THE CLASSICAL LIBERAL VERSION OF LABOR LAW: BEWARE OF COERCION DRESSED UP AS LIBERTY

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In this Article, I contest on both theoretical and empirical grounds the progressive agenda, as represented by Hanoch Dagan, that seeks to advance the unionization movement in the name of individual autonomy and property. Theoretically, the Article shows that the common-law account of autonomy, which stresses freedom of action from external constraints involving the use or threat of force, provides the best analytical framework, one that undermines the modern progressive case for collective bargaining by workers. The negative account of autonomy applies to all persons; its correlative duties are simple. It applies regardless of the overall level or distribution of wealth. It is scalable from small to large societies. And it forces employers to respect the full range of material and psychological needs in order to recruit and retain their workers.

In contrast, the modern progressive alternative imposes no clear correlative duties on employers. It has no obvious way to constrain the dominance of union forces. And its commands are sufficiently complex that they are often not understood by the workers whom they are intended to protect.

Empirically, this Article shows that the institutional rigidity of union structures in dynamic markets fails; and it rejects the claim that individual workers are wedded to their current employer, given competitive forces that allow for rapid entry and exit. Given the long-term systematic advantages of the classical liberal model, it is no surprise that unions are generally in decline in major industrial societies.

Introduction: Labor Contracts and Labor Relations

One central issue in this conference is whether the law of "work" should be regarded as a matter of public or private law.[1] Answering this question is urgent today because all modern Western democracies have passed many laws that are strongly protective of labor unions and their right to organize. Throughout my career I have been very critical of this dominant trend on the ground that it is inconsistent with my

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1 *See, e.g.*, Sophia Z. Lee, *The History of Job (In)security: Why Private Law Theory May Not Save Work Law*, 24 Theoretical Inquiries L. 147 (2023) (noting that employment law can be conceived as doubly private, given the use of private negotiations ultimately informed by private-law interpretation).

classical liberal view of contractual relationships.[2] My view differs sharply from today's progressive framework. The latter agenda was spearheaded most recently by Hanoch Dagan in his recent book, "A Liberal Theory of Property Rights."[3] Dagan summarizes his thesis in his essay, "Autonomy and Property."[4] Both of these writings urge increasing the power of unions in political and economic matters.

I regard the titles of both his book and his article as notable instances of an old principle—*suggestio falsi, supressio veri*. Both Dagan's book and his essay defend, in my view, a profoundly anti-liberty and anti-autonomy position in the area of labor law, insofar as they push for a major reinvigoration of the labor union movement. Those theoretical arguments, which I shall address presently, work at a highly normative level. But for the theory to work empirically, it must be able to point to concrete instances of union success, not just for unionized workers, but for nonunion workers, employers, customers, suppliers, and the public at large: otherwise, any gains for unions come at the expense of other individuals, when what is needed is some indication of some overall social improvement. In practice, it is highly unlikely that stronger protection for unions will have positive effects, given that the historical patterns show only the simple brute fact of the steady decline in unionization around the world. It is fashionable to attribute this to employer obstruction of union activities, but such practices existed to an even greater extent during the union heyday. A better explanation must take into account changes in technology and industrial organization, with which the rigid and static union governance structures simply cannot keep pace. Unions have failed to meet the demands of both employers and employees in a highly dynamic universe that requires successful firms to constantly recombine factors of labor and capital in order to compete successfully in product and service markets.

The case for competitive markets is strongest when we consider the provision of most goods and services, for a plethora of existing firms and new entrants make the risk of monopolization exceedingly remote.[5] It is impossible to think of the ordinary business firm, be it small or large, as remotely akin to a common carrier or a public utility, which are the sole suppliers of some needed good or service.[6] Of

2 Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. Chi. L. Rev. 947 (1984).

3 Hanoch Dagan, A Liberal Theory of Property Rights (2020).

4 Hanoch Dagan, *Autonomy and Property*, *in* Research Handbook on Private Law Theory 185 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

5 This topic has been the subject of much discussion under the antitrust laws. For the claim that antitrust law generally fails unions, see Eric A. Posner, How Antitrust Law Fails Workers (2021). For my response, see Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & Liberty 327 (2022). For a rebuttal of my argument, see Eric A. Posner, *Antitrust and Labor Markets*, 15 N.Y.U. J.L. & Liberty 389 (2022); and, further, Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & Liberty 407 (2022). The core of the dispute lies in estimations of the concentration that some employers have in labor markets. Posner tends to see this as pervasive, and I argue that it is a relatively rare phenomenon, and where it does occur, as in some local hospital markets, the same antitrust laws tend to work in the same way as in ordinary consumer markets. For a recent empirical study that points in that direction, see Elana Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. Rev. 397 (2021).

6 For discussion, see Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty and the Common Good ch. 10 (1998). Today, the most urgent question of this sort is whether

course, the idealized conditions needed for pure competition are never satisfied in the real world. There is not an infinite number of firms and workers in any labor market. Still, perfection should not be the enemy of the good. We can take a cue from the antitrust laws that use a generalized Herfindahl-Hirschman index to test whether the levels of concentration are sufficiently high to warrant some kind of antitrust-like scrutiny.[7] It seems fair to say that unregulated labor markets—i.e., labor markets in which external parties do not set the substantive terms and conditions for trade—should be efficient insofar as they produce maximum output from any given set of available resources, both in static and in dynamic terms. On the other hand, any effort at monopolization of any market, whether for labor or products, will reduce overall social welfare. The standard critiques of labor unions dwell heavily on this issue.[8] Unfortunately, the modern new-liberal defenses barely mention, and never cope with, the issue of monopoly unions, even though under American law legislators have found it necessary to exempt unions from antitrust scrutiny under Sections 6 and 20 of the Clayton Act of 1914.[9] A similar exemption of unions from these (and other laws) was introduced under the Trade Disputes Act of 1906.[10]

These two early statutes represent profound forms of government intervention in labor markets. They were, so to speak, the opening salvo of public law. Even though the antitrust exemption provided an enormous boost to unions in the United States, its effect was limited because it did not compel employers to engage in "good faith" collective bargaining. That second step, which is far more coercive, took place in the Unites States with the passage of the National Labor Relations Act of 1935, for thereafter the employer no longer had the option of refusing to deal with a united front of workers. Instead, it was put under a statutory obligation to

various social media companies should be regarded as common carriers and thus subject to avoid discrimination on substantive grounds. See Texas H.B. 20, with its extensive neutrality and disclosure provisions. The bill was struck down in Netchoice v. Paxton, 573 F. Supp. 3d 1092, WL 5755120, (W.D. Tex., 2021); Netchoice v. Paxton, 27 F.4th 1119 (5th Cir. 2022) (staying motion for preliminary injunction in summary order); plaintiff's motion to vacate that stay was granted in Netchoice, LLC v. Paxton, 2022 WL 1743668 (May 31, 2022), so at present the law is not in effect.

7 *See* CFI Team, *What is the Herfindahl-Hirschman Index (HHI)?* CFI (Feb. 10, 2020), https://corporatefinanceinstitute.com/resources/knowledge/finance/herfindahl-hirschman-index-hhi/ (last visited Feb. 20, 2022). The index is calculated by taking the square of the percentage of the market held by the largest firms in the market. In the limit, one firm has the entire market, so that the index is 100 x 100 or 10,000. Even two firms of equal size radically reduce the index to (50)(50) or 2,500. In most labor markets no firm has more than a tiny fraction of the market, so that some of the leading squares yield tiny numbers that are outside the range of the antitrust laws.

8 My recent contributions emphasize this deficiency. *See* Richard A. Epstein, *American Workers Do Not Need Unions*, Law & Liberty (July 1, 2020), https://lawliberty.org/forum/american-workers-do-not-need-unions/; Richard A. Epstein, *Preserving Labor Market Flexibility*, Law & Liberty (July 31, 2020), https://lawliberty.org/forum/preserving-labor-market-flexibility/. *See also* Samuel Hammond, *Adversarial Unions Are Not the Full Story*, Law & Liberty (July 8, 2020), https://lawliberty.org/forum/adversarial-unions-are-not-the-full-story/; Mark Pulliam, *What Really Threatens American Labor*, Law & Liberty (July 15, 2020), https://lawliberty.org/forum/what-really-threatens-american-labor/; Michael Lind, *Labor and Management Remain Unequal*, Law & Liberty (July 22, 2020), https://lawliberty.org/forum/labor-and-management-remain-unequal/.

9 15 U.S.C. § 17.

10 Trade Disputes Act 1906, 6 Edw. 7 c. 47 (Gr. Brit.).

deal with the union in good faith as the exclusive bargaining agent of the workers in the bargaining unit.[11]

In this context, the use of the term "relations" in the title of this statute marks the well-documented transition from private to public law. It is yet another illustration of coopting a sensible private-law principle of relational contracts, which involve interaction amongst multiple parties for long periods of time. Private lawyers often use the term "relational contract" to describe open-ended relationships between parties who usually (but need not) have some explicit written agreement that sets out some of the key terms of the deal—annual salary, pension and health benefits, workplace and the like[12]—but that skeletal framework leaves open a large fraction of their day-to-day interactions to interpersonal decisions taken on the spot, guided by unenforceable social norms that usually sit outside the scope of the law.

Even though these informal norms govern in virtually all day-to-day interaction, it would be a mistake to think that they cover only economic matters. It is surely correct that any system of employment relations has to take into account the element of "dignity" in order to be complete. Any employer that overlooks these soft dimensions will find it difficult to hire and retain workers. It is sometimes asserted that the only dignitary interests that employers respect are those of key workers who have entrenched positions within the firm. But I believe that this misstates how firms operate. Workers function within a semi-public environment, such that any affronts to the dignity of lower-level workers could, and often do, easily provoke a strong response from senior workers who take a protective position toward their own subordinates or who believe that it is downright immoral to take advantage of lower workers within the firm. Indeed, there are many senior workers who think that they have an informal fiduciary duty to protect weaker workers from bullies. There is little hard empirical evidence on questions of this sort, but in my own 54-year career I think that these forces offer a powerful constraint on employer behavior, for no one likes to lose a good subordinate to spurious charges. No one can be confident that all workplaces operate by the same norms or have equal success in this regard. But the more modest proposition—that bad behaviors have adverse consequences on recruitment and retention of wayward firms—seems eminently defensible.

The dignity question is not unique to employers, for it is also at work with unions, who must respect the dignitary interests, not only of their members, but also of other employees in the bargaining unit whom they represent. It is easy to forget that slighting those workers who do not support you can create the same kinds of workplace tensions. And these tensions often come to a high boil in those cases where two rival unions are bidding for the support of the same group of workers in some kind of jurisdictional dispute.[13] It is generally difficult to make operational

11 National Labor Relations Act, 29 U.S.C. §§ 157 [Sec. 7] & 158(a)(1) [Sec. 8(a)(1)] (1935).

12 *See* Stewart MacCauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev 1 (1963). This is a highly influential article that does address the role of reciprocity in bolstering exchange relationships.

13 For the legal complications, see Douglas Leslie, *The Role of the NLRB and the Courts in Resolving Jurisdictional Disputes*, 75 Colum. L. Rev. 1470 (1975).

any set of rules that are intended to protect and advance dignitary interests in union settings. Yet just because notions like dignity cannot be easily operationalized in a court of law does not mean that they do not matter, for they most definitely do, whether the legal regime adheres to the contract-at-will model or imposes some restrictions on employer freedom—which in my view often weakens the ability of firms to make ad hoc adjustments in order to satisfy these dignitary interests.

At first blush, therefore, the use of the term "relations" seems to suggest a greater appreciation of these soft values under which voluntary written agreements set out the basic parameters of the deal and informal negotiations take care of the rest. But that is not the way these labor statutes treat the issue. That point is made quite clear by the two iterations of labor-related statutes in New Zealand, the first of which, called the Employee Contracts Act of 1991 (ECA)[14] (which I had a hand in preparing), had a strong freedom of contract orientation. Its stated mission was to "provide for freedom of association," which in turn meant that workers had the right to decide whether to be bound by collective bargaining agreements and employers had the right to decline to bargain in that fashion. The ECA did not instate full-blown contract at will, but even so it ushered in an era in which about 600,000 new jobs were quickly created. At the same time, union membership fell from over 50 percent of the labor force to around 20 percent.[15]

But when the Labour Party took over the government in 2000, these earlier successes did not seem to matter. The recalibration of the basic statutory deal was called, quite consciously, the Employment Relations Act (ERA) of 2000.[16] The New Zealand ERA, like the NLRA (which also uses the term relations), abstractly speaks of good faith as a contractual imperative. But it makes it clear that informal adjustments of ordinary relational contacts are not how the principle of good faith is implemented. Instead, the ERA immediately veers 180 degrees by creating obligations of trust and confidence. The law also imposes a *legislative* requirement of good faith behavior in a context in which collective bargaining arrangements are said to be necessary to cope with the inherent inequality of bargaining power between laborers and employers. This inequality is presumed largely as a matter of political faith. That conception, however, is at sharp variance with the traditional notions of good-faith agreements under the private law, which go exactly in the opposite direction by tolerating ad hoc adjustments that do not have the formality and generality normally associated with legal rules.

The stage is now set for a contrast between the two regimes. Part I examines how concepts like good faith and autonomy function in an unregulated market. Part II then looks at interactions between workers and firms in both union and nonunion settings. Part III then looks at the deep divide between the classical liberal and progressive views, with especial reference to the recent Supreme Court

14 Employee Contracts Act 1991.

15 Richard A. Epstein, *Employment and Labor Law Reform in New Zealand*, 33 Case W. Res. J. Int'l L. 361 (2001).

16 Employment Relations Act 2000.

decision in *Cedar Point Nursery v. Hassid*, which sharply cut back on traditional union prerogatives. A short conclusion follows.

I. The Unregulated Market

As is my habit, I find it instructive to begin with a passage from the Roman law:

> Likewise, in contracts of this description [consensual or *bona fide* contracts] the parties are reciprocally liable, because each is liable to the other to perform what is proper and just; while, on the other hand, in the case of verbal obligations one party stipulates and the other promises; and in the entry of claims one party creates an obligation by doing so, and the other becomes liable.[17]

The class of contracts that are governed by bona fide principles include sale, hire, agency, and partnership, where it is understood that the hire contract (*locatio conductio*—placing and receiving, as it were) covers not only leases of land, but also employment relationships of all sorts, including independent contractors. Now it is important to stress the evident divide between these good-faith contracts and the *stricti iuris* contracts that form the backbone of Roman contract law. Thus, at the back end of the quotation, there is a discussion of the contract of *stipulation*, which in Roman law is a unilateral contract that deals with promises made typically for a debtor to pay money, creating a liquidated obligation on the part of the debtor on the one side to a creditor on the other. The distinction between these kinds of contracts is not born of any latent hostility to freedom of contract. Rather, it marks an intelligent assessment of what freedom of contract requires. In the background of a one-sided promise to a stipulator, there has usually been a prior loan, leaving precious few reasons why a borrower should be able to walk away from that obligation; those reasons that do matter, such as a modification of the original terms, can be handled by explicit exceptions to the basic rule, as under the Roman law rules of novation (modification of an ongoing arrangement that sometimes involves the introduction of third parties) and *acceptilatio* (a formal release that takes the place of full satisfaction of the debt). Certainty, not fluidity, is the baseline for the analysis of loan transactions, as it is to this very day, so the allowable exceptions to the basic obligation are sharply limited.

In contrast, the consensual contracts are often enforceable both when fully executory and even when they are not. The basic pattern of the deal calls for bilateral commitments, such that the key notion is "reciprocal" obligations—much like the non-contractual elements stressed by Stewart McCauley.[18] This means that what one person does is often conditional upon what the other side has (or has not) done. Those rules of sequential conduct make it impossible to spell out at the time of contract

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17 The Four Commentaries of Gaius on the Institutes of the Civil Law, Third Book, G. Inst. 2.144, http://legalhistorysources.com/Law508/Roman%20Law/GaiusInstitutesEnglish.htm#THIRD%20BOOK (last visited Oct. 29, 2022).

18 *See* MacCauley, *supra* note 12.

formation all of the key terms with the requisite specificity. Of course, this does not imply that there are no standard implied terms; indeed, the warranties of title (or in Roman law, the warranty against eviction) and the warranty of merchantability are presumptively baked into the formula, as they are today.[19] But that still leaves a lot of room for good-faith variations, for A must perform in a certain way only if B performs first, and this leaves a large uncharted field in which A must adjust his conduct when B has not quite performed correctly, which in turn often requires further adjustments by B when needed to help keep the relationship alive, all while sharing the gains and losses between the two. It is in just these cases that social norms, often based on course of dealing or industry practice, come to fill out the gaps in the initial deal by setting out what should be expected in common scenarios like those dealt with by the two warranties mentioned above.[20] These conditions are, in most trades, more regular than is commonly supposed. Parole evidence on standard industry practice is a lot more reliable than parole evidence intended to show some unique arrangement, which presents a greater risk of fraud.

This basic principle, moreover, is not as arcane as it sounds to some modern ears. The major trope, for example, in partnership cases is that as these duties evolve, each party is supposed to act as though the benefit conferred upon the partner is of equal value to the benefit conferred upon himself. If both sides follow that norm, the discrete losses on individual transactions cancel out, so that the net positives over the full round of cases is fully shared, even though the balance of advantage looks quite different if each individual step is considered in isolation from the others, where long-term reciprocity is no longer in play.

Indeed, it is just that long-term aggregation that enables long-term relationships to work well, so long as each side has trust in the other. Trust depends on two conditions. First, there is the key choice of trading partners, which is decided by the parties involved and never imposed by a third party. Early partnerships were often between two brothers who, under Roman law, first became independent after the death of their paterfamilias, which meant that each party was his own man (literally *sui juris*).[21] The biological concern that each had in the welfare of the other was not complete, but it was large enough in many cases to reduce the temptation to default, given that hurting a trusted and valued partner was, in part, a self-inflicted wound.

Second, the rules must be worked out in such a way as to deal explicitly with the worst forms of contractual opportunism. Thus, in certain partnerships, if one

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19 In both Roman and Anglo-American law, buyers are concerned with two kinds of risk in any transaction. The first is that the title that they receive will not be good, insofar as some third party has a claim superior to that of the seller. The warranty of eviction states that if the buyer's title is challenged, the seller will defend him against eviction. The second key warranty has to do with the quality of the goods, especially those defects which are not observable at the time of purchase. This warranty protects the buyer against those risks. In general, it allows for the return of the goods when the defect emerges. There is in all legal systems a much-mooted difficulty of the extent to which either tort or contract law gives further protection in the event that the use or consumption of the goods in question causes physical damages.

20 *See, e.g.*, Uniform Commercial Code, § 2.208. Course of Performance or Practical Construction.

21 *See* G. Inst., *supra* note 17, at 3.2.

partner broke out to claim a payment that had to be shared by both, he, by his opportunistic behavior, forfeited his share of the proceeds to the innocent partner; yet if a parallel payment came his way, he could keep the gain entirely.[22] Similarly in cases of willful breach, the rule is heads I win, and tails you lose, which means that if the breaching party makes a gain, he is required to turn it over to the other, but if he suffers a loss, then he must restore with interest the diverted sum. It should be clear that under this rule, the expected value to the breaching party is always negative. The rule thus operates as an effort to counter the forces of self-interest by making sure (to the extent that detection is possible, enforcement is reliable) that the breacher always gets a net negative expected value from the transaction. Hence there is a careful interplay between the social and the legal dimension of the arrangements.

Exactly that type of interaction between the legal and the social takes place in the employment context, not only with respect to individual workers who are eligible for union membership, but up and down the full set of contracts. This includes contracts with supervisors who, however defined, do not fall within the class of protected employees under most labor statutes.[23] In this regard, the standard contract at will is the usual skeletal kind of arrangement that allows for dismissal for good reasons, bad reasons, or no reason at all. But it would be a mistake to assume that these contracts are conducted as if the "no reason" option dominates employer or worker behavior. What the term is designed to express is that the court will not second-guess these decisions when there is no specific contract provision that covers the matter in question. An undifferentiated for-cause standard is not a suitable basis for litigation because the decision to fire is often made after elaborate investigation and negotiation. It is already hard enough to prove cause due to either antidiscrimination laws or labor laws, which prohibit firing or other adverse decisions based on either certain protected characteristics or union activities. But even if these constraints were not in play, any employer who wanted to be irrational would still have so much to lose from his capricious actions that it is doubtful that such cases would be anything other than rarities in an unregulated environment.

It is simple fact that an unwise firing is costly to any employer, especially one with many employees. The employer who exercises that option has to bear the cost of going shorthanded until a replacement is found, which itself can turn out to be a time-consuming process, especially when filling positions of greater skill. Firing a weak or difficult worker, in contrast, can often release the capabilities of the existing employees and go a long way toward improving office morale, which remains a key determinant of firm success. In addition, firing capable workers has reputational costs, for strong employees, fearing future erratic behavior, may look elsewhere because they now place less stock in the implicit understandings of good faith with their employer. Indeed, the reputational sanctions here work much more powerfully

22 *See id.* at 3.2. The parallels to modern corporate opportunity doctrine should be apparent.
23 *See* National Labor Relations Act, 29 U.S.C. § 152(3) [Section 2(3)] (1935), where the term supervisor is left undefined.

against an employer with many workers than against an employee, who has better chances of avoiding detection (even in an age of internet searches).

Within this framework, legal protections can kick in whenever an employer has engaged in opportunistic behavior. Thus, as a variation on the Roman law of partnership, the employer who ditches an employee before payment is made for past work still must pay that commission or fee after dismissal. The contract at will is only at its full force when the relationship is fully executory. And in those cases where a firm does fire workers that incur job-specific costs (for example, in training or moving) before taking the job, the workers will usually receive some form of protection if they are fired just after work begins. This will usually take the form of a front-end advance, or a form of severance pay, even if none is stipulated in the contract. If they are fired later on, however, they can recoup these transition costs. In addition, all these obligations are quite sensitive to scale, so that if these front-end costs get large, specific reimbursement will be negotiated in advance; and if the termination costs take place under circumstances where the market is closed to new opportunities (e.g., seasonal work), the deal will require some severance pay, which is typically done by formula, and rarely by applying damage mitigation rules that are far too difficult to administer in cases of mass layoffs. The well-nigh universal preference for fixed severance pay is explained by the fact that the numbers first increase the probability of both actual and perceived parity among workers, and, second, avoid counterfactual inquiries into worker minimization strategies, which are hard to determine in any individual case, and impossible to handle administratively in any event.

There are also similar questions of opportunism on the worker side. The basic problem here arises because worker pay under term contracts is often equally distributed across pay periods, either in months or weeks. The work, however, is not evenly distributed over time. For example, in agricultural contexts, the work typically peaks toward the end of the harvest period, since the crops will rot if not quickly harvested. A worker who quits early can gain a huge advantage if he can get, say, 80 percent of his pay while having done only 60 percent of his work. Everyone agrees that the strategic advantage in this case lies with the worker, and the question is what remedy is best to deal with it. There is little doubt that all sorts of informal sanctions and inducements are active in these cases, especially with respect to workers who have long-term relationships with the employers. Nonetheless, these will fail in at least some circumstances, so when the matter goes into litigation, it becomes necessary to determine the proper response.

The classic nineteenth-century example involves the farmhand who signs on for an "entire contract" of one year for $120 payable at the end of the work year, plus room and board, and then leaves after 9 and ½ months. Should he receive no cash compensation because he left early? Or receive $95 prorated by time? Or receive some lesser sum if the decision to quit was before harvest time, and the cost of cover by hiring in the spot market was in excess of $25?[24]

The first response seems harsh if the worker breach results in a windfall to the employer. But in many cases the worker has received room and board for the period, so that denial of a bonus is a powerful inducement for full performance of the contract. The simple proration has to be wrong because it leaves the worker better off with the breach than with performance. The last result reduces the sting to the worker, but makes it difficult to do the mitigation calculation, so the full denial tends to be the dominant solution.

The same issue can arise today with respect to bonuses, where the uniform practice is that employees, including fancy professionals at the top of the food chain, receive nothing if they quit the day before the bonus has vested. This is not too dissimilar from the nineteenth-century practice if one views the cash as a bonus on top of the room and board that was provided during the stay.

The same theme arises when an employer agrees to foot the bill of paying the worker's cost of completing a job-related degree. If that payment is made lump sum prior to completion of the degree, the worker may be tempted to quit after the education is completed, but before the employer recoups its anticipated costs of funding his or her education. One elegant contractual solution is to have the worker pay for the degree, and for the employer to pick up some fixed fraction of the expenses (say 20 percent) for each year that the worker stays on the job, in an effort to combat opportunism by paying only after the worker stays at the firm. There is no need to go into greater length on this point. The key takeaways are that implicit social norms of the workplace not only help to ease conflicts of interest, but also help deal with dignitary and other nonpecuniary issues. But even when these practices are embedded, it is imperative that specific rules guard against opportunism from *both* sides—a bilateral risk that the modern pro-union forces do not address. The reciprocal duties of good-faith conduct are needed because of the persistent risk of bad-faith conduct, also from both sides. The good-faith principles that started with Roman law contracts thus remain fully applicable today precisely because the formal structure of the opportunism problem depends only on sequence of performance issues, and not the various modes of performance.

II. Contractual Behavior in Union and Nonunion Settings

It should be apparent that the notion of a "social" relationship is quite different as one moves from private arrangements to regulated ones.[25] Labor statutes create an obvious tension between the good-faith adjustments of the private law and the

24 *Compare* Stark v. Parker, 19 Mass. 149 (1824) (take nothing), *with* Britton v. Turner, 6 N.H. 481 (1834) (pro rate with adjustments).

25 For discussion, see Richard A. Epstein & Kayvan Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 Berkeley Tech. L.J. 1381, 1398-402 (2017).

explicit duties of good faith imposed by statutes. The difference is evident from one simple observation. One central position of the private law of contract is that the law does not make agreements for the parties against their will.[26] The doctrine of good faith in contracting therefore only fills in the gaps in agreements between willing parties. The law never forces one to choose a contracting party against his will. But, of course, forcing choice of contracting parties is the *raison d'être* of mandatory collective bargaining regimes, which now use the notion of good faith to determine just how an employer must deal with an unwanted union in whom there is, almost by definition, no trust by management. The same words have very different meaning.

The same analysis is true of the notion of "autonomy," which is also used to support a (false) liberal theory of property rights. The notion of autonomy is at common law closely allied with the notion of good faith. The autonomy principle says that people do not have to bargain with those with whom they choose not to contract. The great power of this definition lies in its ability to give a precise and operational definition of the correlative duties that the autonomy right imposes on other people.[27] That correlative duty demands, colloquially, only that people keep their hands (and feet) to themselves. Technically it means that they refrain from the use of force and related forms of aggression (poisoning, setting traps) against others. What it does not require is any measure of resource support, which could in turn infringe on a supporter's own autonomy.

Putting the fundamental obligation in this form has the following great virtues. First, public knowledge of the rule can be taken for granted, which in turn means that the maxim "*ignorantia iuris non excuseat*" (ignorance of the law is no excuse) can be made operational because there are no gaps in knowledge of this principle by any perpetrator. Once affirmative obligations—for example, the obligations imposed on a sex offender—are far less clear, a notice requirement needs to be imposed.[28] The content of obligations of financial support cannot be determined abstractly, and such obligations therefore impose huge burdens for the system to determine and for individual citizens to learn of their content.

Second, the correlative duties are insensitive to the variations in the wealth of various individuals. Rich or poor, the obligation to refrain from the use of force is constant, so that it is not constantly revised with changes in either individual or social wealth.

26 *See, e.g.*, Boston Ice Co. v. Potter, 123 Mass. 28, 30 (Mass. 1877) ("A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into").

27 For discussion, see Richard A. Epstein, Design for Liberty: Private Property, Public Administration, and the Rule of Law 74-75 (2011).

28 For the old example, see Lambert v. California, 355 U.S. 225 (1957) (holding that in order to arrest a convicted felon for nonregistration, the party must have actual knowledge of the law).

Third, the obligations here are scalable. The prohibitions against the use of force work well in small communities and in large nations. There is, therefore, no need to develop a scheme to transition from one state of the world to another, as either individual or social conditions remain.

Given the relative ease with which these conditions are satisfied, it is possible to run this system of autonomous rights with a relatively small administrative state. To be sure, there are reasons to limit individual autonomy, such as requiring individuals to pay taxes, register to vote, or enter into certain lines of businesses. But the classical liberal position tries both to limit the occasions and to tailor the exceptions. Broad, flat taxes are thus preferable to elaborate progressive schemes, and licensing requirements should depend more on simple measures of eligibility (age) and simple financial tests and less on a full-scale administrative determination of entitlements. And where competitive markets are possible, as is surely the case with labor, the reasons to override individual autonomy are limited to instances of monopoly power.[29]

The Dagan position is much more elusive because it seeks to be all things to all people. Dagan and his supporters seek to avoid this fact through constant reiteration of the terms "autonomy, liberty, property, and equality," which are (at a surface level) perfectly consistent with the classical liberal notions of labor and property. In one formulation, Dagan's position reads:

> In a genuinely liberal polity, law follows the three pillars of the autonomy-enhancing conception of property: (1) it carefully circumscribes owners' private authority so that it is adjusted to its contribution to self-determination; (2) it includes a structurally pluralist inventory of property types so as to offer people real choice; and (3) it complies with the prescriptions of relational justice so as to ensure that ownership does not offend the maxim of reciprocal respect for self-determination on which property's legitimacy is grounded.[30]

These generalizations are high on aspiration but low on specificity. In particular, Dagan's is a theory of entitlements that has no clear way of generating a correlative set of duties in the way in which the classical liberal definition does. It is not clear that people must refrain from the use of force against others, if that might be helpful in the self-realization of their own ends. It is not clear whether the conception is universal so that it applies to all people in a state of nature, or whether it turns out to be role-specific so that landlords, lenders, and employers may be subject to some (unspecified) obligations to make affirmative contributions to the welfare of tenants, borrowers, and employees. Nor does it clarify societal obligations, such as who has an obligation to supply what resources to which individuals. The muddiness of these entitlements makes it difficult to know what resources are assigned to which persons, which knowledge is necessary for persons to swap their own goods or services for those of another.

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29 *See* Epstein and Posner debate, *supra* note 5.

30 Hanoch Dagan, *Autonomy and Property*, *in* Research Handbook on Private Law Theory 185 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

Indeed, the weakness of these conditions is reflected in modern labor law. The classical liberal constitution allows individuals and firms to trade on whatever terms they see fit. But the more complex versions of autonomy adopt what no classic liberal theory would allow, namely the requirement to bargain, or worse, mandatory arbitration. For example, one forced bargaining statute misnamed the "Employee Free Choice Act,"—now included in the Protecting the Right to Organize Act—requires mandatory arbitration toward an initial two year "contract" which is the exclusive result of an administrative proceeding that no employer cares to join.[31] It is therefore very clear that the collection of classical liberal terms is pressed into service of an agenda wholly antithetical to its fundamental premises. The need, therefore, is to identify the intellectual levers used to make the switch from competition to state-dictated monopoly power. A number of notions, going back a long time, are invoked to close that gap.

One common argument is to say that freedom of contract is not possible until each side has sufficient wherewithal to bargain effectively. Cynthia Estlund quotes with evident approval a passage from Otto von Gierke in a recently translated 1889 lecture: "Unrestricted freedom of contract destroys itself. A fearsome weapon in the fist of the strong, a blunted tool in the clutch of the weak, it becomes the means of oppression of one by another, the merciless exploitation of intellectual and economic power."[32]

Really? When wages tend to rise with productivity? In the United States today, there are more job openings than job applicants, in part because the availability of large unemployment subsidies has delayed the return to work of some prospective employees.[33] And the gains are the greatest in red states where the subsidies turn

31 *See* Protecting the Right to Organize Act of 2021, HR. 842, 117th Cong. (2021) which has already passed the House of Representatives, https://www.congress.gov/bill/117th-congress/house-bill/842. One key provision requires compulsory arbitration before a three-member panel—one from labor, one from management, and one neutral—if the parties cannot agree on a contract within 30 days, plus an additional agreed time. The arbitral panel will have access to the employer's financial records, the nature of its business, the employee cost of living, and employee needs and the needs of their families. A majority of that panel can impose a two-year contract binding on both parties, subject to variation. *See* PRO Act (d) Unfair Labor Practices § 2(d). The new provision for arbitration differs from that under the EFCA, which left it to the agency to set out the rules for regulation. I regard these provisions as unwise and unconstitutional under current American law. *See* Richard A. Epstein, The Case Against the Employee Free Choice Act (2009). But they do look as though they could be consistent with Hanoch Dagan's pliable definitions of property and autonomy.

The Act also contains other provisions that will tip the balance strongly toward labor, including Section 2(d(1)), which is intended to limit the ability of the employer to hire replacement workers at the conclusion of any economic strike.

32 Otto von Gierke, The Social Role of Private Law (Ewan McGaughy trans., 19 German L.J. 1017 (2018)) (1889).

33 Will Feuer, *Job Openings Soar to New Record of 9.3M as Workers Stay on Sidelines*, N.Y. Post (June 8, 2021), https://nypost.com/2021/06/08/job-openings-soar-to-new-record-as-workers-stay-on-sidelines/. "Economists say three factors are keeping new workers on the sidelines: fear of catching COVID-19, child-care responsibilities and pandemic-boosted unemployment benefits that give people an extra $300 per week." None of these are market failures. The last is an illustration of how subsidies can distort the work-leisure distinction.

out to be smaller.[34] Neither of these results is surprising under standard market assumptions. Indeed, as a theoretical matter, how could employers execute Gierke's fiendish plot so long as workers have exit options? A less extreme version of the same argument was made by Oliver Wendell Holmes in his dissent in *Coppage v. Kansas*,[35] today a widely disapproved case that (rightly) held that collective bargaining statutes were an unconstitutional infringement of the principle of freedom of contract:[36]

> In present conditions, a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins.[37]

Dagan takes much the same position about the preconditions for freedom of contract when he writes:

> For property law to deliver its ideal of enhancing people's self-authorship, it *must* rely on a just background regime that affords everyone the material, social, and intellectual preconditions that are needed to enable people to become and remain self-determining individuals. This is why the book's defense of the liberal ideal of property is explicitly qualified: property is fully justified only in a genuinely liberal polity, and its legitimacy is necessarily contingent on the performance of a background legal regime that supports the enhancement of autonomy.[38]

There are slight differences in these various formulations. The Holmes dissent rested on the proposition that freedom of contract depends on an "equality of position," while the Dagan position posits a just background regime of material and moral support to allow people to become self-determining individuals, whether or not equal in resources to the position of some trading partner. But these differences in orientation are small compared to the common misconceptions. The classical liberal position says that people who have limited means should use them to their best extent, no matter how low their wealth or paltry their skills. The many rags-to-riches stories are testimony to the power of individuals to rise from honest labor when they face no positional or wealth barrier to entry. Commonly, people work their way up from humble origins to enter into all sorts of contracts that improve their position. That could include working (like apprentices and interns) for very low wages in the hope that the accumulation of human capital will make the venture worthwhile, while using savings or loans or family connections to cover their

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34 Rebecca Rainey & Eleanor Mueller, *Red States Lead Economic Recovery, Giving GOP Ammo Against Biden's Spending Plans*, Politico (June 24, 2021), https://www.politico.com/news/2021/06/24/gop-states-fight-uneven-recovery-495762.

35 236 U.S. § 1 (1915).

36 For my defense of the yellow dog contract, see Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357, 1370-75 (1983) (defending the yellow dog contract).

37 *Coppage*, 236 U.S. at 26-27 (Holmes, J., dissenting).

38 Hanoch Dagan, *Liberal Property for Skeptics*, Law & Pol. Econ. Project (Apr. 2, 2021), https://lpeproject.org/blog/liberal-property-for-skeptics-part-2/.

short-term expenses. The principle of freedom of contract thus states that people will, if various legal impediments to voluntary arrangements are removed, enter into bargains that improve their position relative to what it was. If that condition is satisfied in competitive markets, there is no reason to guess at the relative gains of the various parties. Never tamper with win/win transactions in market settings.

It is therefore dangerous to claim, as did Holmes, that workers somehow have the sole right to determine which contracts are fair to them, any more than employers have the right to determine, which contracts are fair to them. The whole notion of contractual fairness is that only a set of mutually agreed upon terms counts as fair. More to the point, it is just wrong to insist that either "equality of position" or material self-sufficiency is a precondition for exercising contractual freedom of contract at all. If it is thought that workers or anyone else have to meet minimum conditions for enjoying liberty to work, then should workers be barred from selling their labor in nonunion contexts? What Holmes called a "fair" wage is in practice a monopoly wage that has social costs.

Nor is the case for unions made stronger by relying, as does the New Zealand Employment Relations Act, on the notion of "inherent inequality of bargaining power." The NLRA of 1935 uses the same trope: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty who are organized in the corporate or other forms of ownership . . . ."[39] The words "full" and "actual" are intensifiers whose operational content is unclear. But in this instance, neither of these conceptions comes close to explaining how employment contracts are made. Thus, many employment contracts are formed in nonunion settings, and others are formed by workers who after majority vote decline to join a union. Are their contracts somehow defective? And if they are not, just how are these terms agreed to in the first place other than by ordinary business negotiations where wages tend to move up or down with market conditions, in ways that reflect the various wealth and other preferences of workers and management alike? Just as an employer need not hire and may freely fire, so too the worker need not take the job and may freely quit if the job is not to his or her liking. What then does it mean for there to be inequality of bargaining power in this setting?

Nothing, really. The employee surely has a reservation price, that is, a wage level that leaves him worse off than if he had taken the job. The acceptance of one job means that personal labor—cooking at home, making repairs—is lost. Since those are not options worth zero, no employee will accept every offer regardless of its terms. At the minimum, the contract will be accepted only if in expectation it promises wages (and collateral benefits—dealing with health insurance, pensions, vacations) higher than the lost opportunities. So there is an instant floor on offers, which could vary over the course of any relationship, at which point both parties to a contract can reassess their position and leave, no questions asked. Most of these implicit renegotiations are successful, but employment turnover is high in any event. Here the basic principle appears to be that workers are more hesitant to quit in bad

39 National Relations Labor Act, 29 U.S.C. § 151 (1935).

times, when employers are more willing to fire. And the converse is true in good times. The Bureau of Labor Statistics records a ratio of quits to layoffs, to reflect the basic situation, and it tends to confirm the basic view, as the ratio in troughs can be 0.7/1.0 (more dismissals than quits) and in good times 2.0/1.0 (the reverse).[40] It is hard to think of any explanation based on the inequality of bargaining power that could explain these wide variations. But those numbers look perfectly sensible as a rational response on both sides to changes in the overall landscape.

The difficulties with this notion of unequal bargaining power go deeper because it is not clear just how great an advantage is said to accrue to the employer. Bargaining power plays no role in a perfectly competitive market, because wages tend to converge to a single point, which leaves a zero-bargaining range over wages. But most markets are not perfectly competitive. There are always ad hoc positional advantages that arise for both sides during the course of a relationship where both sides develop some specific trait that makes it hard from them to switch to another position where they have no accumulated social capital. At that point, the bargaining range could go, to keep it simple, from zero to ten. The inequality of bargaining power in these constrained circumstances is used to predict the division of surplus. Closer to zero advantages the employer and closer to ten, the employee. Predictions as to which way this will move are terribly hard to make in any individual case, and even harder to generalize. As with the simple farmhand example, the risk of bilateral monopoly precludes any generalization, let alone one that rests on strong adjectives like "inherent" power. This notion has no clear empirical content, and thus no real normative pop.

III. Property and the Workplace

The question then for the so-called new liberal theory is how it can escape the charge that it fails as against the traditional models. Here Dagan and his supporters offer a number of impassioned but insufficient rationales. The dominant strategy starts with a new descriptive account of how the workplace runs. Accordingly, Dagan introduces his account of the workplace in these decidedly Marxist terms:

> The critical upshot of this prescription is particularly significant regarding the workplace because employers' ownership of the means of production is conventionally understood to entail the management's power to govern. In turn, this managerial authority is said to justify a hierarchical structure of employees' subordination and to preclude claims for worker voice.[41] If the ownership of means of production necessarily (or obviously) takes a Blackstonian form, then property is necessarily

40 For a recent account of the fluctuations, see Rick Penn & Eric Nezamis, *Job Openings and Quits Reach Record Highs in 2021, Layoffs and Discharges Fall to Record Lows*, Monthly Labor Review, U.S. Bureau of Labor Statistics (June 2022), https://www.bls.gov/opub/mlr/2022/article/job-openings-and-quits-reach-record-highs-in-2021.htm.

41 *See* Fibreboard Paper Products Corp. v. National Labor Relations Board, No. 379 U.S. 203 (1964).

> a—if not *the*—major source of many autonomy-reducing features of existing labor markets, as so many critics of property warned through the ages.
>
> A liberal theory of property resists—indeed repudiates—this conventional wisdom. It requires us to carefully delineate the private authority of owners of means of production so that owners-employers' authority must not include excessive powers that may impinge upon workers' basic rights.[42]

Unfortunately, these observations take the view that the power to govern, which normally goes with management, should be treated as an absolute, such that the workers in the firm are bound to follow orders, come what may. That power to govern then leads to a hierarchical structure, which in turn is backed by a "Blackstonian" view of property rights, which always involves the "sole and despotic dominion" over some asset that does not brook interference from anyone else. From these assumptions it is a short step to claim that the workforce situation for "existing labor markets" will necessarily have features that reduce individual autonomy.

This description accurately describes a slave economy, in which workers are acquired by conquest, or perhaps even a conscription economy in which men and women are drafted into their positions. But it does not remotely describe the Blackstonian model of private property, which gives the owner the exclusive right of possession (subject to narrow constraints in cases of imminent peril to life, limb, or property), but in no way dictates how permission to enter should be given or on what terms and to what individuals. Nor does the Blackstonian view of property explain what offers from property owners should be accepted. Mutual agreement is essential for these licenses and leases to go forward, whether in labor markets or anywhere else. Those who sign up will often, as with the contract at will, reserve the right to quit, which is not consistent with a view of absolute employer dominance. Management does retain the power to govern, and it is under current rules extraordinarily reluctant to surrender these prerogatives, say on issues of subcontracting work, unless compelled to do so by labor law. But that power to govern does not prevent a worker from quitting, and in practice any exercise of management power requires an extensive amount of "buy-in" up and down the ranks to implement a successful plan. It is therefore simply mistaken to say of any nonunion firm that its workers do not have a voice in the operation. There are regular meetings, suggestion boxes, trips to the boss's office, informal exchanges over drinks in which the successful firm recruits information from below in an effort to improve both morale and overall performance.

None of this is the slightest bit exceptional in the world of management. Here is one telling story from, of all places, the *New York Times*, entitled "Hubert Joly Turned Around Best Buy. Now He's Trying to Fix Capitalism,"[43] which describes

42 Hanoch Dagan, *supra* note 30, at 10 n.31.

43 *See* David Gelles, *Hubert Joly Turned Around Best Buy. Now He's Trying to Fix Capitalism*, NY Times (July 15, 2021), https://www.nytimes.com/2021/07/15/business/hubert-joly-corner-office-best-buy.html.

Hubert Joly, CEO of Best Buy and a senior lecturer at the Harvard Business School. Here was his formula, which leaves Gierke in the dust:

> Eschewing the conventional wisdom—that Best Buy should slash wages and cut costs in a bid to jack up profitability—Mr. Joly began investing in the company. He gave workers better perks, reorganized store floorplans and even teamed up with Amazon. The strategy worked, and Best Buy shares soared during his tenure.[44]

There are some important lessons to learn here. There was no union in sight. Nonetheless, Joly did not wait for workers to demand anything. He gave them what he thought they should have without being asked. He also made other changes, both large and small, to secure employee buy-in. He cared about his employees and said so. Here is a good guess that he teaches these same lessons to his HBS students. It is not clear that this model will work for all firms, but by the same token, there are surely many employers who seek to stay ahead of the game by making offers to anticipate what their workers want before they walk out the door. Nothing is more common today than endless stories about how employers must face the new reality that many potential employees do not want the grind of a daily commute in the post-Covid age, and therefore commonly negotiate agreements that often reduce office time.[45] The patterns are many, but the one description that does not apply is that the employer decrees and the employee obeys.

There was one predictably sour note in Joly's interview. He denounced Milton Friedman for looking only at the bottom line with an "obsessive focus on profits." This only proves that he did not understand Friedman's message, which was to praise competition as the best means to allocate scarce resources in both labor and other markets. Employers that are obsessed with profits will fail if they treat employees as expendable goods. But Friedman was well aware that the only way to secure profits in the long term is to make sure that employees want to stay with the job. So if Joly's strategy made sense, he would embrace it as the best means to improve profits. And he well knew that the competition that is everywhere in labor markets is antithetical to Dagan's view of labor relationships as command-and-control operations.

There is, moreover, one other key lesson to learn from Joly, which is that the level of interaction between workers and management is almost always greater in a nonunionized firm than in a unionized one. It is for this reason that the NLRA bans company unions organized by the firm to give workers a say in how they operate.[46] They know full well that a company union cannot organize strikes, and by giving workers a say in the firm, they reduce the likelihood that workers will want to join industrial unions adverse to labor. If these groups were so idle and ineffective, they would attract little support. But their durability in many businesses attests to their

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44 *Id.*

45 Morgan Smith, *64% of Workers Would Consider Quitting if Asked to Return to the Office Full-Time*, CNBC (Apr. 28, 2022), https://www.cnbc.com/2022/04/28/64percent-of-workers-would-consider-quitting-if-asked-to-return-to-office-full-time.html; *see also* James R. Bailey & Scheherazade Rehman, *How to Overcome Return-to-Office Resistance*, Harvard Business Review (Feb. 14, 2022), https://hbr.org/2022/02/how-to-overcome-return-to-office-resistance.

46 National Labor Relations Act, 29 U.S.C. § 158(a)(2) [Sec. 8(a)(2)] (1947).

usefulness, which can be explained by this proposition. These company unions allow the firm to efficiently address common issues without taking the risk that workers will use the weapons of collective bargaining against them. So, it is a win/win situation, which is why the case law makes it imperative that a well-functioning union be folded when an industrial union mounts its organizing campaign.[47]

Thus, union workers forfeit by statute their right to have, without union consent, direct contact with the boss on all matters of vital personal concern. The union is the exclusive representative of the workers, and its word governs so long as it is in power. The only rights that workers have are through a grievance process that under current law the union controls.[48] The possibility of promoting union workers into management positions is impeded for the simple reason that employers are loath to share trade secret-like information with workers who can turn it against them by sharing it with their union leaders or the union negotiating team. The union thus reinforces class differences and social hierarchies, including those which operate within the union itself. Unions tend to be successful only if there is some long-term continuity so that employees think it makes sense to invest in the union structures that can combine a mix of wage and non-wage advantages. But the so-called democratic structures in unions create a top-heavy team which tends to favor workers with seniority, who may want short-term higher wages—over younger workers who would like long-term stable relations and therefore hope to avoid the potential contraction or breakdown of a firm that is dominated from above.[49]

IV. Contrasting the Classical Liberal Model with the Progressive Worldview

Unfortunately, all of these complex internal dynamics within both union and nonunion firms are ignored by Dagan in his efforts to displace the classical liberal model, which assumes that workers and management seek their best options in a competitive market characterized by free entry and exit. The failure to even explore these markets helps explain the huge gap in his analysis. He does not address the failure of unions to maintain their membership rates in the private sector, despite having the benefit of the NLRA.[50] In the United States, the numbers have dropped from around 35 percent of eligible workers in 1954 to around 6 percent today. Meanwhile, New Zealand saw union membership drop after the passage of the

47 *See, e.g.*, NLRB v. Cabot Carbon Co, 360 U.S. 203 (1958) (enjoined operation of a company union).

48 *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967), written by a very pro-union Justice, Bryon White. My academic opposition to labor unions had its first public expression in my student Note, Richard A. Epstein, *Individual Control over Personal Grievances Under* Vaca v. Sipes, 77 Yale L.J. 559 (1968), which I wrote because it was the final examination question in my labor law class with the late Harry Wellington.

49 *See, e.g.*, Richard A. Epstein, The Case Against the Employee Free Choice Act 121-22 (2009).

50 Governor's Office of Employee Relations, *New York State Public Employees' Fair Employment Act—The Taylor Law*, https://goer.ny.gov/new-york-state-public-employees-fair-employment-act-taylor-law (last visited Nov. 14, 2022). The law was first introduced in 1967.

Employment Contracts Act of 1991, from approaching 50 percent of eligible workers to about 20 percent in the 1990s—a number that did not appreciably grow after the passage of the Employee Relations Act of 2000.[51] The simple explanation is best: too many unions do not provide long-term benefits for their members.

The situation is no better when we look to the third-party effects of unionization, which in the case of unions are overwhelmingly negative. The disruption of essential services by strikes in the transportation industry can inconvenience thousands of individuals who rely on these services to get to work, to school, and to medical appointments. Yet for these "incidental" damages, unions are not accountable. Unions often work on the larger stage to raise barriers to entry by calling for stronger zoning laws that keep out nonunion businesses. And they work together with their employers to impose tariffs and other restrictions in order to keep markets for themselves no matter the harms to firms (many of which work in the export markets) and individual consumers. To be sure, some unions may adopt efficiency practices, but they are less likely to do so than nonunionized firms. Their decline in position stems from the simple fact that even for their own workers, unions cannot provide long-term stable benefits

Why? Unions and their supporters like to point to fraud and other illicit practices by management, especially during union elections. That argument is in most cases a loser. Unfair labor practices are as likely to be employed by unions as by employers. The legal rules dealing with fraud have remained relatively constant over the years, and there is no reason to think that some isolated statement made in the heat of negotiations will turn the outcome of an election. Given the sprawling nature of unionization campaigns, plaintiffs are rarely able to prove that enough workers would have changed their minds in the absence of allegedly false and material statements. It is no surprise that unions (and also management) tend to lose efforts to set aside election results in litigation. But most importantly, the reason for these labor losses is often all too simple: despite the allegations of fraud, all signs suggest that workers independently conclude that they are better off without a union than with one, no matter how much abstract theorizing there is in the opposite direction.

Consider first the recent high-profile union efforts to organize a Volkswagen plant in Tennessee[52] and an Amazon warehouse in Alabama.[53] In both cases, the workers consciously preferred the steady income and health benefits in a nonunion arrangement to the risk that the automobile plant would move elsewhere if unionization made operating costs too high. In essence, the deal these workers had was better than the deal promised to them by a third party whose actual intentions and performance could not be known in advance. Too much public evidence of the

51 *See* Richard A. Epstein, *Employment and Labor Law Reform in New Zealand*, 33 Case W. Res. J. Int'l L. 361, 373 n.34 (2001).

52 Bobby Allyn, *Tennessee Workers Reject Union At Volkswagen Plant—Again*, NPR (June 15, 2019), https://www.npr.org/2019/06/15/733074989/tennessee-workers-reject-union-at-volkswagen-plant-again.

53 Alina Selyukh, *It's A No: Amazon Warehouse Workers Vote Against Unionizing In Historic Election*, NPR (Apr. 9, 2021), https://www.npr.org/2021/04/09/982139494/its-a-no-amazon-warehouse-workers-vote-against-unionizing-in-historic-election.

relevant considerations and too many articulate, antiunion workers existed for the fraud case against Volkswagen to take hold.

A third example, one in which I had an advisory role, involved the efforts of the United Farm Workers, backed in litigation by the then Attorney General of California, Kamala Harris, to unionize the largest stone fruit grower in the Fresno Valley, Gerawan Farms. The union briefly sought to organize the firm in the early 1990s but then disappeared until 2012, when it returned to argue that it was still the bargaining agent for workers who had never heard of them. This maneuver was possible because representative status under California law could not be lost through abandonment of duty, but only by a decertification election.[54] The union also attempted to take advantage of the fact that California law allowed for a first contract to be imposed by mandatory arbitration in the event of a bargaining impasse. Gerawan refused to recognize the union until there was an election, which was eventually held. Charges of fraud were brought and extensively litigated by California on behalf of the UFW. The disputed ballots were eventually put to one side, but the union still lost by over 80 percent of the vote, making the supposed fraud in one setting immaterial.[55]

What explains this outcome? Look at the contract terms, which do not square well with Dagan's theory of worker exploitation. Gerawan paid premium wages; it gave its workers the assurance of a non-mechanization guarantee; it did not hire temporary workers to undermine the position of its permanent employees; it provided scholarships for children of employees; it engaged them actively in the management of the business; and it was known for its solid relationships with workers and for its low employee turnover rates. The workers did not want UFW to interfere, and they picketed against the dues, equal to three percent of salary, that the union sought to collect. The firm and the workers were engaged in a win/win transaction, and that allowed them to prevail. The Dagan version of management/labor relationships is completely detached from the facts on the ground in these cases. To be sure, there are always firms that will and do misbehave, but they are punished by the loss of good workers and a corresponding decline in profitability. Good firms know that their workers are a huge asset, and they treat them accordingly.

Dagan is not the only theorist who talks about these issues, and it is useful to look at some of the other proposals dealing with the possible reform of labor law. Katharina Pistor speaks of a common theme in all these discussions—namely, the question of inter-jurisdictional battles of the sort that, especially in the corporate context, give rise to the choice between two sorts of legal regimes: the race to the

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54 *See* Gerawan Farming, Inc. v. Lyons, 24 Cal. 4th 468 (Cal. 2000).

55 Liza Veale, *Farmworkers Voted to De-unionize. The Union Says it was a Sham Election*, KALW (May 21, 2019, 4:49 PM), https://www.kalw.org/show/crosscurrents/2019-05-21/farmworkers-voted-to-de-unionize-the-union-says-it-was-a-sham-election. No one wins by 80 percent through fraud. Indeed, the union may have been the one engaged in questionable activity. The workers had hired their own counsel in order to fight the union because, among other things, it refused to allow Gerawan workers to attend as observers the arbitral proceedings between Gerawan and the UFW that set the terms of the mandatory settlement.

bottom, so that social welfare decreases, or the race to the top, so that the converse is true. She seems to opt for the former rule: "Competition for legal rules, that is, the ability to pick and choose the rules by which one wishes to be governed irrespective of the ramification of this choice for others, may be one of the greatest dangers for a liberal order."[56] In so doing, she hits on the same progressive theme of Dagan: that the workers are bit players in a drama over which they have no control, victimized by choices made unilaterally for them by management teams intent on thwarting the wishes of shareholders and workers alike by picking a friendly state that will bend to the wishes of the firm. By Pistor's definition, Delaware, home to about 70 percent of Fortune 500 companies,[57] often wins the race to the bottom in the corporate context.[58] But Pistor would be hard-pressed to explain why many American states, especially those with right-to-work (RTW) laws, have proven successful in attracting business away from the states that maintain strongly pro-union stances.[59] The RTW advocates do offer evidence to explain why these laws outperform union states. They eliminate the union dues, and they enhance workplace flexibility, which in turn allows workers to receive higher wages because capital is allocated in a more efficient fashion.[60] The official AFL-CIO response does not dig into the economic consequences of these regimes but simply denounces the law for hurting workers.[61]

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56 Katharina Pistor, *Liberal Property Law vs. Capitalism*, Law & Pol. Econ. Project (Jan. 27, 2021), https://lpeproject.org/blog/liberal-property-law-vs-capitalism/.

57 Delaware Division of Corporations, 2020 Annual Report Statistics, https://corp.delaware.gov/stats/ (last visited June 26, 2022).

58 *See generally* Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 212-18 (1991) (taking the race-to-the-top approach). The term "race to the bottom" is associated with William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974).

59 For my defense, see Richard A. Epstein, *The Misconceived Attack on Right to Work Laws*, 2017 U. Chi. Legal F. 95 (2018). The key provision is Section 14(b), which reads: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."
The most important case on this provision in recent years is Sweeney v. Pence, 767 F.3d 654 (7th Cir. 2014), which rejected the claim that the RTW statute imposed a duty on employers to compensate the union for the time and effort in representing nonunion workers in grievance proceedings, over a dissent of Diane Wood, *id*. at 671.

60 Adam A. Millsap, Right-to-Work Laws Are Good for Workers, Forbes (Oct. 23, 2019), https://www.forbes.com/sites/adammillsap/2019/10/23/right-to-work-laws-are-good-for-workers/?sh=651f67333119. Pro-employer groups raise the same issues, *see, e.g.*, *3 Ways Right to Work Benefits Your Company*, Projections, https://projectionsinc.com/unionproof/how-right-to-work-benefits-your-company/ (last visited June 17, 2022). Certain purists on the premarket side are opposed to RTW laws on the grounds that they make it harder to overturn the entire union structure. *See, e.g.*, Logan Albright, *The Problem with Right-to-Work Laws*, Mises Daily Articles (July 18, 2014), https://tinyurl.com/cwx7v794. *See also*, Gary Chartier, *What's Wrong with Right-to-Work*, FEE (Apr. 26, 2012), https://tinyurl.com/383m5cmt, which claims that RTW laws violate freedom of contract, a dubious premise since unions gain their power by majority vote, not unanimous consent.

61 *Right to Work*, Afl-Cio, https://aflcio.org/issues/right-work (last visited July 11, 2022): "Right to work" is the name for a policy designed to take away rights from working people. Backers of right to work laws claim that these laws protect workers against being forced to join a union. The reality is that federal law already makes it illegal to force someone to join a union. The real purpose of right to work laws is to tilt the balance toward big corporations and further rig the system at the expense of working families.

Given the state of the evidence, it is hard to condemn RTW laws as a race to the bottom. That charge would be true if a firm could pick a given state in order to better limit its liability to strangers. Thus, it would be unconscionable to allow a firm to reincorporate in one state in order to escape the clutches of the antitrust law of its original home state, which is exactly what happened in the famous Supreme Court case of *Black & White Taxi Corp v. Brown & Yellow Taxi Corp*.[62] But it does not require a revolution in antitrust law to deal with these instances of strategic behavior. It only requires that choice of law rules recognize that the same jurisdiction that governs formalities—the place of contract formation—need not, and often should not, govern the choice of regulatory law, which should be tied, when possible, to the place of a firm's actual operations. If parties cannot contract out of antitrust law, they cannot use reincorporation in another jurisdiction to achieve that same end.

Similarly, in dealing with interstate nuisance cases, both public and private, it would be a serious mistake to assume that the "source" state should be allowed to set the rules of its own liability, as the Supreme Court did in *International Paper v. Ouellette*.[63] This gives one state the ability to impose harms on another by making it more difficult for the harmed state to establish tort liability. But here the solution is to use the once-articulated federal common law, which is not tilted in either direction by political authorities.[64]

The situation with voluntary organizations is, however, completely different. Firms have to attract workers—which requires them to offer *both* satisfactory wages and collateral terms. If RTW states were inferior, we should see firms stay in states that offer strong union protections. All other things being equal, this would allow them to offer lower wages. No union would then seek the repeal of laws that gave them a leg up in organizational fights. But exactly the opposite pattern is observed. In reality, like strong protections for freedom of contract, the possibility of avoiding unionization is perceived as beneficial for workers. Pistor thus makes the same root mistake as Dagan. Both authors treat the labor contract as a matter of conscription, not as an opportunity to share gains.

Yet it is hard to see how worker autonomy is advanced by the recent efforts of progressive scholars to rehabilitate labor law on their own terms, including most prominently through the passage in the United States of the Protecting the Right to Organize Act (PRO).[65] In addition to mandatory arbitration,[66] the PRO is

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These laws make it harder for working people to form unions and collectively bargain for better wages, benefits and working conditions.

62 278 U.S. 518 (1928).

63 479 U.S. 481 (1987).

64 *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 110 (1938). Two ironies here: first, *Hinderlider* was decided on the same day as Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)), which had declared that there was no federal common law. Second, the use of this body of principles works well here but led matters astray in *Black & White Taxi*. For further discussion of the public nuisance cases, see Richard A. Epstein, *The Private Law Connections to Public Nuisance Law: Some Realism About Today's Intellectual Nominalism*, 17 J. Law, Econ. & Pol. 282 (2022).

65 *See* Gierke, *supra* note 21.

66 *See* the discussion of Gerawan farms, *supra* at page 117.

intended to repeal the RTW laws presently in place in twenty-seven states, introduce a card-check system that would eliminate the safeguards currently in place for conducting organization elections, silence employer speech on unionization, and block subcontracting arrangements.[67] But at the same time, in the judicial arena, powerful legal forces are pushing in exactly the opposite direction, as recent decisions have stripped away the distinctive privileges that legislatures seek to bestow on their union allies.[68]

In order to get some perspective on these powerful crosscurrents, it is critical to recall that any basic commitment toward collective bargaining requires more than a repudiation of the standard understandings of both good faith and individual autonomy. Once the decision is made to force employers in competitive markets—the furthest thing from common carriers—to bargain with unions against their will, it becomes strictly necessary to make other adjustments in the system to preserve the union's privileged status. The first intervention is that under labor statutes, individual contracts between employers and employees are not possible once a union is chosen, because the union becomes the exclusive bargaining agent for all members of the bargaining unit, whether they voted for or against the union. In the critical 1944 case *J.I. Case Co. v. National Labor Relations Board*,[69] the Supreme Court held that any collective bargaining agreement superseded all individual employment contracts negotiated before the union was in place. The Court knew full well that keeping these contracts in place would make it impossible for unions to organize or bargain. But within the year, the equal awareness of the power of union leaders to negotiate deals without any limitation put all minority workers at risk of a breach of all fiduciary duties. In *Steele v. Louisville & Nashville Railway*,[70] the white union leaders systematically bargained with the employer to give all the good jobs to white workers and the dirty ones to black workers. Well aware of the abuses of monopoly power, the Court imposed a duty of fair representation, which required the union to treat all unit members equally. But that duty turned out to be difficult to enforce, so that instances of rampant racial discrimination persisted long after that duty was imposed.[71] Conflicts of interest can persist between different groups of workers even when there are no racial distinctions, but in these contexts, the courts have been unable to fashion any rule to detect and control such favoritism.[72]

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67 *See* National Labor Relations Act, 29 U.S.C. §§ 157-158 (Section 7 & 8); Rights to bargain and unfair labor practices; § 159 (Section 9) (Representatives and Elections).

68 *See* Harris v. Quinn, 573 U.S. 616 (2014) (striking down Illinois's Public Labor Relations Act, which opportunistically treats the state as an employer solely for the purpose of allowing unions to organize home healthcare workers).

69 321 U.S. 332 (1944).

70 323 U.S. 192 (1944).

71 For discussion, see Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 123-25 (1992). Indeed, these same racial issues of abuse of trust were evident in the well-known civil procedure case Conley v. Gibson, 355 U.S. 451 (1957), which arose out a duty of fair representation case brought by black workers against their white union leaders.

72 Humphrey v. Moore, 375 U.S. 335 (1964).

Yet other ad hoc accommodations are still needed. Thus, the Supreme Court also made clear that ordinary rules of free, robust, and uninhibited debate did not apply to union negotiations. Unlike ordinary negotiations, where either side is free to say that it will refuse to deal and to give its reasons for so doing, the employer here was strictly limited to making predictions about what would happen. It could not make either promises or threats to workers as to how it would respond—for example, to move or close the plant—if the union were recognized.[73] Once outright refusal to deal was rendered unlawful, so too was any speech that announces the intention to refuse to deal. Next, the ordinary rules on trespass had to be suspended as well. Thus, in *Republic Aviation Corp. v. N.L.R.B*,[74] the Supreme Court held "invalid" a rule that prohibited employees from soliciting union members on the employee's own time on the employer premises, so long as it did not interfere with the operations of the business. The employee's actions clearly constituted a common-law trespass that violated the exclusive possession of the employer, but the Court displaced a clear categorical rule that limited entry rights onto anyone's property to cases of strict necessity. That rule has long been the target of union defenders, who constantly cite to *State v. Shack*,[75] in which a New Jersey court allowed union organizers to enter a worker's home located on company property for organizing purposes.

But occasional home visits of the sort at stake in *Shack* are not the heart of the major dispute. What really matters are union visits on company property, and these were, to the great consternation of labor supporters, struck down in the recent Supreme Court decision *Cedar Point Nursery v. Hassid*.[76] By a six to three vote, the Court declared unconstitutional a 1975 regulation of the California Labor Relations Board, with exclusive jurisdiction over agricultural workers, which provided that unions could enter onto the premises for three hours per day for 120 days per year in order to solicit support. Cedar Point challenged that regulation on the ground that the authorized activity constituted the sort of a permanent physical entrance into the property that, if allowed, required compensation under *Loretto v. Teleprompter Co.*[77] *Loretto* treated "permanent physical occupations" as per se compensable takings under the Takings Clause, which reads: "Nor shall private property be taken for public use without just compensation."[78] Unfortunately, Justice Thurgood Marshall carefully restricted the decision to avoid creating constitutional doubts about, for example, rent control laws, even though those laws obviously involve

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73 National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935). Section 8(c) reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or in visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."
This provision was put into the statute in 1947 to protect employers, but the last clause in fact imposes a powerful limitation on how negotiations take place, and it has been interpreted broadly. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

74 324 U.S. 793 (1945).

75 277 A.2d 369 (N.J. 1971), invoked by Cynthia Estlund, *Is Labor Law Internal or External to Private Law? The View from* Cedar Point, 24 Theoretical Inquiries L. 124, 135-39 (2023).

76 141 S. Ct. 2063 (2021).

77 458 U.S. 419 (1982).

78 U.S. Const. amend. V.

the permanent occupation of land by tenants under the authorization of a federal, state, or local government.

These problematic limits were compounded by the fact that the content of the notion "permanent" was unclear. *Loretto* treated the placement of a cable box on the roof of an apartment house as a "permanent" occupation, even though its expected useful life, given the speed of technological advance, was at most a couple of years. The Trump administration took the position that the indefinite time horizon made the takings in question in *Cedar Point* permanent.[79] Its position was quickly repudiated by the Biden administration,[80] which treated these intermittent entries as temporary and thus outside the *Loretto* rule.

The best analytical response to this question is that both parties are right—and wrong. The source of the difficulty is that *Loretto* gave no rationale whatsoever for restricting the per se rule to permanent occupations. Indeed, the decision is rightly understood as an exception to the famous regulatory takings regime governed by *Penn Central Transportation Co. v. City of New York*,[81] which adopted a highly deferential standard to those activities that "merely" restricted the way in which an owner can use property in its exclusive possession. That decision is an intellectual mess because it does not explain why taking a restrictive covenant over someone else's land does not constitute a taking. Moreover, it does not give a complete account of the field because it places temporary takings—a term with no clear definition—in a legal no-man's land that both the Biden and Trump administrations in *Cedar Point* sought to fill in different ways. The rub of the problem is that *Penn Central* is hopelessly wrong because it manufactures a distinction that makes no sense.[82] This distinction leads to serious confusions about the proper way to value property interests.[83] I have no doubt that the majority in *Cedar Point* took major liberties with the precedents,[84] but at the same time I have no doubt that there is no principled reconciliation of *Penn Central* and *Loretto.* Professor Estlund in her *cri de coeur* thinks that the new accommodation, if it stands, is a major, perhaps mortal, threat to labor organizing activities.[85] I too suspect that the decision will have a significant negative impact on current organizing efforts and will pose a substantial constitutional obstacle to the adoption of any strong pro-union legislation in the near future. But by the same token, *Cedar Point* is best understood as a kind of judicial payback for the large number of pro-union decisions that were wrong as a matter of first principles of

79 Brief for U.S. as Amicus Curiae Supporting Reversal, *Cedar Point Nursery v. Hassid* 141 S. Ct. 2063 (2021) (No. 20-107).

80 *See* Letter from Elizabeth B. Prelogar, Solicitor General, United Solic. Gen., U.S., to the Honorable Scott S. Harris, Clerk, U.S. Sup. Ct., (February 12, 2021), https://www.supremecourt.gov/DocketPDF/20/20-107/168955/20210212160515182_20-107%20letter.pdf.

81 428 U.S. 104 (1978).

82 *See* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stan. L. Rev. Online 99 (2012), http://www.stanfordlawreview.org/online/physical-regulatory-takings.

83 For my most recent attack on the decision, see Richard A. Epstein, *Valuation Blunders in the Law of Eminent Domain*, 96 Notre Dame L. Rev. 1441 (2021).

84 *See* Richard A. Epstein, *A Bombshell Decision on Property Takings*, Defining Ideas (June 28, 2021), https://www.hoover.org/research/bombshell-decision-property-takings.

85 Estlund, *supra* note 75.

constitutional law. I wish that there had been more candor in the adoption of its new rule, but the rule itself is sound.

Conclusion

The purpose of this Article is to expose what I believe to be the incurable fallacies in seeking to use the standard terminology of classical liberal theory—good faith, autonomy, freedom, dignity—to support a comprehensive regime of coercion that has long characterized pleas for unionized activities in the United States and elsewhere. As usual, the strong effort to force business association involves a huge level of administrative oversight needed to impose a system of monopoly rule over what could be competitive labor markets. The effort, to the extent that it has been successful thus far, leads to the same lose/lose situation created by all such coercive statutes: lower levels of liberty for employers and workers alike produce lower levels of wealth and utility for employers and workers alike. The new pro-union movement may seek to dress up old institutional blunders in new garb, but the clothing quickly falls aside, revealing the ultimate intellectual poverty of the progressive position from top to bottom.