given neo-liberalism's view that the market cannot cause damage, it is unsurprising that the neo-liberal view of government's role is minimal. Indeed, political adherents to Hayek's economic views primarily implemented deregulatory policies.¹²⁶ The neo-liberal government is not, however, absent.¹²⁷

In the neo-liberal world of economics, the firm, defined as “an artificial entity through which the interests of various groups of individuals (workers, managers, suppliers of capital, &c.) are related” is a profit maximizer.¹²⁸ The firm does this by “ordering these relationships so as to maximize the residual gain (or minimize the residual loss), which accrues to the owners.”¹²⁹

Neo-liberalism also embraces the doctrine of monetarism. Developed by Milton Friedman, monetarism holds that macroeconomic market failures can be controlled through supply-side monetary policy¹³⁰ rather than Keynesian demand-side government intervention.¹³¹ Like Hayek's theories, Friedman's monetarism is firmly grounded in “freedom” as a political value and in two related political principles to preserve

¹²³ See Peter J. Boettke, *The Theory of Spontaneous Order and Cultural Evolution in the Soc. Theory of F.A. Hayek*, 3 CULTURAL DYNAMICS 61, 63–67 (1990).

¹²⁴ See FRIEDRICH A. HAYEK, THE MIRAGE OF SOCIAL JUSTICE, LAW, LEGISLATION AND LIBERTY 147 (1976).

¹²⁵ See generally Vincente Navarro, *Neoliberalism as a Class Ideology; Or, the Pol. Causes of the Growth of Ineq.*, 37 INT'L J. OF HEALTH SERV. 47 (2007).

¹²⁶ See Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rts.: The Autonomous Dignified Worker*, 76 U.M.K.C. L. REV. 1, 26–27 (2007); Sandra Fredman, *The New Rts.: Lab. L. and Ideology in the Thatcher Years*, 12 OXFORD J. LEGAL STUD. 24 (1992).

¹²⁷ Hayek himself carved out a role in business affairs to regulate theft, coercion, and fraud and to enhance private-sector efficiency through regulation in some instances, such as monopoly. See H.T. Koplín, *The Profit Maximization Assumption*, 15 OXFORD ECON. PAPERS 130, 131 (Jul. 1963).

¹²⁸ See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 17–18, 36, 81 (1944).

¹²⁹ See *id.*

¹³⁰ See generally MILTON FRIEDMAN, A PROGRAM FOR MONETARY STABILITY (1959).

¹³¹ See JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1935).

freedom—that the scope of government power must be limited, and government power itself must be dispersed.¹³² Monetarism views itself as in direct opposition to all government intervention—even government intervention to do good—on the rationale that “the power to do good is also the power to do harm.”¹³³

Monetarism became a powerful counternarrative to the New Deal and post-war socio-economic-legal narratives dominated by Keynesian macroeconomic theory.¹³⁴ Recall that Keynesian economists aimed government policies at correcting market failures. While those policies alleviated cyclical and structural unemployment, it certainly never eradicated unemployment.

Neo-liberals formulated a response to Keynesian policies. By eschewing social problems and reimagining them as individual problems, the neo-liberal economist focused on blame, thereby returning to the old deserving poor trope and its foil, the undeserving poor. A significant part of this narrative is the argument that the welfare state discourages human motivation.¹³⁵

B. Critique of Neo-liberalism

1. The problem of greed

Adam Smith himself, noted that the market is built on human nature’s avarice—coveting and accumulating material items: “The homely and vulgar proverb, that the eye is larger than the belly, never was more fully verified than with regard to the [landlord/property owner],” whom Smith characterizes as “proud,” “unfeeling,” and “without a thought for the wants of his brethren.”¹³⁶ Smith continues: “The capacity of [the landlord’s] stomach bears no proportion to the immensity of his desires.”¹³⁷ He adds that the “rich select only from the heap what is most precious and agreeable.”¹³⁸ At this point Smith introduces the invisible hand:

¹³² See FRIEDMAN, *supra* note 130, at 2 (1959).

¹³³ See FRIEDMAN, *supra* note 130, at 3.

¹³⁴ See generally KEYNES, *supra* note 131.

¹³⁵ See *Work Incentives, the Recovery Act, and the Econ.: Hearing on Unintended Consequences: Is Gov’t Effectively Addressing the Unemployment Crisis? Before the Subcommittee on Econ. Growth, Job Creation and Regul. Affs.* (2013).

¹³⁶ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹³⁷ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹³⁸ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

[The rich] consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end from which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an *invisible hand* to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.¹³⁹

Smith's theory, which became one of the defining features of liberal economics and later neo-liberalism, was that it is precisely the greed of those who own and want "things" coupled with the ability of those who use their labor to create "things" that creates markets. But, Smith explains, because the property owner and the rich can eat no more than the "meanest peasant," they will naturally distribute what they do not need. But there is an important caveat here:

The rest he is obliged to distribute among those, who prepare, in the nicest manner, that little which he himself makes use of, among those who fit up the palace in which this little is to be consumed, among those who provide and keep in order all the different baubles and trinkets, which are employed in the oeconomy of greatness; all of whom thus derive from his luxury and caprice, that share of the necessaries of life, which they would in vain have expected from his humanity or his justice. . . . *The rich only select from the heap [derived from the soil] what is most precious and agreeable.* They consume little more than the poor, and *in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires,* they divide with the poor the produce of all their improvements. They are *led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it,*

¹³⁹ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

*without knowing it, advance the interest of the society, and afford means to the multiplication of the species.*¹⁴⁰

This passage is the keystone to classical and neoclassical theory—but it is also the key to its critique. Regarding (neo)-classical theory, this passage reflects Smith's view that human nature is selfish and greedy. Because the rich can “consume little more than the poor”¹⁴¹ (a concept that would eventually form one basis for marginal demand theory), they will end up distributing the remaining goods and services to the poor as if “led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants.”¹⁴² On the flip side, even though the rich can “consume little more than the poor,”¹⁴³ they will still want the “most precious and agreeable”¹⁴⁴ products to “gratify ... their own vain and insatiable desires.”¹⁴⁵ This leads to the conundrum that capitalism presents: A market economy pushes individuals to innovate and to make improvements that augment productivity and increase efficiency. But that same economy pushes individuals to desire beyond their own needs. This situation may cause few moral qualms in an economy based on sustainability. But once the Industrial Revolution took hold, those who initially had more could purchase capital, such as machinery, to leverage the labor of others to produce more to sell on the market to satisfy those insatiable desires. Labor utilization eventually yields to labor exploitation.

2. Neo-liberalism's effect on labor and the working poor

Neo-liberalism speaks of labor, not in terms of individual living humans but as one of several fundamental factors of production, just like land, capital, or factories.¹⁴⁶ This view has profound effects for workers. As a threshold matter, it ignores the human aspect of labor. Workers consist of individual humans. As such, they possess dignity, autonomy, agency, and all the rights of any American.¹⁴⁷ By relegating them to a factor of production,

¹⁴⁰ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴¹ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴² SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴³ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴⁴ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴⁵ SMITH, MORAL SENTIMENTS, *supra* note 111, at 165.

¹⁴⁶ See Henk Overbeek, *Neoliberalism and the Regul. Of Glob Lab. Mobility*, 581 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 74, 76 (2002).

¹⁴⁷ See Lofaso, *supra* note 126.

we dismiss their rights and focus merely on their utility to employers, all in one fell swoop.¹⁴⁸ Neo-liberalism also tends to view liberty solely from the employer's point of view.¹⁴⁹ This narrative is itself problematic for two reasons. First, in contrast with how neo-liberalism de-humanizes workers by making them factors of production, neo-liberalism simultaneously humanizes employers. This is true whether the employer is a small mom-and-pop shop (and thus closer to, if not co-extensive with, a human person) or whether it is a large corporation, created by the state ostensibly to serve human shareholders but with little accountability to other interested individuals, including workers.¹⁵⁰ Second, neo-liberalism also ignores the affects that the employer's exercise of its liberty interest has on the liberty of workers. When a group of workers strike in protest of an employer's unfair conduct, the neo-liberal narrative demonizes the strikers as *hurting* employers rather than focusing on the actual labor dispute: What, if anything, did the employer do to cause a group of workers to temporarily withdraw their labor? Afterall, workers are not paid when they strike and therefore unless they are independently wealthy, a status that is antithetical to a worker, the decision to strike constitutes an enormous sacrifice for every single worker. And even if there is a strike fund, those funds are limited. Therefore, the decision to strike must be strategic because workers by definition depend on wages to survive.

A particularly vivid illustration of how callous neo-liberalism can be to workers is found in Hayek's work:

Even if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, I am not coerced by him or anybody else. So long as the act that has placed me in my predicament is not aimed at making me do or not do specific things, so long as the intent of the act that harms me is not to make me serve another person's ends, its effect on my freedom is

¹⁴⁸ See generally Robert G. Blanton & Dusun Peksen, *The Dark Side of Econ. Freedom: Neoliberalism has Deleterious Effects on Lab. Rts.*, LSE PHELAN US CENTRE (Aug. 20, 2016), <https://blogs.lse.ac.uk/usappblog/2016/08/20/the-dark-side-of-economic-freedom-neoliberalism-has-deleterious-effects-on-labour-rights/>.

¹⁴⁹ See generally *id.*

¹⁵⁰ To be sure, corporate officers might be derivatively accountable to workers, such as when workers are able to gain the sympathy of the corporation's customers who then place economic pressure on the corporation to do right by their workers. But this accountability derives from its profit-maximizing goals, not from any intrinsic willingness to view its workers as humans or to dignify them.

not different from that of any natural calamity a fire or a flood that destroys my house or an accident that harms my health.¹⁵¹

Recall that Hayek views liberty as the absence of coercion. For Hayek then, it is the threat of starvation that compels individuals to freely accept work on whatever terms the market dictates. This view therefore lets employers off the hook for any term and condition that the market can bear and does not see how employers, who freely offer these terms, are themselves infringing on workers' liberty and perhaps other human rights.

3. Neo-liberalism does not accurately describe modern-U.S. capitalism

Significantly, neo-liberalism does not accurately describe twenty-first-century capitalism as practiced in the United States. Any modern textbook on economics will reveal that free markets depend on ideal models of perfect competition.¹⁵² This means that they have to have certain characteristics to behave in predictable ways including a substantial number of market participants such that no one of which can affect price;¹⁵³ those market participants must have perfect information;¹⁵⁴ homogenous commodities are on trade;¹⁵⁵ movement of labor, capital, goods, and services

¹⁵¹ See HAYEK, *supra* note 1 at 137.

¹⁵² See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMY* 28–29 (6th ed. 2011).

¹⁵³ See Neil E. Gretsky, Joseph M. Ostroy, William R. Zame, *Perfect Competition in the Continuous Assignment Model*, 88 J. ECON. THEORY 60, 61 (1999) (defining perfect competition as “the inability of individuals to (favorably) influence prices” and defining “approximate perfect competition as the inability of individuals to (favorably) influence prices more than a little”); Joan Robinson, *What is Perfect Competition*, 49 Q. J. ECON. 104, 104 (1934). This factor means that market participants are price takers—none of them have the power to set price.

¹⁵⁴ See Joan Robinson, *What is Perfect Competition*, 49 Q. J. ECON. 104, 104 (1934); EDWARD CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 25 (1933) (discussing perfect knowledge).

¹⁵⁵ See Louis De Alessi, *Property Rights, Transaction Costs, and X-Efficiency: An Essay in Economic Theory*, 49 Q. J. ECON. 104, 104 (1934); EDWARD CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 25 (1933) (discussing perfect knowledge).

is free,¹⁵⁶ decision making are rational;¹⁵⁷ and there are no transaction costs.¹⁵⁸ Perfect competition also means no externalities,¹⁵⁹ which by definition means no need for government intervention.¹⁶⁰ Finally, neither markets nor perfect competition can survive without well-define and enforceable property rights.¹⁶¹ None of this exists in the United States, except perhaps at the Saturday morning local farmers' market.

III. HISTORICAL ATTEMPTS TO CURB EXCESSES OF CAPITALISM

Throughout history and primarily after the industrial revolution, there have been many attempts by the government to reduce the abuses of capitalism while still promoting a capitalist society. This section discusses the rise of United States industrialism and the labor abuses in America resulting therefrom. It then analyzes the Progressive Agendas of both Theodore Roosevelt and Franklin Delano Roosevelt. While Teddy Roosevelt promoted antitrust laws and organized labor, FDR sought for the government to be a countervailing power to business.

A. The Rise of Industrial U.S. America

Nineteenth-century United States witnessed an explosion of economic development fueled by extensive population growth, the

¹⁵⁶ See EDWARD CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 6 (1933) (discussing perfect competition in terms of ideal fluidity or mobility of factors"). The free movement of economic factors is the foundation for European integration first into the Common Market and ultimately into the European Union. See, e.g., Serge Hurtig, *The European Common Market*, 32 INT'L CONCILIATION 321 (1958) (discussing the concept of free movement and the integration of Europe into a free trade zone).

¹⁵⁷ See Lynn A. Stout, *Taking Conscience Seriously*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 158 (Paul J. Zak, ed. Princeton Univ. Press 2008); Lofaso, *supra* note 126, at 9.

¹⁵⁸ See Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1662 (1989); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹⁵⁹ See Arthur Cecil Pigou, *The Economics of Welfare* 160–61 (1920) (famously introducing and describing the problem of externalities).

¹⁶⁰ See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (explaining why government intervention is not necessary to solve the problem of externalities, at least as far as there are zero transaction costs).

¹⁶¹ See ROBERT COOTER & THOMAS ULEN, *LAW AND ECON.* 70 (6th ed. 2011).

development of increasingly more land and resources as “Americans”¹⁶² settled westward, and increased productivity through the application of recent, innovative technologies.¹⁶³ Population growth contributed to urbanization, although land gains through purchase, conquest, or otherwise, delayed increases in population density.¹⁶⁴ It is within this context that the United States industrialized as the population moved out of agriculture¹⁶⁵ and into the manufacturing sector. As one recent study explained “[b]y the early twentieth century, the United States was the world’s leading producer of manufactures, with labor productivity twice as high as that in Britain, the nation where industrialization had first taken hold.”¹⁶⁶ The rise of the factory and implementation of steam-powered machinery fueled American industrial ascendancy, allowing it to emerge from the nineteenth century as the world’s leader in manufacturing, with a two-to-one advantage over the United Kingdom in labor productivity.¹⁶⁷

While economic historians and other scholars have not yet come to a consensus on all the details, they seem to agree that the nineteenth century witnessed the economic development of the United States from a rural agricultural state in its political infancy to a world-leading industrial manufacturing nation.¹⁶⁸ That transformation, powered by steam and later electricity (both of which were fueled by coal), driven by the transportation revolution led by railroads, and populated by urbanization, also witnessed the rise of the factory and the demise of artisanal laborers, who were replaced by factory workers.¹⁶⁹

¹⁶² It is beyond the scope of this paper to discuss the numerous ways in which the land in the present-day United States was “transferred” from Indigenous peoples to non-indigenous individuals. STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER I* (2005).

¹⁶³ See Atack, J. et al., *Industrialization and Urbanization in Nineteenth Century America*, 94 REG’L SCI. & URB. ECON. 1, 1 (2021) (hereinafter “Atack”).

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.* (citing ROBERT E. GALLMAN AND PAUL W. RHODE, *CAPITAL IN THE NINETEENTH CENTURY* (2019)).

¹⁶⁶ See Atack, *supra* note 163, at 2 (citing Stephen N. Broadberry and Douglas A. Irwin, *Labor Productivity in the United States and the United Kingdom During the Nineteenth Century*, 43 EXPLORATIONS ECON. HIST. 257–79 (2004)).

¹⁶⁷ See Broadberry & Irwin, *L. Productivity in the U.S. and the U.K. During the Nineteenth Century*, 43 EXPLORATIONS ECON. HIST. 257, 265 (2004).

¹⁶⁸ See generally Peter G. Goheen, *Industrialization and the Growth of Cities in Nineteenth-Century Am.*, 14 AM. STUD. 49 (1973).

¹⁶⁹ See *id.* at 54.

By the turn of the twentieth century, labor abuses were ubiquitous. Well-publicized tragedies such as the 1911 Triangle Shirtwaist Factory fire¹⁷⁰ and the literature of muckrakers¹⁷¹ exposed these abuses, which evoked American public sympathy and a call for political action.

B. Theodore Roosevelt's Progressive Agenda

Progressives, led by President Theodore Roosevelt, identified three areas of reform: (1) democratize government and eliminate government corruption; (2) expand the federal, state, and local government's role in curbing capitalism's abuses through regulation; and (3) curb corporate power.¹⁷² Roosevelt was a leading architect of the modern merit-based civil service system, which aimed to reform government and eliminate corruption.¹⁷³

Roosevelt envisioned a modern American capitalist democracy where corporate power and organized labor “can do much good, and as a necessary corollary they can both do evil.”¹⁷⁴ Accordingly, Roosevelt was a proponent of organized labor and antitrust laws.¹⁷⁵ Roosevelt desired for organizations to engage in “fair-dealing as between man and man” and stated that an organization's worth comes from courage, skill, and wisdom.¹⁷⁶ Thus,

¹⁷⁰ See *The Triangle Shirtwaist Factory Fire*, U.S. DEP'T OF LAB., <https://www.osha.gov/aboutosha/40-years/trianglefactoryfire> (last visited July 27, 2022).

¹⁷¹ See, e.g., UPTON SINCLAIR, *THE JUNGLE* (1906). See also JACK LONDON, *THE IRON HEEL* (1908); Jack London, *The Scab*, *THE ATLANTIC*, Jan. 1904, available at <https://www.theatlantic.com/magazine/archive/1904/01/the-scab/306194/>.

¹⁷² See Kirsten Swinth, *The Square Deal: Theodore Roosevelt and the Themes of Progressive Reform*, 43 *EXPLORATIONS ECON. HIST.* 257, 265 (2004).

¹⁷³ See Theodore Roosevelt, *The Present Status of Civil Service Reform*, *THE ATLANTIC MONTHLY* 239–46, Feb. 1895, available at <https://www.theatlantic.com/magazine/archive/1895/02/the-present-status-of-civil-service-reform/519723/> (outlining the history and progress of civil service reform through the Civil Service Commission between 1883 and 1895, including creation of the merit-based classified service, to eliminate the spoils system in federal government and calling for Congress to pass additional reform laws). Notably, Roosevelt served as the Civil Service Commissioner between 1889 and 1895, appointed by President Benjamin Harrison. See THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* Chapter V (1913) (discussing civil reform's two goals—government efficient and elimination of the spoils system).

¹⁷⁴ See THEODORE ROOSEVELT, *A SQUARE DEAL* 31 (1906).

¹⁷⁵ See *id.* at 37 (“I believe emphatically in organized labor. I believe in organizations of wage workers.”).

¹⁷⁶ *Id.*

“we must treat each man on his worth and merits as a man . . . [and] must see that each is given a square deal, because he is entitled to no more and should receive no less.”¹⁷⁷

Implicit in this agenda was a vision of the dignified worker: “we are unequally developed, mentally as well as physically. But each of us has the right to ask that he shall be protected from wrong doing as he does his work and carries his burden through life.”¹⁷⁸

In 1906, Roosevelt signed two nonwork laws affecting the workplace: the Federal Meat Inspection Act,¹⁷⁹ which regulated the slaughter and processing of meat and meat products under sanitary conditions, and the Pure Food and Drug Act,¹⁸⁰ which regulated other food, medicine, and drugs.¹⁸¹ Both laws were enforced using criminal penalties including imprisonment and fines. These laws helped to increase worker safety and to promote overall societal health.

C. Franklin Delano Roosevelt’s New Deal

Beginning his presidential term in 1933, Franklin Delano Roosevelt (“FDR”) saw the market failures of businesses as social problems that the government could fix.¹⁸² With respect to labor, however, FDR also recognized that even without government statutory intervention, workers could fix market failures by collectivizing labor and engaging in collective bargaining.¹⁸³ Thus, he desired for businesses to grow freely while

¹⁷⁷ *See id.* at 7.

¹⁷⁸ *See id.* at 19.

¹⁷⁹ Federal Meat Inspection Act of 1906, Pub. L. 59-382, 34 Stat. 669 (1906).

¹⁸⁰ Pure Food and Drug Act of 1906, Pub. L. 59-384, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938). For a brief history of the Pure Food and Drug Act, see Anne Marie Lofaso & Lakyn D. Cecil, *Say “No” to Discrimination, “Yes” to Accommodation: Why States Should Prohibit Discrimination of Workers Who Use Cannabis for Med. Purposes*, 43 SEATTLE U. L. REV. 955, 961–63 (2020).

¹⁸¹ *See* Franklin D. Jones, *Hist. Dev. of the L. of Bus. Competition*, 36 YALE L.J. 351, 376 (1927) (explaining that “the protection of the public was the paramount consideration in the enactment of [the Food and Drug Act of 1906]”).

¹⁸² William E. Leuchtenburg, *Franklin D. Roosevelt: Domestic Affairs*, UVA MILLER CTR., <https://millercenter.org/president/fdroosevelt/domestic-affairs> (last visited Aug. 8, 2022).

¹⁸³ *See Lab. Unions During the Great Depression and New Deal*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/labor-unions-during-great-depression-and-new-deal/> (last visited Aug. 13, 2022).

government and labor grew freely as a counterforce.¹⁸⁴ Government intervention in this era entailed the creation of a statutory floor of rights which were originally for temporary work relief programs,¹⁸⁵ similar to initiatives taken at the beginning of the COVID-19 pandemic. These early interventions paved the way for more long-term solutions like the National Labor Relations Act,¹⁸⁶ the Fair Labor Standards Act of 1938,¹⁸⁷ and social security benefits for unemployment and retirement created by the Social Security Act.¹⁸⁸

These facets of the New Deal era illustrate the conception that labor is a countervailing power to business that has both political and economic layers.¹⁸⁹ This concept of labor must necessarily include an element of consumer protection, given that an interdependent relationship exists among collectivized labor unions, the general public, and business. The public wishes to use labor output (e.g., consumer goods), while businesses are profit motivated and want to exploit labor as an input.¹⁹⁰ Unionized labor forces use

¹⁸⁴ See Jonathan Grossman, *Fair Lab. Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Aug. 13, 2022) (emphasizing that the National Industrial Recovery Act, developed by FDR's advisers under the New Deal program, was intended to "raise wages, create employment, and thus restore business").

¹⁸⁵ See *America's Great Depression and Roosevelt's New Deal*, DIGITAL PUB. LIBR. OF AM., <https://dp.la/exhibitions/new-deal/relief-programs> (last visited Aug. 14, 2022) ("[T]he Federal Emergency Relief Act (FERA), the Civil Works Administration (CWA), and the Civilian Conservation Corps (CCC) provided immediate support in the form of cash payments and temporary employment.").

¹⁸⁶ Pub. L. 74–198, 49 Stat. 449 (July 6, 1935) (codified at 29 U.S.C. § 151 et seq., as amended).

¹⁸⁷ Pub. L. 75–718, 50 Stat. 1060 (June 25, 1938) (codified at 29 U.S.C. § 203 et seq., as amended).

¹⁸⁸ Pub. L. 74–271, 49 Stat. 620 (Aug. 14, 1935) (codified at 42 U.S.C. ch. 7, as amended).

¹⁸⁹ See *President Franklin Delano Roosevelt and the New Deal*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/> (last visited Aug. 14, 2022) ("In the long run, New Deal programs set a precedent for the federal government to play a key role in the economic and social affairs of the nation.").

¹⁹⁰ Exploitation can be as extreme as child labor or human trafficking, or it can be as simple as retaining labor at the lowest wage possible. See generally Henry Davies, *How Shall Labor and Capital Be Reconciled? Education the Solution*, in *LABOR AND CAPITAL: A DISCUSSION OF THE RELATIONS OF EMPLOYER AND EMPLOYED* 5 (ed. John P. Peters, 1902) (describing the relationship between capitalists and laborers as "polarized" and arguing that "[t]his violent antagonism

their collective power which, of course, is stronger than the power that an individual worker would possess.¹⁹¹ Also obvious is the fact that under a capitalist economy, wealth and capital accumulation is essential and businesses are always growing or seeking to expand.¹⁹² Thus, statutory schemes like those employed by FDR and the New Deal attempted to counteract market failures potentially arising from an entirely unregulated economy both through statutory initiatives and the flourishing of collectivized labor units.

IV. GOODS THEORY: CHARACTERIZING GOODS, SERVICES, AND RESOURCES

In a capitalist system, economists typically treat labor as a private good. This means that an individual can sell their labor in exchange for wages. This section disrupts that paradigm. By looking at the goods theory of economics, we can reconceptualize labor as a public good that accounts for human flourishing within the framework of the U.S.-American capitalist system. This section first distinguishes public goods and private goods through an analysis of their respective characteristics. It then argues that labor can be reimagined as a public good rather than a private one, and it suggests ways in which this is possible.

A. Private Goods Are Rivalrous and Excludable and Come in Two Types, Durable and Non-durable; Public Goods Are Non-rivalrous and Non-excludable

Economics have assigned two fundamental characteristics to goods, services, and resources: excludability and rivalry. Excludability is the degree to which a good, service, or resource can be limited to only paying customers, or conversely, the degree to which a supplier, producer, or other managing

between the forces of power (wealth) and the forces of usefulness (labor) inevitably leads to the effort of power to exploit usefulness”).

¹⁹¹ Josh Bivens et al., *How Today's Unions Help Working People*, ECON. POLICY INST. (Aug. 24, 2017), <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/> (emphasizing that unionizing and collective bargaining are the best ways for employees to be heard in the workplace).

¹⁹² See Matthew T. Bodie, *Lab. Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1131 (2019) (emphasizing that capitalism brings eternal competition among firms and both unionized and nonunionized workers).

body—such as the government—can prevent free consumption of a good.¹⁹³ Non-excludable goods are either costly or impossible to exclude consumer from using.¹⁹⁴ The idea of excludability and non-excludability is constantly being developed by economists.¹⁹⁵ In the 1950's, economist Paul Samuelson highlighted the market failure of the free-rider problem that can occur with non-excludable goods.¹⁹⁶ Richard Musgrave expanded on Samuelson's theory of good classifications.¹⁹⁷ Economist Garrett Hardin, in the late 1960s, further analyzed another key market inefficiency with regard to non-excludable goods.¹⁹⁸ In the 1990's, American economist Elinor Ostrom theorized excludability as a continuous characteristic that ranges from fully excludable to fully non-excludable.¹⁹⁹

Rivalrous is the degree to which a consumer's consumption prevents simultaneous consumption by other consumers or, alternatively, reduces the ability of another person to consume it.²⁰⁰ In other words, an individual consuming the good renders the good unavailable for others. Rivalrous goods may be durable or non-durable. Non-durable goods are destroyed after consumer use and may not be re-used by another.²⁰¹ Durable goods may only be used by one at a time and afterwards may be used by a different

¹⁹³ Jason Gordon, *Excludable and Rivalrous Goods Explained*, THE BUS. PROFESSOR (June 23, 2022), https://thebusinessprofessor.com/en_US/economic-analysis-monetary-policy/excludable-and-rivalrous-goods-explained.

¹⁹⁴ Daniel Liberto, *Rival Good*, INVESTOPEDIA (June 1, 2022), https://www.investopedia.com/terms/r/rival_good.asp.

¹⁹⁵ See, e.g., Paul A. Samuelson, *The Pure Theory of Public Expenditure*, In THE REVIEW OF ECONOMICS AND STATISTICS 387 (1954); Garrett Hardin, *The Tragedy of the Commons*, in SCIENCE 1243 (1968). ELINOR OSTROM, GOVERNING THE COMMONS (1990).

¹⁹⁶ Samuelson, *supra* note 195.

¹⁹⁷ See RICHARD MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY (1959).

¹⁹⁸ Hardin, *supra* note 195. The tragedy of the commons refers to goods that are rivalrous but also non-excludable.

¹⁹⁹ OSTROM, *supra* note 195. An example of a fully excludable good is a consumer buying a ticket to attend a movie. A semi-excludable good would include copyright infringement, where a consumer should normally pay, but because piracy is possible, some consumers may get the good for free. A fully non-excludable good would be, for example, a scenic view from a lighthouse.

²⁰⁰ Jason Gordon, *Excludable and Rivalrous Goods Explained*, THE BUS. PROFESSOR (June 23, 2022), https://thebusinessprofessor.com/en_US/economic-analysis-monetary-policy/excludable-and-rivalrous-goods-explained.

²⁰¹ Daniel Liberto, *Rival Good*, INVESTOPEDIA (June 1, 2022), https://www.investopedia.com/terms/r/rival_good.asp.

consumer.²⁰² Non-rivalrous goods, on the other hand, may be possessed by multiple consumers without preventing simultaneous consumption and are typically intangible.²⁰³

Private goods are the keystone in the foundation of a capitalist economy.²⁰⁴ Economists define private goods as having two characteristics: They are rivalrous and excludable.²⁰⁵ To understand what that means, we must explore both concepts.

Rivalrous goods have the following characteristics:

- When someone consumes a unit of the good, then that unit is no longer available for others to consume;
- All consumers are rivals competing for the good;
- Each person's consumption subtracts from the total stock of the good available.
- The good is often subject to high demand and fierce competition, which drives up its price.²⁰⁶

Rivalrous goods are divisible into two types: durable and nondurable. Consumption does not destroy durable rivalrous goods, such as hammers, which are usable one at a time; by contrast, consumption destroys nondurable goods, such as fruits and vegetables.

While private goods are both rivalrous and excludable, public goods are non-excludable and non-rivalrous.²⁰⁷ Thus, collective consumption of a public good is one in which all may enjoy, and one

²⁰² *Id.*

²⁰³ *Id.* Examples of non-rivalrous goods are scenic views, broadcast television, or national defense.

²⁰⁴ See Lawrence B. Solum, Legal Theory Blog: Legal Theory Lexicon: Public and Private Goods, (Sept. 9, 2009), <https://lsolum.typepad.com/legaltheory/2016/06/legal-theory-lexicon-public-and-private-goods.html>

²⁰⁵ See Lawrence B. Solum, Legal Theory Blog: Legal Theory Lexicon: Public and Private Goods, (Sept. 9, 2009), <https://lsolum.typepad.com/legaltheory/2016/06/legal-theory-lexicon-public-and-private-goods.html>

²⁰⁶ See Lawrence B. Solum, Legal Theory Blog: Legal Theory Lexicon: Public and Private Goods, (Sept. 9, 2009), <https://lsolum.typepad.com/legaltheory/2016/06/legal-theory-lexicon-public-and-private-goods.html>

²⁰⁷ JUNE SEKERA, PUBLIC GOODS IN EVERY DAY LIFE 29 (2018).

individual's consumption does not lead to the subtraction of another's consumption. National defense, for example, is a public good where an individual may not opt out or choose not to be defended.²⁰⁸

In the United States, labor and work have typically been treated as private goods where only a single user may consume or possess it. Factors such as strong demand and fierce competition may drive the price of labor up. The price of labor is a wage, and wages can also be durable or non-durable. As discussed in the following section, labor would look vastly different if conceived of as a public good.

B. Reimagining Labor as a Public Good That Accounts for Human Flourishing

In re-evaluating the neoliberal paradigm, labor is re-conceivable as a public good where the government provides jobs for all individuals. A full-employment model is the most obvious manifestation of labor as a public good. However, a full-employment model is exceedingly unlikely in the United States, which is highly skeptical of views such as these, which appear closely aligned with a socialist economy.

However, the U.S. Government has already stepped in to provide for the people in the past, especially in times of dire need.²⁰⁹ Accordingly, even within a U.S.-brand capitalist framework, there is room to re-conceptualize labor as a public good wherein the government figuratively carries its citizens through troubled times. But such measures are too extreme to be political viable in the United States during normal times—absent war, famine, or disease. A more politically viable solution for reimagining labor in the United States is through the lens of flourishing economics.

Flourishing economics—also called human flourishing—revolves around the idea that wealth is just one of many features or conditions of human well-being.²¹⁰ In this model, wealth becomes not just the accumulation of material things but also includes other conditions of well-being. Overall well-being comprises basic needs, such as sufficient wealth, health, safety, human shelter, meaningful relationships and community belonging, lifelong education, and free movement through transportation.²¹¹

²⁰⁸ *Id.*

²⁰⁹ For example, during the New Deal and the COVID-19 pandemic, the federal government has provided for people temporarily with items such as stimulus checks.

²¹⁰ Tyler J. VanderWeele, *On the Promotion of Human Flourishing*, PNAS (July 13, 2017), <https://www.pnas.org/doi/full/10.1073/pnas.1702996114>.

²¹¹ *See id.*

A solid public education and skills training system is a necessary foundation for anchoring human flourishing because education gives individuals greater job choices.

In a completely free-market, capitalist economy, implementing these conditions would be incremental because of ideological opposition. For example, one could imagine a utopic society with a full employment policy, universal healthcare, free public housing with community centers, lifelong education, and free public transportation. But such a society could not simply materialize in the United States.

At least in the post-war era, the United States has been relatively successful in fulfilling many of these basic needs within a capitalist framework: relatively in the comparative sense and successful in convincing the voting public that it has been successful.²¹² Accordingly, movement toward a more progressive agenda would take time. Starting with the New Deal, the United States, rather than creating a full employment policy,²¹³ implemented a social security policy that centers upon the idea that all able-bodied adults should work and therefore that the government will only help those who have a good excuse (the deserving poor) for not working.²¹⁴ For example, the U.S. American social security system includes unemployment insurance in the event of job loss that is not the individual's fault,²¹⁵ disability (SSI) in case an injury or poor health prevents an individual from working,²¹⁶

²¹² See generally David Singh Grewal, *Closing Remarks: L. and Equity After the Crisis*, 35 YALE L. & POL'Y REV. 337, 338-39 (2016) (noting that this period is often termed the "Golden Age of Capitalism").

²¹³ The Works Progress Administration, which employed millions of workers for government projects, was an exception to this rule due to the extreme unemployment issues created by the Great Depression. *The Department in the New Deal and World War II 1933–1945*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/dolchp03> (last visited Aug. 19, 2022).

²¹⁴ See generally *Fifty Years Ago*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/50ed.html> (last visited Aug. 19, 2022) (explaining that the Social Security Act was intended to provide assistance to destitute individuals and "to assure workers that their years of employment entitled them to a life income").

²¹⁵ *Unemployment Insurance Program Description and Legislative History*, SOC. SEC. ADMIN., <https://www.ssa.gov/policy/docs/statcomps/supplement/2012/unemployment.html#:~:text=To%20induce%20states%20to%20enact,weeks%20in%20a%20calendar%20year> (last visited Aug. 19, 2022).

²¹⁶ *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html#:~:text=The%20Social%20Security>

and retirement benefits and Medicare healthcare for individuals who become too old to work.²¹⁷

A more expensive option would be universal healthcare, which would free employers from the burden of contributing to healthcare.²¹⁸ The United States has already implemented comparatively inexpensive health and safety benefits in the workplace.²¹⁹ Implementing a fair and living wage is another solution.²²⁰

In the area of housing in the employment context, employers could offer several benefits that would augment human flourishing. First, employers could permit or expand telecommuting options. This would free up employee time by saving commuting time. It would also allow employers to pay less in space. With the increased use of online video communication technology such as Microsoft Teams, WebEx, and Zoom, to name just three, telecommuting is a better option than—which allowing for individuals to work from home—as well as employers renovating office spaces with open spaces and natural light to increase the wellbeing of its employees.

In augmenting conditions of employment, the question becomes the best way to implement flourishing economics. It could be through a union or a statutory model. However, one potential problem with creating meaningful work is that it can mean different things to different people. Regardless of what wealth under flourishing economics means to particular individuals, it should at the very least incorporate job training and educational opportunities to promote desired employment. Further, because employment is

%20Act%20was,a%20continuing%20income%20after%20retirement. (last visited Aug. 19, 2022).

²¹⁷ *Id.*

²¹⁸ This was the original idea behind Obamacare before Congress changed it to more of a capitalist solution similar to Romneycare.

²¹⁹ The Occupational Health and Safety Administration (“OSHA”), a branch of the Department of labor, was created “to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance.” *About OSHA*, U.S. DEP’T OF LAB., <https://www.osha.gov/aboutosha> (last visited July 29, 2022).

²²⁰ Despite the United States’ challenges in implementing a livable wage for many Americans, the United States has implemented minimum wage acts in attempts to address these concerns. *See* 29 U.S.C.A. § 206 (West 2022). The question to a living wage remains as to the method of effectuation: through union organization, the “Fight for 15,” or through federal legislation. The Fight for \$15 is a global movement in over 300 cities on six continents who have organized to advocate for increased minimum wages of \$15 per hour. *See About Us*, FIGHT FOR 15, <https://fightfor15.org/about-us/> (last visited Aug. 1, 2022).

unavoidably intertwined with commuting, a starting place would be bettering the United States public transportation system through developing high-speed railways and fixing roads.

In addition to job re-training and income replacement, another idea is to restructure the WARN Act. The WARN Act requires advance notice to employees if an employer is preparing for a mass economic dismissal,²²¹ and it only requires this notice for employers who have one hundred or more employees.²²² The WARN Act should be amended or restructured to allow a bargaining representative for employees—even for employees who are not unionized—at the point when massive economic dismissals are announced.

CONCLUSION

This symposium article is a first attempt by the authors to reimagine labor as a public good to determine whether such a reconceptualization might bring us closer to an economic system with a social heart. Our preliminary analysis suggests that by disrupting the free-market economist's paradigm of treating workers as private goods, we can begin to find ways of moving forward toward a more human treatment of workers in the workplace. In a post-COVID-19 world, where workers are demanded more humane treatment or leaving the workplace, this reconceptualization promises to be mutually beneficial.

²²¹ 29 U.S.C.A. § 2102 (West 2022).

²²² 29 U.S.C.A. § 2101 (West 2022).