Abolish the Employer Prerogative, Unleash Work Law

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Employers are sovereigns in their workplace. While market power disparities, enforcement gaps, and the dwindling influence of the U.S. labor movement seem to guarantee that, it is the law that anoints employers as kings. Indeed, the "employer prerogative" stands as the default governing rule in the workplace: all workplace decisions fall within the employer's discretion unless altered by a contractual agreement, statute, or other court doctrine. As a result, all legal interventions in the workplace, and the normative debates that surround them, must necessarily contend with the employer prerogative.

This Article argues that the employer prerogative should be abolished. The employer prerogative is too sticky, and consequently, it skews all of work law theory and practice toward management interests. The Article begins by describing how the cumulative effects of a judicial presumption of the employer prerogative, labor market power disparities, the employment-at-will doctrine, and enforcement gaps make modifying this default legal rule a Sisyphean task. The argument follows by analyzing two mechanisms that tie the employer prerogative to the uphill political struggle of redistributing power in the workplace—what I term the whack-a-mole *effect and the*

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regulatory cage-jeopardy *effect. Together these mechanisms enable employers to use their prerogative to evade workplace interventions or punish workers and their communities for pursuing redistributive workplace policies. In effect, the employer prerogative becomes self-entrenching.*

Perhaps the most troubling aspect of this default rule is that challenging it is taboo. Hence, the Article concludes by offering a novel framework for considering alternatives. The Article describes other possible default governance rules and suggests relying on new and renewed legal institutions to reallocate these default authorities among multiple stakeholders. These interventions offer the structural remedies vitally needed to correct the workplace's skewed status quo of power and to actualize work law's potential—unleashing it from its employer prerogative constraints.

> How far are we prepared to go in restricting th[e] employer prerogative?
>
> —Paul Weiler[1]

INTRODUCTION

During the first peak of the COVID-19 pandemic in March 2020, workers across the United States witnessed how employers briefly ceded control over their workplaces as government-mandated shutdowns and other restrictions effectively placed workplaces under the visible auspices of the state.[2] When restrictions were lifted weeks later, states and localities handed control back to employers. Nonetheless, this dynamic represents a sharp break from the status quo.[3] Before the COVID-19 pandemic, workplace sovereignty was commonly perceived as the exclusive right of management, solid and immovable;[4] now, it resembles more of a pendulum—each time COVID-19 infection rates have spiked, states and localities have stepped back in to implement various workplace restrictions.

By some accounts, employer power is more entrenched than ever before as a result of increasing market power disparities, enforcement gaps, and the dwindling resources of the battered U.S. labor movement.[5] However, the shifting of workplace power during the COVID-19 pandemic demonstrates that workplace power is not a static object. Indeed, this period has revealed

1. PAUL C. WEILER, GOVERNING THE WORKPLACE 51 (1990).

2. *Cf.* SUZANNE METTLER, THE SUBMERGED STATE 26–28 (2011) (describing the tendency of regulatory state involvement to be done out of public sight).

3. Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 365–66 (2017) [hereinafter Sachs, *Status Quo Vulnerability*] (describing the management-tilted status quo of powers in the U.S. workplace).

4. Consider the following quotes of managers from unfair labor practice proceedings at the National Labor Relations Board (NLRB): "Managers involved in union campaigns often vigorously contest [legal interventions in the workplace], telling workers, for example, '[I don't] give . . . a damn about the law,' or 'I'm the total dictator,' or simply 'I am the law.'" *Id*. at 354 (citations omitted).

5. CELINE MCNICHOLAS, LYNN RHINEHART, MARGARET POYDOCK, HEIDI SHIERHOLZ & DANIEL PEREZ, ECON. POLICY INST., WHY UNIONS ARE GOOD FOR WORKERS—ESPECIALLY IN A CRISIS LIKE COVID-19 (2020), https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/ [https://perma.cc/5E66-SHRL].

that our most basic assumptions about social life are built, ultimately, on shifting sands.[6] It is true regarding politics,[7] policing,[8] debt,[9] race,[10] and immigration,[11] and it is also true regarding workplace power.[12] In all these cases, significant, much-abused power disparities stem from a legal infrastructure that is highly consequential, deeply entrenched, yet potentially dynamic all at the same time.

It would be difficult to find a legal concept more entrenched and more consequential to work law[13] than the employer prerogative. In legal parlance, the "employer prerogative" refers to management's authority to make unilateral decisions in the workplace.[14] The employer prerogative is *the* default governance rule in the workplace;[15] accordingly, *all* workplace-

6. *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90 (2020).

7. Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020).

8. Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327 (2021).

9. DEBT COLLECTIVE, CAN'T PAY WON'T PAY: THE CASE FOR ECONOMIC DISOBEDIENCE AND DEBT ABOLITION (2020).

10. MOVEMENT FOR BLACK LIVES, REPARATIONS NOW TOOLKIT (2020), https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf [https://perma.cc/2V5G-DX5W]; Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/RCC3-SGPS].

11. *See, e.g.*, BRYAN CAPLAN, OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION (2020) (offering an open borders vision for immigration policy).

12. *See About*, CLEAN SLATE FOR WORKERS' POWER, https://www.cleanslateworkerpower.org/about [https://perma.cc/FR5R-YPHU] (last visited Oct. 22, 2021) (asking "what would labor law look like if, starting from a clean slate, it was designed to empower working people to build a truly equitable American democracy and a genuinely equitable American economy[?]").

13. This Article refers to "employment law" and "labor law" collectively as "work law." For specific treatment of the employer prerogative under labor law see *infra* Parts I & II.A.2.

14. Throughout the Article, I use "employer prerogative" and "managerial prerogative" interchangeably. *See Managerial Prerogative*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defined as "[a] manager's discretionary power to make decisions affecting the business or organization, esp. day-to-day operational issues"). The terms "employer prerogative" and "managerial prerogative" are also common in foreign work law literature. *See* GUY DAVIDOV, THE IDEA OF LABOUR LAW 54 (2016); HUGH COLLINS, JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT (1992); Henry L. Chambers Jr., *Employer Prerogative and Employee Rights: The Never-Ending Tug-of-War*, 65 MOD. L. REV. 877 (2000). "Management prerogative" is also often used to discuss conflicts around management rights clauses in collective bargaining agreements. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 634–833 (Kenneth May ed., 6th ed. 2003) (discussing the concept of employer prerogative and the related concept of "reserved management rights" at length); ROBERT A. GORMAN & MATHEW W. FINKIN, BASIC TEXT ON LABOR LAW 635 (2d ed. 2004) (discussing unilateral action in the context of management rights clauses in collective bargaining agreements).

15. Mark Harcourt, Helen Lam & Richard Croucher, *The Right-to-Manage Default Rule*, 46 INDUS. REL. J. 222, 223 (2016) ("For the employment relationship, the most important default is the (common law) right of managers to manage and its mirror in the employee's common law duty to obey."); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000) ("The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise. This includes the work performed and

related decisions fall within the employer's discretion *unless* altered by contractual agreements (implicit or explicit, individual or collective), statutes, agency decisions, or other court doctrines.[16]

Attempting to enumerate all the issues that can fall under the employer prerogative would prove futile. Yet, for just a taste of the breadth of the subject matter, consider the following list.[17] It is the employer's prerogative to hire[18] and terminate[19] employees at will. It is the right of the employer to

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the continued employment of its employees. The law, by giving total dominance to the employer, endows the employer with the divine right to rule the working lives of its subject employees."). In the context of an organized workplace, this doctrine is sometimes referred to as "reserved management rights," under which "rights not expressly constrained by law (or waived by management through negotiation or practice) are reserved to the employer." *See* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 215 (2008).

16. *See, e.g.*, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (holding that under Title VII of the Civil Rights Act of 1964, management controls all aspects of hiring, unless such actions constitute illegal discrimination); Swint v. Pullman-Standard, No. 71-955, 1974 U.S. Dist. LEXIS 6754, at *33 (N.D. Ala. Sept. 13, 1974) (Title VII serves as a check on management rights); ELKOURI & ELKOURI, *supra* note 14, at 641–42 (listing legislation restricting management prerogative); PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 179 (1969) (A collective bargaining agreement is "a set of specific restrictions on otherwise unlimited managerial powers."); William Corbett*, The "Fall" of* Summers*, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 315 (1996) ("[T]he workplace is the property of the employer, and in the absence of an agreement to the contrary, the employer may do as it wishes with its property."); Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 177 (1995) ("Employee entitlements are narrow exceptions to an expansive realm of employer prerogatives, power, and property. Employee rights or entitlements are whatever is left over when the court gets done defining an employer's rights of property and of control over the terms of employment."); Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace* 94 N.C. L. REV. 601, 615 (2016) [hereinafter Kim, *Market Norms*] ("[I]n the private sector, the starting assumption is one of managerial prerogative . . . . The background norm assumes that employers should be given wide discretion to manage their businesses as they see fit. . . . Legal protections for employees in the private sector are carve-outs from the background norm—exceptions created when intervention is deemed necessary to advance important public purposes."). For discussion of the employer prerogative in the context of collective bargaining agreements, see Summers, *supra* note 15, at 81–82 ("In the interpretation of the collective agreement, analysis begins with the premise that, except for the collective agreement, the employer has the prerogative of unencumbered decision making on all matters concerning the enterprise. The collective agreement is conceived as only circumscribing those prerogatives; the employer remains free to act except as limited by express or implied provisions in the agreement.").

17. An employer can decide all the issues on this list unilaterally. Some issues relate more to the employer's control over the "manner and means" of its employees' work, and others draw on the employer's control over the organizational structure of its business. Both types of issues are considered to fall under the default employer prerogative. *See infra* Part I.

18. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The [National Labor Relations Act] does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."); Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97 (1991).

19. *See* RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW INST. 2015) ("Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement."); Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343 (2014); Samuel Estreicher, *Unjust*

offer any wage above or equal to the mandated minimum wage.[20] Management can establish and then reform the business's organizational structure by outsourcing or relocating selected operations.[21] Employers have the right to decide the manner and means of employees' work.[22] Management holds the right to determine what employees wear[23] and whether their hairstyles or grooming habits "look professional."[24] The employer has the prerogative to be "shortsighted and narrow minded," in decision making[25] along with the authority to adopt a mandatory ethics code for its employees.[26] Management can determine that from now on, an algorithm and not a human agent will hire you,[27] survey tiny minutia of your performance,[28] establish your work routines,[29] or replace you completely. Employers hold the right to establish mandatory educational sessions on diverse topics such as the perils of unionization.[30] Employers can announce a workplace meatless Monday or initiate company-wide wellness programs.[31] Employers can ask that employees participate in political lobbying and punish employees for expressing their own political views.[32] Employers control what products are

Dismissal Laws: Some Cautionary Notes, 33 AM. J. COMP. L. 310 (1985); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

20. *See, e.g.*, *The 21 States Stuck at $7.25*, RAISE THE MINIMUM WAGE (July 24, 2017), https://raisetheminimumwage.com/resource/the-21-states-stuck-at-7-25/ [https://perma.cc/WG9P-P3TM]. The current federal minimum wage is $7.25 per hour.

21. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674–76 (1981).

22. *See infra* Part I.

23. A common exception to this default rule is protection for employees wearing union insignia, such as pins and buttons. For a recent formulation of the union insignia rule, see Wal-Mart Stores, Inc., 368 N.L.R.B. No. 146, 2019 WL 7169812, at *1–2 (Dec. 16, 2019).

24. *See, e.g.*, Alisha Jarwala, *Fighting Workplace Hairstyle Discrimination: An Explainer*, ONLABOR (Mar. 12, 2020), https://onlabor.org/fighting-workplace-hairstyle-discrimination-an-explainer/ [https://perma.cc/D7DB-Q7JU].

25. Drown v. Portsmouth Sch. Dist., 435 F.2d 1182, 1186 (1st Cir. 1970).

26. Newspaper Guild Local 10 v. NLRB, 636 F.2d 550, 561 (D.C. Cir. 1980).

27. *See, e.g.*, Ifeoma Ajunwa, *The Paradox of Automation as Anti-bias Intervention*, 41 CARDOZO L. REV. 1671, 1702–04 (2020).

28. *See, e.g.*, Bradley A. Areheart & Jessica L. Roberts, *GINA, Big Data, and the Future of Employee Privacy*, 128 YALE L.J. 710, 756–59 (2019); Valerio De Stefano, *"Masters and Servers": Collective Labour Rights and Private Government in the Contemporary World of Work*, 36 INT. J. COMP. LAB. L. & INDUS. REL. 4 (2020) (arguing that new technologies "magnify the employers' legal and practical powers and prerogatives over workers").

29. In the context of algorithmic control over "just-in-time" scheduling of shifts, see SAM ABBOTT & ALIX GOULD-WERTH, WASH. CTR. FOR EQUITABLE GROWTH, UNBOXING SCHEDULING PRACTICES FOR U.S. WAREHOUSE WORKERS (2020) https://equitablegrowth.org/research-paper/unboxing-scheduling-practices-for-u-s-warehouse-workers/?longform=true [https://perma.cc/978S-R5DE].

30. *See, e.g.*, Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953).

31. *See, e.g.*, Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 763 (2017) (reviewing corporate wellness programs in the context of privacy concerns).

32. *Compare* Waters v. Churchill, 511 U.S. 661, 694–95 (1994) (Stevens, J., dissenting) ("This is a free country. Every American has the right to express an opinion on issues of public significance. In the private sector, of course, the exercise of that right may entail unpleasant consequences. Absent some

made, where raw materials are purchased, and to whom products are sold.[33] Perhaps most important, employers hold the authority to decide how any of these issues are determined, revised, evaluated,[34] rewarded, and punished.[35]

Where you end up often depends on where you begin—and work law begins from the employer's prerogative.[36] The default legal sovereign in the U.S. workplace is not the employment contract,[37] nor regulators or courts, and surely not unions.[38] The default sovereign in the workplace is, as one might expect, the boss.[39] As is the case with many other default legal rules, this initial allocation of legal rights in the workplace skews the status quo and affects alternative arrangements that aim to displace it. The employer prerogative is *sticky*: it proves resilient against contractual, regulatory, and political modifications. This stickiness results from different overlapping social, doctrinal, and political trends which cement the legal default as the real-life status quo on the job.

First, courts treat the employer prerogative as setting a rebuttable presumption against contractual, statutory, and constitutional intrusions into

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contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds."), *with* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (termination of employee for refusing to participate in company lobbying activity violates public policy). *See also* ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK (2018); Benjamin Sachs, *It Should Be Illegal to Fire the Cyclist Who Gave Trump the Finger*, WASH. POST (Nov. 8, 2017), http://wapo.st/2yIKnag [https://perma.cc/N5JF-JDTZ].

33. *See, e.g.*, Jacki Silberman, *Organizing for Morality in High Tech—Part Three*, ONLABOR (Oct. 2, 2020), https://onlabor.org/organizing-for-morality-in-high-tech-part-three/ [https://perma.cc/AAS6-XE4Q]; Andrew Strom, *The Power of Collective Action*, ONLABOR (May 25, 2020), https://onlabor.org/the-power-of-collective-action/ [https://perma.cc/ERG4-PM5W].

34. One type of cap on the employer prerogative is a determination that an employment contract is subject to "just cause," which entails limitations on the employer prerogative to terminate the employee. But, even under a just cause regime, some jurisdictions leave the employer with "factfinding prerogative"—the authority to determine the factual base underlying the termination decision. *See, e.g.*, RESTATEMENT OF EMP'T LAW § 2.04 cmt. d. (AM. LAW INST. 2015).

35. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 273 (1975) (Powell, J., dissenting) ("The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management.").

36. My thanks go to Professor Charles Sullivan for this apt description of my argument.

37. *Cf.* Matthew T. Bodie, *Taking Employment Contracts Seriously*, 50 SETON HALL L. REV. 1261, 1261 (2020) (suggesting the employment relationship is best characterized as a contract).

38. *See, e.g.,* JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014); WEILER, *supra* note 1.

39. The comparison between governance in the workplace and governance in the state is not new. *See, e.g.*, Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."); Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 1 (1947) ("In annual conferences, the employer and the union representing the employees, in addition to fixing wage rates, write a basic statute for the government of an industry or plant."); Karl E. Klare, *Labor Law As Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 458–80 (1981); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1359 (1982) [hereinafter Klare, *The Public/Private Distinction*]. For a recent jab at the workplace-as-state comparison see ELIZABETH ANDERSON, PRIVATE GOVERNMENT (2018) (conceptualizing employers as a "private governments").

management decision-making. The bar for legally rebutting the presumption of employer prerogative can be extremely high, unreachable even. Second, most workers face a significant market power disadvantage compared with their employers. This power disparity makes contractual limitations on the prerogative unattainable for a vast majority of workers.[40] Third, the prevailing employment-at-will doctrine reinforces workers' weakness in the labor market. This doctrine enables managerial dominance over the firm by allowing the employer to easily terminate workers without cause and to modify contractual terms at will.[41] Fourth, the United States suffers from a massive work law enforcement gap.[42] This yawning gap means that some employers enjoy a de facto prerogative even on issues that have in fact been modified by law. These combined social and doctrinal factors are the reason workers generally fail to challenge or successfully modify the prerogative.

In addition to these diverse causes for the employer prerogative's stickiness, this Article identifies two additional political feedback effects that entrench the prerogative, making it resistant to distributional intrusions and workers' rights interventions. The first political mechanism is what I term the *whack-a-mole* effect, whereby employers use their law-given prerogative to find permissible workarounds to redistributive policies and actions. The second mechanism is what I term the *regulatory cage-jeopardy* effect, whereby employers act on their prerogative to change and modify their business practices, structure, or location, and "punish" workers, consumers, and the broader public for pursuing business-adverse policies and actions. These mechanisms constitute a permanent losing position for workers and their communities vis-à-vis employers, as any attempt to regulate the workplace or shift workplace power away from employers is conducted in the *cage* of explicit or implicit threats of jeopardy and at the risk of *whack-a-mole* futility.[43] Because the prerogative provides employers with the tools to hinder redistributive policies and actions, the employer prerogative is self-perpetuating.

Largely neglected in legal scholarship,[44] the employer prerogative is detrimental to any workplace interventions that entail a shift in the workplace power structure. In their pursuit of redistributive policies, worker movements

40. *See, e.g.*, Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perception of Legal Protection in an At Will World*, 83 CORNELL L. REV. 105 (1997) [hereinafter Kim, *Bargaining with Imperfect Information*]; *infra* Part II.B.

41. *See, e.g.*, Feinman, *supra* note 19, at 131–33; *infra* Part II.C.

42. *See, e.g.*, David Cooper & Theresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POLICY INST. 3–6 (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/#epi-toc-16 [https://perma.cc/Z3R2-G9S3].

43. These two mechanisms of *whack-a-mole-futility* and *regulatory cage-jeopardy* fit nicely into Hirschman's research on conservative rhetoric. *See* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991). *See infra* Part III for further discussion.

44. For some examples of explicit theoretical treatment, see SELZNICK, *supra* note 16, at 122–23, 178–79 (1969); JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 87–88 (1983).

and advocates build legal workarounds to mitigate the effects of the employer prerogative. They do so by engaging in canonical work law interventions such as carving out specific issues from the employer prerogative—like setting a mandatory minimum wage—or by creating "countervailing power" to overcome the employer prerogative, for example, by facilitating the formation of unions.[45] But the default employer prerogative is always there, as work law's force of gravity.

For these reasons, this Article seeks to tackle the employer prerogative head on. In considering possible alternatives to this default rule, this Article suggests a framework for a novel kind of work law intervention: the allocation and reallocation of workplace governance rights. This framework is composed of two basic questions: (1) who has default authority over workplace interests? and (2) which legal instruments can reallocate those authorities? In turn, this Article provides examples of how this framework can be tailored to accomplish a diverse set of possible work law reforms. My goal in supplying such examples is to demonstrate the utility of treating the default employer prerogative as a dynamic aspect of work law's theory and practice—to unleash work law from its employer prerogative constraints.

The Article proceeds as follows. Part I describes the default legal rule of the employer prerogative. Part II surveys legal and social factors that make the default employer prerogative the status quo of workplace governance. Part III describes the two political mechanisms—the *whack-a-mole* and *regulatory cage-jeopardy* effects—that perpetuate this status quo and make it resistant to workplace regulatory and reform efforts. Part IV offers a framework for considering possible alternatives to this default rule. A short Conclusion follows.

I. THE DOCTRINE OF DEFAULT EMPLOYER PREROGATIVE

For the overwhelming variety of labor markets and organizational workplace structures, the law prescribes a simple default governance rule: the employer prerogative. According to this default rule, employers hold sole authority in the workplace unless contracted or regulated otherwise.[46] This default rule is independent of economic and organizational particularities. For the law of work, it does not matter if the employment relations are between a small grocery store owner and a manager, a McDonald's franchisee and a cashier, or between Google and a senior software engineer. Regardless of the employee's relative position in the labor market, the

45. *See, e.g.*, Cynthia L. Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) [hereinafter Estlund, *Rebuilding the Law of the Workplace*] (describing these two dominant models of workplace governance); Gali Racabi, *Despite the Binary: Looking for Power outside the Employee Status*, 95 TUL. L. REV. 1167 (2021).

46. *See supra* notes 16 & 17, and *infra* note 47, and accompanying text.

employer, by legal default, can determine all "manner and means" of the employee's work and is in complete control over the organizational structure in which work takes place.[47] It is the legal doctrine of the employer prerogative, not economic bargaining, that determines this initial control.

The default employer prerogative is ever-present in judicial and scholarly treatments of work law's procedures,[48] substantive doctrines,[49] and remedial regimes.[50] In many legally significant ways, the exercise of prerogative distinguishes management from its agents and workers.[51]

As a background assumption in legal disputes, the employer prerogative is primarily assumed rather than proved, and asserted rather than defended.[52]

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47. *See* RESTATEMENT OF EMP'T LAW § 1.01 cmt. D (AM. LAW INST. 2015); RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. F (AM. LAW INST. 2006) ("[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work."). Some see control over other's work as *the* essence of employment relations. *See, e.g.*, DAVIDOV, *supra* note 14, at 54 ("Employers always retain a position of *power* over their employees; to one extent or another they *control* them."); OTTO KAHN-FREUND, LABOUR AND THE LAW 7 (2d ed. 1977) ("[T]here can be no employment relationship without a power to command and a duty to obey."); De Stefano, *supra* note 28, at 3 (describing the persistent "concept of subordination" in civil law jurisdictions); *see also* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937) ("Within a firm . . . market transactions are eliminated and in place of the complicated market structure with exchange transactions is substituted the entrepreneur-co-ordinator, who directs production.").

48. *See, e.g.*, Burns v. Blackhawk Mgmt. Corp., 494 F. Supp. 2d 427, 434 (S.D. Miss. 2007) ("[M]anagement prerogatives . . . are to be left undisturbed to the greatest extent possible. Internal affairs of employers must not be interfered with except to the limited extent that correction is required in discrimination practices.") (quoting *Additional views on H.R. 7152, U.S. Code Cong. & Adm. News 2516*, 88th Cong., 2d Sess., 1964).

49. *See infra* Part II.A.

50. *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 521 n.11 (1986) (reading section 706(g) of Title VII, 42 U.S.C. § 2000e-5, as preserving employer prerogatives by limiting remedial interference by courts); Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth., 785 F.2d 333, 337 (1986) ("[W]here the employer has performed a major reorganization of its business and the *status quo ante* relief would require a reversal of this reorganization, [it] need not be granted if it would cause undue hardship."); RESTATEMENT (SECOND) OF CONTRACTS § 368 (AM. LAW INST. 1981) (An employment contract not of definite period and is terminable at will, may not be specifically enforced.); *see also* Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 9 (considering the employer prerogative as a decisive factor in remedying wrongful discharge cases); Joseph Spadola, *An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CALIF. L. REV. 691, 699 (2014) (describing how the Supreme Court drafted discrimination remedies around the "lawful prerogatives of the employer").

51. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 434 n.7 (2013) (describing how in defining a supervisor for purposes of the NLRA, Congress sought to distinguish "between straw bosses . . . on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action"); NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 279–85 (1974) (discussing the legislative history of the definition of "supervisor" under the NLRA). *But see* NLRB v. Yeshiva Univ., 444 U.S. 672, 682–84 (1980) (finding lack of employer prerogative of university faculty as dispositive for the purposes of defining supervisor-status under the NLRA).

52. *See* Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV 205, 208–12 (2001); *cf.* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) [hereinafter Epstein, *A Common Law for Labor Relations*] (defending the prerogative).

This makes its exact legal origins fuzzy.[53] In large part, the employer prerogative is a judicial and scholarly creation and is sometimes considered as a legal offspring of the employer's property interests in its business,[54] a gap-filling assumption in incomplete work contracts,[55] and a derivative of societal norms that construct the employer as the default workplace sovereign.[56] Direct statutory sources anchoring the employer prerogative are scant, and those sources that do exist generally relate to subjects excluded from mandatory bargaining in public sector labor relations.[57] But some usages of the prerogative in the context of statutory interpretation do draw on legislative history.[58]

53. *See, e.g.*, SELZNICK, *supra* note 16, 136–37 (critiquing the adequacy of property and contract rationales for employer prerogative). This is not to say the prerogative's historical origins are unclear as it is rooted in the multivariable paths of non-contractual labor relations. *See, e.g.*, MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW (1989) (describing the evolution of the employee-employer relationship in common law countries); CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865 376 (2010) (describing the historical origins of the employee-employer relationship in the U.S.); James G. Pope, *The Thirteenth Amendment at the Intersection of Class and Gender:* Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen*, 39 SEATTLE U. L. REV. 901, 904 (2016) (describing connected legal development of employment relations, household relations and forced labor).

54. *See, e.g.*, ATLESON, *supra* note 44, at 32–33, 91–94; Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 936–37 (1989) (stating that the employer is the property owner of its business, and can "determine the terms on which others are granted access to the employer's property"); Corbett, *supra* note 16, at 315 ("[T]he workplace is the property of the employer, and in the absence of an agreement to the contrary, the employer may do as it wishes with its property."); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1765 (1989) (offering a property-based explanation for the existence of hierarchy in firms); Klare, *The Public/Private Distinction*, *supra* note 39, at 1366–67. In his defense of the employment at-will doctrine, Epstein argued that it recognizes both "that the employer is the full owner of his capital and [that] the employee is the full owner of his labor." Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984); *see also* Epstein, *A Common Law for Labor Relations*, *supra* note 52, at 1388–89 (criticizing the NLRA's workplace access doctrines as "cut[ting] back upon the absolute power to exclude that is the hallmark of any system of private property").

55. Some scholars consider the employer prerogative as an "open ended subordination clause" implicitly written into all employment contracts. *See, e.g.*, Beermann & Singer, *supra* note 54, at 938–39; Guy Davidov, *Unbound: Some Comments on Israel's Judicially-Developed Labor Law*, 30 COMP. LAB. L. & POL'Y J. 283 (2008) [hereinafter Davidov, *Unbound*]; Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002); De Stefano, *supra* note 28, at 4 ("[Employment] contractual relation 'requires obedience on the part of the employee to the employers' lawful instructions.' Even in the absence of overt contractual terms providing for this subordination, an implied duty to obey all lawful instructions and 'to serve the employer faithfully within the requirements of the contract.'") (citations omitted).

56. *See, e.g.*, COLLINS, *supra* note 14; Beermann & Singer, *supra* note 54, at 934–38.

57. *See, e.g.*, Federal Service Labor-Management Relations Act (FLRA), 5 U.S.C. § 7106 (2018) ("Management Rights" under the FLRA); Colo. Rev. Stat. § 24-50-1110 (2021); Del. Code tit. 19, § 1305 (2021); Fla. Stat. § 447.209 (2021); 5 Ill. Comp. Stat. 315/4 (2020); Iowa Code § 20.7 (2021); Mont. Code § 39-31-303 (2021); Nev. Rev. Stat. § 288.150 (2021); D.C. Code § 1-617.08 (2021); Vt. Stat. tit. 3, § 905 (2020); Wash. Rev. Code § 41.80.040 (2021); Wis. Stat. § 111.90 (2021).

58. *See, e.g.*, *infra* note 97 and accompanying text.

However, the murkiness of the employer prerogative's origins does not mean the doctrine lacks potency. Perhaps counterintuitively, this murkiness adds a sense of inherency and naturalness to what is, ostensibly, an assignment of legal powers to employers.[59] While one can find analytical distinctions between these various sources and justifications of the prerogative, the practical consequence of such differences is minute. All paths lead to default employer authority.

Regardless of its specific legal basis, the employer prerogative is work law's analytical starting point[60] and is the "state of nature" of the workplace—the condition that prevails before work law intervenes.[61] In the run-of-the-mill workplace legal claim, the employer makes the first move, for example by drafting the contract, terminating an employee, or paying less than minimum wage.[62] Only then can an employee or their advocates challenge a discriminatory contractual clause, prohibited termination, or minimum wage violation. This chronological progression of most workplace legal claim-making starts from concrete managerial authority and ends with work law claims.[63]

As an inherent part of employment, we can find the employer prerogative in all types of working relations, ranging from those constructed around at-will contracts, through just-cause relationships, and to union-management relations.[64] In all kinds of working relations, work law places some limitations on the employer's prerogative. For example, even in at-will relations the employer still must pay a minimum wage; in just-cause relations, the employer is limited in terminating its workers;[65] in organized

59. Sunstein, *supra* note 52, at 208 ("It is important to emphasize that the employer has these rights not by nature, and not as a result of anything consensual, but because of a distinctly legal decision to confer the relevant rights on the employer rather than the employee.").

60. *See, e.g.*, Beermann & Singer, *supra* note 54, at 914 (defining legal baselines as the starting points of legal arguments); Allen R. Kamp, *The Missing Jurisprudence of Merit*, 11 B.U. PUB. INT. L.J. 141, 146 (2002) ("The basic principle of employment law . . . is the powerful concept of employer prerogative.").

61. A similar argument is that the regulatory interventions of the New Deal are interpreted against the backdrop of an unmodified common law. *See, e.g.*, Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421 (1987). *See also* Guy Davidov, *Defending a Purposive Approach to Labour Law: A Reply to Comments*, GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI (2017) ("[I]t is possible to see the managerial prerogative as a 'creation' of labour law, but it seems more useful to understand it as an implied part of the employment contract. If we would apply the general laws of contract, without labour law, to an employment relationship, we will also have a 'managerial prerogative'—whether explicit or implied in the contract.").

62. *See supra* note 16 and accompanying text.

63. For example, under collective bargaining agreements, it is common to instruct workers to "obey and grieve." *See* Summers, *supra* note 15, at 82 ("If the employer gives an order which directly violates the agreement, the employee still has a duty to obey unless obeying would risk serious bodily injury. If the employee refuses to obey the wrongful order, there is 'just cause' to discharge.") (citations omitted).

64. In labor-management relations the employer prerogative is sometime referred to as "reserved management rights." *See supra* notes 14–15 and accompanying text.

65. *See infra* Part II.C (differentiating between at-will and just-cause employment relations).

workplaces, under the National Labor Relations Act (NLRA), the employer must negotiate with a representative union on "mandatory subjects of bargaining;"[66] and all covered private-sector employers are legally prohibited from retaliating against workers engaged in protected concerted actions.[67] But, in *all* working relations, private or public,[68] organized or unorganized, part-time or full-time, in McDonald's or Google, the employer prerogative is the default governance rule, on top of which different work law limitations are then constructed.[69]

This is not to say that all these working relations are identical in how effectively work law limits the employer prerogative. There are tremendously important differences in the legal powers of public sector employers versus private sector employers, organized and unorganized workers, between different sources of work law, and the effectiveness and availability of enforcement mechanisms.[70] But, while these workplaces and sources of work law are distinct in meaningful ways, they are also identical in a crucial way: *the* commonality of all working relations *qua* working relations is that the initial legal location of decision-making power in the workplace rests with the employer.

The inherency of the employer prerogative in employment relations is evident in employment classification tests. These tests serve as the criteria courts and agencies use to determine whether an employee-employer relationship exists[71] and, in turn, whether the whole host of statutes, regulations, and employment and labor law doctrines apply.[72] Most classification tests treat the employer's prerogative over the workplace as a primary indication (perhaps *the* indication) for whether an employee-employer relationship exists.[73]

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66. *See infra* Part II.A.2 (discussing how this rule was eroded in the NLRB and courts' interpretation of the NLRA).

67. *Id*.

68. *See infra* Part II.A.1 (discussing similarities in finding the employer prerogative in both private and public workplaces).

69. *Cf*. Davidov, *Unbound*, *supra* note 55 (describing the employer prerogative doctrine in Israel, where termination is conditioned on a "good-faith" hearing). *But see* Sunstein, *supra* note 52, at 210 ("[T]he NLRA removes common law rights from employers and creates . . . [entitlements] placed, as an initial step, in the hands of neither side.").

70. Some of the latter is addressed *infra* Part II.

71. *See infra* Part III.A.

72. *See* Racabi, *supra* note 45.

73. *See, e.g.*, Henthorn v. Dep't of Navy, 29 F.3d 682, 684 (D.C. Cir. 1994) ("The [employment status test under the FLSA] considers the extent to which typical employer prerogatives govern the relationship between the putative employer and employee."); Zheng v. Liberty Apparel Co., 355 F.3d 61, 67 (2d Cir. 2003) ("[W]hen an entity exercises those . . . prerogatives, that entity, in addition to any primary employer, must be considered a joint employer."); Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984) (cucumber pickers were not employees where owner of fields "relinquished" control of harvest to skilled workers); RESTATEMENT OF EMP'T LAW §§ 1.01, 13 (AM. LAW INST. 2015).

To be sure, the employer prerogative can be waived contractually,[74] delegated to workers,[75] and regulatorily limited.[76] This undisputed legal capacity to reallocate certain authorities creates a semblance of legal balance between employers and workers.[77] This seeming balance famously ignores market power differential.[78] But it also ignores the importance of the initial allocation of *legal* rights—the effects of the initial foci of governance in the workplace.[79]

The initial allocation of rights does in fact matter.[80] As Cass Sunstein has put it: "In the workplace, as elsewhere, the law cannot 'do nothing.' For even the most enthusiastic believers in private property and freedom of contract, it is necessary to start somewhere—not with nature or voluntary arrangements but with an initial allocation of legal rights."[81] To take a famous counterfactual, it matters that despite the right to choose union representation in the workplace, the default is no union representation.[82] As will be described in the following two Parts, the initial allocation of governance authority matters for both the concrete distribution of workplace power and attempts to shift that power.

II. WHAT MAKES THE DEFAULT EMPLOYER PREROGATIVE "STICKY"?

What are the effects of the default employer prerogative on workplace power? The following two Parts describe why we can expect the default

74. *See, e.g.*, Baltimore v. Balt. Fire Fighters, Local 734, I.A.F.F., 613 A.2d 1023, 1028 (Md. Ct. Spec. App. 1992) ("[A] private employer can bargain away whatever prerogatives it deems appropriate."); Chi. & N.W. Transp. Co. v. Ry. Labor Execs.' Ass'n, 908 F.2d 144, 152 (7th Cir. 1990) (defining a "matter of prerogative" as "one the [employer] is not required to bargain over . . . though nothing in the [law] forbids it to do so").

75. Claims regarding delegation of prerogative can arise under section 8(a)(2) of the NLRA, which makes it illegal for the employer "to dominate or interfere with the formation or administration of any labor organization." *See generally* Gen. Foods Corp., 231 N.L.R.B. 1232 (1977) (finding no section 8(a)(2) violation occurred where employee teams were empowered to make job assignments, assign job rotations, or schedule overtime); Joseph D. Richardson, Comment, *In Name Only: Employee Participation Programs and Delegated Managerial Authority after* Crown Cork & Seal, 62 ADMIN. L. REV. 871, 880 (2010).

76. SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET 15 (2005) (surveying the literature on work regulations).

77. Kim, *Bargaining with Imperfect Information*, *supra* note 40.

78. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 LEGAL STUD. F. 327 (1991); *cf.* Epstein, *In Defense of the Contract at Will*, *supra* note 54, at 957 ("[T]he rights under the contract at will are fully bilateral, so that the employee can use the contract as a means to control the firm, just as the firm uses it to control the worker.").

79. Kennedy, *supra* note 78.

80. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

81. Sunstein, *supra* note 52, at 208.

82. WEILER, *supra* note 1, at 115–16.

employer prerogative to be sticky.[83] When a default is sticky, legal power rests in its initial position: here, with management. This Part focuses on reasons why workers fail to modify—either through contractual negotiations or legal action—the default employer prerogative.

A. Judicial Presumption of Employer Prerogative

> In a day-and-age when government regulation tends to act as an impediment to free enterprise, stifling initiative in the private sector, courts must be mindful to remember that freedom of contract still reins: absent contractual restrictions or federal or state laws restrict management prerogatives, an employee serves at the whim of the employer.[84]

The employer prerogative appears inherent in working relations.[85] Often, courts use the prerogative not merely as a default baseline meant to fill contractual and regulatory voids, but as an animating principle of work law,[86] or worse, as an unchangeable reality.[87] As a principle of work law, the employer prerogative is explicitly or implicitly used by courts to counter workers' constitutional, statutory, and contractual claims.[88]

The following examples illustrate that judicial presumptions of the employer prerogative differ in factual and legal contexts but share the same legal structure. First, workers claim in court that a certain legal instrument, such as a statute or contractual provision, limits the employer's prerogative and workplace power. Courts, in turn, often respond by demanding a high bar for proving that the prerogative default was indeed legally altered. Ultimately, despite counter legal arguments, courts routinely defer to

83. Sunstein, *supra* note 52, at 221 (pointing to transaction costs and endowment effects that make default rules "sticky").

84. Bass v. M & S Music Co., No. 78-556, 1979 U.S. Dist. LEXIS 9185, at *9 (S.D. Ala. Oct. 12, 1979) (citations omitted).

85. Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 49 (1988) [hereinafter Klare, *Workplace Democracy*] ("[T]he true basis of the entrepreneurial core limitation on industrial democracy is a deep, often unarticulated belief, pervasive in the discourse of labor law, that it is simply inherent in the nature of private property that management is endowed with ultimate decisionmaking authority.").

86. *See, e.g.*, DAVIDOV, *supra* note 14; Susan D. Carle, *Analyzing Social Impairments under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1160 (2017) ("The principle of management prerogatives holds that workplace regulation should avoid interfering with employers' rights to manage their workplaces.").

87. *See infra* note 95 and accompanying text.

88. *See, e.g.*, Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1553 (2006) (stating that "most areas of work law involve questions about how to balance managerial interests and the rights of workers"); Beermann & Singer, supra note 54, at 925–27; Epstein, *In Defense of the Contract at Will*, *supra* note 54, at 970–73.

employers' decision-making powers, disinclined to find that the default presumption of the employer prerogative has been displaced.[89]

A common example is the high burden required to rebut the presumption of at-will employment. Here, workers allege that a contract provision has placed limitations their employers' ability to terminate them absent cause. As will be discussed more thoroughly in Part II.C., employment at will is the default doctrine in the United States and allows employers to terminate their employees for a good reason, bad reason, or no reason at all. In earlier periods of U.S. work law, courts required additional consideration to demonstrate that the parties agreed to override the default rule and guarantee the employee some form of job security.[90] A similar burden is applied to workers' constitutional and statutory claims.

1. Constitutional Claims

One example of the judicial presumption of the employer prerogative in constitutional cases is the ability of public sector employers to evade liability under the First Amendment for punishing certain forms of employee speech.[91]

Generally, public sector workers enjoy certain constitutional protections considered unavailable to private sector workers, including free speech. However, in *Garcetti v. Ceballos*, the Supreme Court held that a memorandum prepared by a prosecutor in the Los Angeles County District Attorney's Office was not protected speech under the First Amendment, because the prosecutor had prepared the memo "pursuant to his duties."[92]

In cabining the First Amendment rights of the prosecutor, and public sector employees writ large, the Court pointed to the nature of the relationship between the parties and the derivative employer prerogative: "Restricting speech that owes its existence to a public employee's

89. *See, e.g.*, Knox v. SunTrust Banks, Inc., No. 1:09-cv-115, 2010 U.S. Dist. LEXIS 118463, at *8–9 (E.D. Tenn. Nov. 5, 2010) ("It is axiomatic that under Title VII . . . this Court does not sit or act as a 'super-personnel department' to re-examine and second guess an employer's legitimate management prerogatives and nondiscriminatory business decisions."); Corbett, *supra* note 16, at 317 ("[T]he Supreme Court has admonished courts in employment discrimination cases to avoid second-guessing employers' business practices because of the courts' relative incompetence in that area.").

90. *See, e.g.*, Skagerberg v. Bladin Paper Co., 266 N.W. 872 (Minn. 1936); Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV 427 (2016); Summers, *supra* note 15; Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1098–99 (1984) (criticizing the additional consideration requirement).

91. The history of freedom of speech in the public sector has always been fraught and was traditionally read to include at least a marginal balancing of public employers' prerogatives against freedom of speech interests. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that when determining the extent of a public employee's free speech rights, one must to arrive at "a balance between the interests of the [employee], as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

92. Garcetti v. Ceballos, 547 U.S. 410, 431 (2006).

professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[93]

The "control over what the employer itself has commissioned or created" is assumed to be an inherent feature of employment relations, from which all other constitutional conclusions follow, namely, that such control over speech does not "infringe any liberties the employee might have enjoyed as a private citizen." The employer prerogative cuts against claims of protected speech at the workplace, narrowing the distinction between the constitutionally protected public workplace and the constitutionally unprotected private one.[94]

Interestingly, it is not the case that public sector employees do not enjoy First Amendment rights altogether. But, it is the scope of employee free speech rights which is determined by the Court's reading of the employer prerogative, and not as one might expect – the other way around. For example, in *Janus v. AFSCME*, the Court held that public sector workers' First Amendment rights are violated by the institution of mandatory union agency fees.[95] The Court distinguished the rights harmed by mandatory union agency fees from the rights at stake when employee speech is punished by emphasizing the inherency of managerial prerogative: "When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson."[96] An employee's speech is not protected speech at all, because the employee's speech is not "really" the employee's words. Surpassing the judicial presumption of the *reality* of the employer's prerogative is a considerable barrier.

93. *Id*. at 421–22.

94. *See* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33 (2008); *see also Developments in the Law—Public Employment*, 97 HARV. L. REV. 1676, 1691 (1984) (arguing that the idea of management rights as developed in the private sector is "ultimately flawed [in the public sector], both because it accords government the same unwarranted managerial prerogatives that have been granted to private employers and because it fails to account for the public employer's special role as political decisionmaker").

95. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018). In her dissent, Justice Sotomayor describes the post-*Janus* balance of freedom of speech rights in the public sector: "Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one." *Id*. at 2493 (Sotomayor, J., dissenting).

96. *Id.* at 2474.

2. *Statutory Claims*

In the context of statutory claims, a typical example of the effects of the employer prerogative on workers' claims is the NLRA.[97] Although the statutory language of the NLRA provides for broad protections and rights for organizing workers and their unions, the history of workers' rights under the NLRA is one of courts grinding those immunities and powers against the employer prerogative.[98]

For example, employees who engage in concerted activities are protected from retaliation over their union activities,[99] but this coverage does not protect striking workers from being "permanently replaced" by their employer. This is so because the Court reasoned that from the NLRA's explicit protection of strikes[100] and concerted activities "it does not follow that an employer . . . has lost the right to protect and continue his business."[101] Nor, apparently, do those rights mean that the employer has lost the right to shut down the workplace in its entirety as retaliation for unionizing.[102] Employees have a recognized right to communicate among themselves and their union representatives about unionizing. Still, the Court and the NLRB have interpreted these rights as limited if they occur on employer property[103]

97. NLRA § 7, 29 U.S.C. § 157 (2018). Another common example of the prerogative's encroachment on workers' statutory rights is discrimination claims under Title VII, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 630(f). *See, e.g.*, Steelworkers v. Weber, 443 U.S. 193, 207 (1979) (stating that Title VII prohibits discrimination against historically disadvantaged groups without "diminish[ing] traditional management prerogatives"); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("The statute was not intended to 'diminish traditional management prerogatives.'"); Walter v. KFGO Radio, 518 F. Supp. 1309, 1314 (D.N.D. 1981) ("The ADEA was not intended to 'diminish management prerogatives.'"); Corbett, *supra* note 16, at 332 (arguing that the employer prerogative "suppress [the] discrimination laws"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 MICH. L. REV. 2229, 2312–13 (1995) ("[Burden shifting cases under Title VII] contain readily quotable passages explaining the need to eradicate discrimination. But the same cases contain passages, less quotable but more closely tied to the Court's actual holding, that articulate a need to protect management prerogative against undue incursions.").

98. ATLESON, *supra* note 44, at 137–38 ("[I]n all the areas [of NLRA jurisprudence], employee interests are based upon the statute. The employer's interests, on the other hand, are not statutorily expressed, and the typical reference is to employer prerogatives to run 'his business.'"); *see also* James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004) (describing the history of the right to strike in the United States).

99. NLRA § 8, 29 U.S.C. § 158.

100. *Id.* § 13, 29 U.S.C. § 163.

101. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

102. Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263, 269–74 (1965); Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Execs.' Ass'n, 491 U.S. 490, 509 (1989) (a decision under the Railway Labor Act reading *Darlington* as holding that a "decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of [a duty to bargain]").

103. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113–14 (1956) (distinguishing the rights of employees and nonemployee organizers for purposes of organizing on the employer's property); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); Cynthia L. Estlund, *Labor, Property and Sovereignty after*

or use an employer computer network.[104] Although the statutory language of "concerted activity" is broad, the NLRA does not protect concerted "slow-downs," because employees cannot "work on their own terms."[105] The Court has also found that the NLRA allows employers to restrict other union activities, such as leafleting during "working time," which "is for work," [106] or even leafleting during off-work hours when such restrictions are necessary to "maintain production or discipline" on employer's property,[107] or when such activities display "disloyalty" to the employer.[108]

Unions that gain representative status have a right to bargain collectively with an employer over a set of mandatory issues.[109] Still, this right does not include issues that the NLRB or courts consider to be at the "core of managerial prerogatives"[110] or that are "fundamental to the basic direction of a corporate enterprise,"[111] such as subcontracting, closing a portion of a plant,[112] or liquidating assets.[113] In justifying these limitations on bargaining subjects, the Court has reasoned that "Congress had no expectation that the elected union representatives would become an equal partner in the running of the business enterprise."[114] In such cases, unions can only demand to bargain over some effects of a managerial decision, not the decision itself.[115] Notoriously, no corollary presumption of a union or employee prerogative has been recognized under the NLRA.[116]

Lechmere, 46 STAN. L. REV. 305 (1994) (criticizing the Court's conception of property rights and restrictive conception of employees' section 7 rights).

104. Caesars Entm't, 368 N.L.R.B. No. 143 (2019) (reversing Purple Commc'ns, Inc., 361 N.L.R.B. 1050 (2014)).

105. Elk Lumber Co., 91 N.L.R.B. 337 (1950).

106. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).

107. *Babcock & Wilcox Co.*, 351 U.S. at 113.

108. NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 472–73 (1953).

109. Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV 29, 41 (1979).

110. ATLESON, *supra* note 44, at 6; Summers, *supra* note 109, at 41.

111. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964).

112. NLRB v. Int'l Harvester Co., 618 F.2d 85, 87 (9th Cir. 1980) ("Partial relocation of assets may also be within management prerogative."); Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966); *see also* Royal Plating, 152 N.L.R.B. 619 (1965); Robert J. Rabin, Fibreboard *and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971).

113. NLRB v. Adams Dairy, Inc., 350 F.2d 108, 111 (8th Cir. 1965).

114. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 676 (1981).

115. Bargainable effects are limited to mandatory subjects of bargaining like wages. *See, e.g.*, Providence Hosp. v. NLRB, 93 F.3d 1012, 1018 (1st Cir. 1996) ("[U]nions generally enjoy the right to bargain over the effects of decisions which are not themselves mandatory subjects of collective bargaining.").

116. NLRB v. Tomco Commc'ns, Inc., 567 F.2d 871, 878 (9th Cir. 1978) (rejecting the argument that a "union has a *duty* of representation to its members, which forbids it to concede certain prerogatives to management, and correspondingly forbids management to insist upon these [union] prerogatives").

Taken at face value, the employer prerogative offers employers residual power: the control over those workplace interests not waived by contract or altered by other legal devices. But courts tend to revert to treating the prerogative as more than a mere default that parties are free to waive contractually. In these cases, such as those involving the terms of at will employment, the prerogative is treated as an animating principle of work law or as part of the inherent "reality" of employment relationships. This treatment of the prerogative effectively means that it is harder for workers to refute the default using constitutional, statutory, or contractual overriding legal arguments, leaving the employer prerogative default a stable governance rule.

B. Market Power and Information Asymmetries

As a social class, workers suffer from a severe disadvantage in bargaining power compared to their employers.[117] Although such power is highly contextual,[118] there is a clear decline in U.S. workers' bargaining power as an overall trend.[119] Since the 1980s, the share of income going to labor has fallen,[120] income inequality has risen,[121] and the gap between the number of workers wanting a voice in their workplace and those getting it has never been greater.[122] While this drop in workers' bargaining power is tied to changes in collective workplace institutions, like the declining power of organized labor, it has broad overarching effects on the already skewed imbalance of bargaining power in individual working relations.[123]

It is commonly noted that the employment contract, the primary legal tool for overcoming the employer prerogative default, only exists at the labor market's higher echelons. Unilateral workplace policies promulgated by the employer, including employee handbooks and employee manuals, govern

117. *See, e.g.*, Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) ("The [FLSA is] a recognition of the . . . unequal bargaining power as between employer and employee."); KAHN-FREUND, *supra* note 47, at 6 ("The main object of [work law] has always been, and I venture to say will always be, to be a counter-vailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.").

118. *See* Racabi, *supra* note 45.

119. *See* Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy,* HARVARD UNIV. (2020), https://scholar.harvard.edu/files/stansbury/files/2020.5.20_stansbury_summers_the_declining_worker_power_hypothesis.pdf [https://perma.cc/KH23-L94C].

120. *Id*. at 1.

121. Elisa Gould, *State of Working America Wages 2019*, ECON. POLICY INST. 19 (Feb. 20, 2020), https://www.epi.org/publication/swa-wages-2019/ [https://perma.cc/UV3C-NNFK].

122. *See, e.g.*, Thomas Kochan, Duanyi Yang, William T. Kimball & Erin L. Kelly, *Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*, 49 INDUS. LAB. REV. 3 (2019).

123. *See, e.g.*, Stansbury & Summers, *supra* note 119.

most lower-tiered-workers.[124] But even in cases where an employment contract exists, market disparities mean that for most workers, both the initial terms of the contract as well as those issues excluded from it are unilaterally decided by the employer.[125]

In addition, employment relations, especially in their early phases, are characterized by severe information asymmetries. Workers lack information about the employer's organizational structure, preempting employees from making specific demands. Workers also lack knowledge of the laws and institutions that govern their work relations.[126] For example, workers tend to "systematically overestimate the protections afforded by law, believing that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract."[127] This is the case when employees misunderstand the employment-at-will rule or overestimate the levels of job security granted by employer statements.[128]

With this skewed understanding of law and the missing perspective on specific organizational features, contractual negotiations serve as a poor instrument for allocating power. For example, it is notoriously difficult to contract around the presumption of employment at will, as the majority of workers are employed at will and "fixed-term contracts are unusual and indefinite-term just-cause contracts are rarer still."[129]

The scope of negotiable issues is also impacted by signaling effects.[130] This means that even when workers have sufficient bargaining power, changes to the status quo are likely to be discrete and confined to particular substantive issues such as pay.[131] Other matters, such as job security or paid sick leave, are likely to be left out of contract negotiations:

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124. *See, e.g.*, RESTATEMENT OF EMP'T LAW § 2.05 cmt. a (AM. LAW INST. 2015) ("[A]s a general matter, employers of any size will make agreements . . . only with their higher-level employees. When an employer is dealing with a large number of similarly situated employees, the employer is likely to communicate the terms of the employment relationship through unilateral statements in documents such as employee manuals, personnel handbooks, and employment policy directives that are provided, or made accessible, to employees."); Arnow-Richman, *Modifying At-Will Employment Contracts*, *supra* note 90, at 435 n.34 (explaining that "[m]ost workers lack a formal written contract purporting to define all of the initial terms of the engagement" unless they are an "executive" or "high-level" employee).

125. Arnow-Richman, *Modifying At-Will Employment Contracts*, *supra* note 90, at 428.

126. Alexander Hertel-Fernandez, *American Workers' Experience with Power, Information, and Rights on the Job: A Roadmap for Reform*, ROOSEVELT INST. 17–21 (2020) https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_WorkplaceVoice_Report_202004.pdf [https://perma.cc/7B4Y-NNTW].

127. Kim, *Bargaining with Imperfect Information*, *supra* note 40, at 133–35.

128. *Id.* at 111.

129. *Id.* at 106–07.

130. *See* David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294, 295 (1991).

131. *See, e.g.*, WEILER, *supra* note 1, at 74 (describing information asymmetry and bargaining biases).

> [Prospective] employees know about the future quality of their work and their likelihood of shirking, and employers know whether they intend to abide by basic fairness norms in handling future discipline and termination. In the absence of a means to verify the claims of the other side, however, neither side is likely to raise the issue of job security. On the one hand, the employee is unlikely to express a desire for just-cause protection, out of fear that the employer will perceive her as a shirker. On the other hand, the employer will hesitate to announce its willingness to offer a just-cause term in exchange for a wage discount, fearing that it will attract a greater proportion of employees who are likely to shirk.[132]

Market power disparities, information asymmetries, and signaling concerns are all known failures in the market for workplace control. These add to the stickiness of the employer prerogative. Control over workplace interests ends up where it was initially located—with the employer—not because it is the right policy solution for each workplace issue or because it represents a meeting of the minds between the worker and management, but rather because the odds are stacked against workers' attempts to contract control out of employers' hands.

C. Employment-at-Will Doctrine

> By the end of the nineteenth century the employment contract had become a very special sort of contract – in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion. For this reason we call it the prerogative contract.[133]

Employment at will is the default employee termination doctrine in the United States.[134] An at-will employee can quit or be terminated with no notice and for a good reason, a bad reason, or no reason at all.[135] The at-will doctrine is the default law of termination in forty-nine states.[136] As a general rule, this doctrine governs in instances when employment contracts are silent as to notice requirements and the standard of termination, and when the contract does not specify any specific employment duration.[137]

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132. Kim, *Bargaining with Imperfect Information*, *supra* note 40, at 118–19.

133. SELZNICK, *supra* note 16, at 135.

134. For simplicity purposes, this Section treats default termination rules in the private sector, ignoring termination rights in the public sector.

135. *See supra* note 19 and accompanying text.

136. Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, ROOSEVELT INST. (Jan. 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/YQ8G-6MR4]. Montana is the outlier. *Id.*; *see* Montana Wrongful Discharge of Employment Act, Mont. Code § 39-2-901 (2021).

137. Feinman, *supra* note 19, at 118.

Employment at will is frequently tied to the rationales underlying the employer prerogative,[138] and is perhaps its "quintessential expression."[139] This is so because of two components of the employment-at-will doctrine: (1) the employer's authority to terminate at will and (2) the employer's authority to unilaterally modify contractual agreements with their workers. These two components enhance and entrench the default employer prerogative and limit workers' ability to override the prerogative contractually, reinforcing the default as a status quo.[140]

1. The Authority to Terminate at Will

As in other domains of work law, termination is by default within the employer's prerogative. To be sure, employer discretion over termination has been capped on several fronts.[141] For example, doctrinal developments, like the introduction of the tort of termination against public policy[142] and expanded contractual readings of good-faith limitations[143] have somewhat curtailed the employer's prerogative over termination. Additionally, some legislation prohibits retaliatory terminations and "just-cause" clauses exist in collective bargaining agreements and in individual employment contracts. However, these exceptions do not swallow the rule, and are instead mere anecdotal limitations to the default rule allowing employers to terminate employees at will.[144]

Despite the doctrine's seeming mutuality, employment at will has an asymmetric effect on workplace power. It is a recognized legal device guaranteeing management the unilateral power to make rules and exercise discretion.[145] In his historical account of the development of employment at

138. NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) ("[D]ischarge of employees [is] a normal, lawful legitimate exercise of the prerogative of free management in a free society.").

139. Corbett, *supra* note 16, at 316 (internal citations omitted).

140. It also weakens other doctrinal limitations of the employer prerogative such as the covenant of good faith and fair dealing. *See* Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1111 (Cal. 2000) ("[T]he implied covenant of good faith and fair dealing imposes no independent limits on an employer's prerogative to dismiss employees."); RESTATEMENT OF EMP'T LAW § 2.07(b) (AM. LAW. INST. 2015) ("The implied duty of good faith and fair dealing applies to at will employment relationships in manner consistent with the[ir] essential nature."). Employment at will also limits the effectiveness of antidiscrimination laws. *See* WEILER, *supra* note 1, at 49; Arnow-Richman, *supra* note 90, at 469.

141. *See*, *e.g.*, WEILER, *supra* note 1.

142. *See* RESTATEMENT OF EMP'T LAW § 2.01(e).

143. *See, e.g.*, *id.* § 2.07.

144. *Cf.* Cynthia L. Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 804–05 (2018) (describing the default rule and some of its effects).

145. *Cf.* SELZNICK, *supra* note 16, at 135 (stating that one function of the at will rule was to prevent workers from gaining a measure of control over their jobs); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 125 (2004) ("[T]he now famous, or infamous, iteration of employment at will encapsulates the absolute power of employers to govern the workplace. Although employment at will expressly addresses employers' absolute right to terminate employees, it is about much more. One who has the power to terminate also has the power to do as she pleases with respect

will, Jay Feinman described it as a crucial factor of control over workplace interests:

> Employment at will is the ultimate guarantor of the capitalist's authority over the workers. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor. Indeed, such a fleeting relationship is hardly a contract at all. . . . [T]he employment at will rule assured that as long as the employer desired it (and as long as the employee was not irreplaceable, which was seldom the case) the employee's relation to the enterprise would be precarious. [It was a]n effective way to assert the owners' control and their right to management and profits and a clear division between owners and non-owners of capital . . . .[146]

Feinman stressed the effects of precarity on the employee and the symbolic effects of the doctrine on establishing a division between capital owners and non-owners. In more recent critiques of employment at will, the emphasis has shifted to employers' ability to dominate and coerce their workers.[147]

In describing the effects of employment at will on the governance of the workplace, Paul Weiler has described how the at-will doctrine is "regularly abused" by pushing employees "into violating the law on behalf of their employer, or into sacrificing their own entitlements to . . . legal benefits."[148] According to Weiler, the asymmetric effect of the at-will doctrine stems from difference in how employees and employers value their work and the workplace:

> [The worker's] job is valuable [to him] both because it generates the earnings which probably constitute the major financial support for the worker and his family, and because work is so important to the personal identity and sense of self-worth of the employee. In a real sense, then, a worker's job is the asset about which he cares most in modern life, even more important to him than the various other forms of property which the law now says that he "owns."[149]

The at-will rule structures work relations as precarious, "casual as the sale of a newspaper on a city street."[150] In effect, what appears to be a double-

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to all terms and conditions of employment. At its core, employment at will is about employer power and prerogative.").

146. Feinman, *supra* note 19, at 131–33 (internal citations omitted).

147. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

148. WEILER, *supra* note 1, at 49.

149. *Id.*

150. SELZNICK, *supra* note 16, at 134.

edged doctrine available to both employees and employers is a one-edged sword wielded by the employer.[151]

2. *Modifying At-Will Contracts on the Go*

Employment at will entails more than the ability of employers to unilaterally end the employment relationship. The doctrine also harbors the authority of employers to unilaterally modify terms in at-will contracts.[152]

The traditional employer rule over the workplace included the right to "freely dictate any and all working conditions."[153] The employer's ability to impose contractual changes stems from its legal capacity to condition continued employment on acceptance of new contractual terms. In this sense, at-will contracts are continuously negotiated.[154]

The legal debate about modification of at-will contracts is effectively summarized by Rachel Arnow-Richman. According to Arnow-Richman, in determining the validity of mid-term modifications, courts focus on the contract doctrine of consideration in taking one of two approaches. Under the unilateral modification approach, courts consider an employer's retention of an employee as sufficient consideration for the employer's proposed contractual change. However, according to the formal modification approach, courts require the employer to offer the employee additional consideration, in the form of improved working conditions—like a pay raise—for the modification to be legally binding.[155]

Courts vary between the two approaches based on jurisdiction and subject matter.[156] Yet under both prevailing legal frameworks, and even under Arnow-Richman's proposed "reasonable notice rule," under which an employer must provide notice prior to unilateral contractual modifications, the authority to engage in such modifications of at-will employment contracts

151. *Cf.* Lobel, *supra* note 88 (discussing workplace "exit" and "voice" functions).

152. *See* Arnow-Richman, *supra* note 90, at 428; West, *supra* note 50, at 9.

153. MARK A. ROTHSTEIN, EMPLOYMENT LAW: CASES AND MATERIALS 555 (4th ed. 1998).

154. *Cf.* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 286 (Univ. of Wis. Press 1959) ("[W]hen it is said that 'labor' is property, what is intended is that the laborer . . . owns the liberty to be continuously bargaining with his employer to be kept on the job by virtue of continuously delivering a service which the employer continuously accepts . . . . The laborer is thus continuously on the labor market—even while he is working at his job he is both producing and bargaining, and the two are inseparable.").

155. *See, e.g.*, *In re* Halliburton Co., 80 S.W.3d 566, 568 (Tex. 2002) ("[W]hen an employer notifies an employee of changes to the at-will employment contract and the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law.") (citation omitted); Arthur J. Gallagher & Co. v. Dieterich, 270 S.W.3d 695, 704–05 (Tex. App. 2008) (explaining that when the employment contract is not at will, continued work does not constitute acceptance of the modification); Arnow-Richman, *supra* note 90, at 429.

156. Arnow-Richman, *supra* note 90, at 440–44 (comparing modifications of non-compete clauses to arbitration clauses in various jurisdictions).

falls within the employer's prerogative.[157] An employer's power to unilaterally modify contractual terms is both a significant piece of the employer prerogative and a factor that cements employer control in the workplace. This authority makes contractual encroachments into the employer prerogative always susceptible to ceding upon employer demand, maintaining the status quo of power in the workplace.

D. Enforcement Gaps

The fourth reason the default employer prerogative has such a lasting effect on control over workplace interests is the prevalence of work law enforcement gaps. Enforcement gaps entrench the employer prerogative by making regulatory limitations on the employer prerogative de facto meaningless. This Section describes two sources of that gap: (1) mandatory arbitration and collective claims waivers and (2) underenforcement by regulatory agencies.

1. Arbitration Agreements and Class Waivers

Mandatory arbitration agreements are clauses in employment contracts dictating that disputes regarding a worker's contractual or statutory rights will be resolved through binding private arbitration and not through the court system.[158] Class action waivers are contract clauses that limit a worker's ability to bring a class action or participate in mass arbitration of legal claims.[159] By pushing cases away from public scrutiny and thwarting collective action against employers' work law violations, mandatory arbitration and class waiver clauses undermine enforcement. When workers cannot effectively enforce their legal rights, authority rests where it was initially allocated —with employers, cementing the employer prerogative.

Taken together, arbitration and class action waiver clauses mean that subjected employees and employers are bound to arbitrate most workplace claims individually. Arbitration clauses are common in contemporary

157. *Id.* at 430 ("In reality, at-will employees have no 'choice' in consenting to mid-term modifications, irrespective of whether they receive 'new' or 'separate' consideration in supposed exchange for the new terms.").

158. Estlund, *Rebuilding the Law of the Workplace*, *supra* note 45, at 338.

159. The limit on class arbitrations is also present when the arbitration agreement is silent or even ambiguous as to this option. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Joanna Niworowski, Note, Lamps Plus, Inc. v. Varela*: Dark Times Ahead for Class Arbitrations*, 75 U. MIAMI L. REV. 257, 260 (2020).

employment contracts[160] but are especially prevalent in low-wage sectors.[161] Though important exceptions to their validity and scope do exist, such clauses have survived significant legal challenges and are now ubiquitous in work law adjudication.[162]

Arbitration clauses are one way employers have responded to the rise in legal claims alleging individual workplace violations.[163] Arbitration clauses divert legal claims away from courts into private dispute resolution procedures suspected of leaning toward employers' interests as repeat players in the arbitration process.[164] Arbitration clauses reinforce the employer prerogative in two primary ways: by keeping legal proceedings (including their background legal violations) away from the public eye and by avoiding setting binding legal precedents.[165] In combination with class action waivers, they also thwart the development of mass claims that are not financially viable to pursue individually.[166]

Employers have the recognized right to draft the arbitration agreement and, as a result, dictate how the arbitration process works, including what the fees are, and how arbitrators are chosen. As Cynthia Estlund put it:

> [E]mployers gain considerable control over the adjudicatory process by securing arbitration agreements. Their control and their incentive to exercise it effectively is enhanced by their posture as likely repeat players who foresee repeated resort to the arbitration process in a range of legal disputes.[167]

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160. Estlund, *Rebuilding the Law of the Workplace*, *supra* note 45, at 391; Sarah Staszak, *Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace*, 34 STUD. AM. POL. DEV. 239, 259 (2020); *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back*, ECON. POLICY INST. (2019), https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf [https://perma.cc/TTX3-4ES3] (stating that by 2024, 80 percent of non-union private sector employees will be prohibited from suing their employers in court); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/9VUK-ZP3R] (estimating that as of 2018 more than 60 million workers have signed mandatory arbitration agreements).

161. Staszak, *supra* note 160, at 239–40.

162. *See* Estlund, *Rebuilding the Law of the Workplace*, *supra* note 45, at 391.

163. *Id.* at 333–35.

164. Mark Gough, *A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation*, 74 INDUS. LAB. REL. REV. 875, 895 (2021) (explaining that employers are well positioned to win in antidiscrimination arbitration); Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203, 1250 (2002) (describing repeat-player advantages of employers in arbitration settings).

165. Cynthia L. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 679 (2018) ("[T]he diversion of legal disputes from courts to arbitrators under the Federal Arbitration Act . . . threatens to stunt both the development of the law and public knowledge of how the law is interpreted and applied in important arenas of public policy."); *see* Racabi, *supra* note 45, at 21 (discussing the effect of precedents on worker power).

166. In some states, general contract doctrine limits some of the more egregious usages of these clauses. Estlund, *supra* note 165, at 701.

167. Estlund, *Rebuilding the Law of the Workplace*, *supra* note 45, at 339.

This diversion of legal claims allows the de facto employer prerogative to spill into domains where it is de jure modified. Again, it is not a policy decision, at least as far as "decision" is commonly understood, but rather it is so simply because there is no longer an effective way to stop those spillovers. Late Justice Ruth Bader Ginsburg described this common fact pattern at the background of such clauses in her dissent in a case rejecting the applicability of the NLRA's protection of concerted activities to class action waivers:

> The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the [FLSA] and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind.[168]

2. Regulatory Underenforcement

The work law framework in the United States is relatively weak and underdeveloped compared with work law institutions in other Western countries.[169] Moreover, the relatively minor regulatory intrusions into the employer prerogative in the United States are hampered by a massive enforcement gap.[170] Some scholars depict the problem as one of underenforcement: "not enough inspectors, not enough penalties, not enough

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168. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (citations omitted).

169. *See* OECD, DETAILED DESCRIPTION OF EMPLOYMENT PROTECTION LEGISLATION, 2012–2013, http://ww.oe.o/els/emp/All.pdf [https://perma.cc/SXD7-SXG9] (describing procedural and substantive protection against unjust termination); OECD.STAT, REAL MINIMUM WAGES, https://stats.oecd.org/Index.aspx?DataSetCode=RMW [https://perma.cc/NH8D-HFG3] (minimum wage); OECD FAMILY DATABASE, PARENTAL LEAVE SYSTEMS, https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [https://perma.cc/LVZ5-65BR] (parental leave); HARRY C. KATZ, THOMAS A. KOCHAN & ALEXANDER J.S. COLVIN, AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING AND LABOR RELATIONS 384, 384 (5th ed. 2017) ("The United States . . . has one of the lowest rates of unionization of any advanced democratic economy, and its rate of unionization has fallen faster in the past 30 years than that of any other industrialized country in the world."); Kathleen Thelen, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSP. ON POL. 5, 12–13 (2019) (labor relations). *See also* KATHLEEN THELEN, VARIETIES OF LIBERALIZATION AND NEW POLITICS OF SOCIAL SOLIDARITY (2014) (describing the liberal model of labor regulations in the United States in a comparative political economy perspective).

170. *See, e.g.*, Fergal O'Brien & Zoe Schneeweiss, *U.S. Ranked Worst for Workers' Rights among Major Economies*, BLOOMBERG (June 18, 2020), https://www.bloomberg.com/news/articles/2020-06-18/u-s-ranked-worst-for-workers-rights-among-major-economies?sref=qD0EKJAt [https://perma.cc/JB2V-434B]; 2020 ITUC GLOBAL RIGHTS INDEX 12, https://www.ituc-csi.org/IMG/pdf/ituc_globalrightsindex_2020_en.pdf [https://perma.cc/EYK3-LBFS] (classifying the United States under the category of "systematic violation of rights").

deterrence,"[171] which adds to a "lengthy processes of administrative and judicial review, procedural constraints on inspections and enforcement, and reduced funding, all of which impair the efficacy of such agencies."[172] A recent quote, from prominent labor relations scholars, supports this theme:

> [T]he gap between [work law] and workplace practice is large and growing. While American employers frequently complain about the "excessive" burden of "unnecessary" regulation . . . they are all but immune from regulation in practice. It would take at least fifty-eight years for the average workplace to be visited by the Department of Labor's Wage and Hour Division (WHD). And the Occupational Safety and Health Administration (OSHA) fares no better—admitting that at current federal and state staffing levels, the average work site would be visited by a safety and health inspector no more than once every sixty-six years. Other enforcement agencies have even fewer resources . . . . And on the rare occasions when violators are discovered and sanctioned, they find that the penalties are light—often no more than a nuisance—in any event.[173]

The COVID-19 pandemic has laid bare such enforcement gaps. Currently, only fifteen states and the District of Columbia provide mandatory paid sick leave policies, and discretionary paid sick leave policies are highly skewed toward the labor market's upper bounds.[174] And although the Families First Coronavirus Response Act (FFCRA) provided much-needed paid sick leave for COVID-19-related absences, it was not without its gaps.[175] These policy deficiencies, along with employment-at-will doctrine and a workplace-tied healthcare system, led to the predictable outcome that employees who carried, or thought they might be carrying, the virus were disincentivized to stay at home. This made workplaces, especially low-wage, high density workplaces, COVID-19 hot spots.[176]

Regulatory encroachments on the employer prerogative are not only substantively weak in the area of workplace health and safety but also extremely remote from the real workplace because of the lack of enforcement

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171. Estlund, *Rebuilding the Law of the Workplace*, *supra* note 45, at 340.

172. *Id*. at 341.

173. MICHAEL J. PIORE & ANDREW SCHRANK, ROOT-CAUSE REGULATION 3 (2018) (citations omitted).

174. *See* KFF, *State Policies on Paid Family and Sick Leave*, STATE HEALTH FACTS (2020) https://www.kff.org/other/state-indicator/paid-family-and-sick-leave/ [https://perma.cc/N62X-FWTB].

175. Notably, the legislation excluded firms with more than 500 employees. *See* FFCRA, Pub. L. 116-127, 134 Stat. 178 (2020); Steven Findlay, *Congress Left Big Gaps in the Paid Sick Days and Paid Leave Provisions of the Coronavirus Emergency Legislation*, HEALTH AFFAIRS (Apr. 29, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200424.223002/full/ [https://perma.cc/DK3K-R94U].

176. Michelle A. Waltenburg, et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020,* CTRS. FOR DISEASE CONTROL & PREVENTION (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm [https://perma.cc/Z2M7-ZS3Q]; Mike Dorning, *Meatpacking Link Found in Up to 8% of Early U.S. Covid Cases*, BLOOMBERG QUINT (Nov. 23, 2020), https://www.bloombergquint.com/politics/study-ties-6-to-8-of-u-s-covid-cases-to-meatpacking-plants [https://perma.cc/LL7X-UNBZ].

capacity. A telling example is that, as of October 2020, OSHA, the federal agency in charge of enforcing safety and health regulations, had cited only 37 businesses across the United States for COVID-related violations.[177]

Enforcement gaps and arbitration agreements make the employer prerogative more than merely a default to be overridden by regulatory instruments but a de facto reality in the U.S. workplace.

III. THE DEFAULT EMPLOYER PREROGATIVE AS A LOSING POSITION

The employer prerogative affects more than just workers' lives, it also has hidden political ramifications. The default doctrine limits the possibility of adopting progressive workplace policies and engaging in redistributive workplace actions that would change the status quo of workplace power. In other words, the employer prerogative itself is a cause of the status quo, not only the outcome of other cumulative factors. In the political science literature, such an effect is called a positive feedback loop: where specific policy characteristics generate particular political outcomes that in turn entrench those policy features.[178] Policy, as the saying goes, *breeds politics*.[179] In the following examples, the default employer prerogative breeds the political mechanisms that entrench it.

I term the first mechanism the *whack-a-mole* effect. Here, employers utilize their prerogative to evade, and frustrate the effects of progressive policy initiatives. I term the second mechanism the *regulatory cage-jeopardy* effect. Here, employers leverage their prerogative to stop redistributive policy initiatives in their tracks by implicitly or explicitly threatening retribution against the promotors of those policy initiatives or their constituencies. These two mechanisms draw from the futility and jeopardy terminology of Albert Hirschman's *Rhetoric of Reaction*[180] but work law scholars should recognize these mechanisms as concrete risks, not mere rhetoric.[181] While it is always the case that regulatory interventions can fail or backfire,[182] it is rarely the case where a single policy frame—here, work law— is behind both the intervention and its frustration.

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177. *U.S. Department of Labor's OSHA Announces $484,069 in Coronavirus Violations*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Oct. 2, 2020), https://www.osha.gov/news/newsreleases/national/10022020-0 [https://perma.cc/W3FL-558G].

178. *See, e.g.*, Daryl J. Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015).

179. *See* Jacob S. Hacker & Paul Pierson, *After the "Master Theory": Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSP. ON POL. 643 (2014).

180. HIRSCHMAN, *supra* note 43.

181. *Cf.* ADRIAN VERMEULE, THE CONSTITUTION OF RISK 52 (2013) (surveying Hirschman's mechanisms in the context of constitutional law).

182. *See id.*; HIRSCHMAN, *supra* note 43.

This Part describes precisely that feedback loop: work law provides employers with the tools to frustrate and push back against work law interventions. To illustrate this feedback loop, this Part looks at workers' and advocates' legal and political efforts to regulate Uber as a workplace and describes how Uber used work law to push back. Uber is a good case study because its exploitation of the employer prerogative was particularly blatant, but the company is far from being an outlier in wielding work law's tools to resist and evade workplace reforms.

A. The Political Effects of the Prerogative: The Uber Example

Uber is at the center of attention of U.S. workplace regulators and activists. Uber classifies its drivers as independent contractors, which effectively excludes them from most work law coverage.[183] Workers, lawyers, and unions are now engaged in a decade-long fight to redistribute power within Uber as a workplace. One main strategy in this struggle is filing claims in courts and arbitral forums and with agencies, and engaging in comprehensive political campaigns, lobbying, and legislative efforts aimed at gaining legal recognition for Uber drivers as employees rather than as independent contractors.[184]

For example, in California, years of bottom-up organizing of drivers, lobbying, and legal struggles culminated in the passage of Assembly Bill 5 (AB5) in 2019.[185] The law changed how employees are classified under the California Labor Code, codifying a relatively stringent classification method known as the ABC test.[186]

While AB5 addressed misclassification generally, its passage was specifically motivated by the legal disruption that Uber and other gig-economy platform companies had caused in the labor market. Following AB5's passage, Uber, along with other platform companies, pushed back by successfully campaigning for Proposition 22, a ballot initiative aimed at exempting Uber, and other app-based transportation and delivery companies, from AB5's requirements.[187] In campaigning for Proposition 22's passage, Uber stated that if the ballot initiative were to fail, forcing the company to classify its drivers as employees instead of as independent contractors, it might react in the following ways:

1. Not hire drivers as employees of Uber and instead use a franchising model. Although it is not clear how this model would have operated,

183. *See* Racabi, *supra* note 45, at 1168–69 nn.2–3.

184. *Id*.

185. A.B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

186. *Id*.

187. *See* Ballot Pamp., Gen. Elec. (Nov. 3, 2020) text of Prop 22, p. 56.

it likely would have entailed Uber auctioning its logo and access to its matchmaking software to franchisees that would employ their own fleets of drivers.[188]

2. Change the way drivers' working time is scheduled. Uber suggested that after reclassifying its drivers as employees, the company would have to change its business model to a more centralized and rigid scheduling and placement scheme. Drivers would have no longer enjoyed their much-valued[189] flexible working time and might have also lost their ability to decide where to work.

3. Leave any jurisdictions that would require classifying its drivers as employees (in the case of AB5 and Proposition 22, California).[190]

4. Lay off 926,000 drivers, maintaining only 260,000 full-time drivers,[191] a devastating move, especially when done amid a pandemic-stricken U.S. job market.

Uber's responses to the possibility of reclassifying its drivers share two significant features. First, these responses would have been destructive for, or at least be highly skewed against, attempts to redistribute power in Uber as a workplace for its drivers. Second, none of these responses would have been legally prohibited. Indeed, if Proposition 22 had not passed, and Uber was forced to classify its drivers as employees, it would have been entirely within Uber's employer prerogative to change its business model, lay off drivers, and take any of the other measures the company previously threatened it would implement.

Thus, this example demonstrates the capacity of employers to use their prerogative to both dodge enacted redistributive policies (the *whack-a-mole* effect—consider Uber's response number 1) and threaten to punish workers and the broader public to stop those redistributive policies from coming into

188. Veena B. Dubal, *The Pitfalls of Uber and Lyft as Franchisors*, ONLABOR (Aug. 19, 2020), https://onlabor.org/the-pitfalls-of-uber-and-lyft-as-franchisors/ [https://perma.cc/4RA5-M8SV] [hereinafter Dubal, *The Pitfalls of Uber and Lyft as Franchisors*].

189. *See* Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 796 (2017) [hereinafter Dubal, *Winning the Battle*]; *see also* Veena B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* (Univ. of Cal. Hastings Sch. of Law, Working Paper No. 381, 2019), https://ssrn.com/abstract=3488009 [https://perma.cc/Q368-V9UM] [hereinafter Dubal, *An Uber Ambivalence*] (documenting the importance of drivers' flexibility and the dilemmas classification brings to drivers and activists); Racabi, *supra* note 45, at 1193 (identifying the research on this point).

190. *See infra* Part III.B.

191. Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, UBER (Oct. 5, 2020), https://www.uber.com/newsroom/economic-impact/ [https://perma.cc/HB83-JCUC].

effect (the *regulatory cage-jeopardy* effect—consider Uber's responses numbers 2, 3, and 4). Both the *whack-a-mole* effect and the *regulatory cage-jeopardy* effect are ever-present in work law and policy debates, and, as explained in the following Sections, have the cumulative effect of entrenching the employer prerogative.

B. The Whack-a-Mole Effect

One of the more commonplace intuitions in work law scholarship is the ability of employers to use their prerogative to frustrate the outcomes of redistributive policies. Attempts to constrain employer power appear to produce a corresponding series of employer reactions aimed at holding on to their power.[192] I call this the *whack-a-mole* effect.[193] This hydraulic effect reduces the likely benefits of every redistributive workplace action or policy intervention, and, in turn, increases the costs of those actions and interventions because advocates are forced to preemptively consider possible employer responses. This poses a significant conceptual and practical challenge for work law and for worker advocates. Because workplace interventions might fall flat on their faces absent employer cooperation, advocates are forced to play nice with employers. This Section utilizes employee status-classification struggles, including those involving Uber drivers, to illustrate the *whack-a-mole* effect.

First, some background. Most U.S. work law is conditioned on a finding of an employee-employer relationship. In this sense, work law is binary.[194] You are either an employee covered by work laws and regulations, or you are not.[195] Workers classified as employees are protected by antidiscrimination and harassment laws based on categories such as race, sex, and disability.[196] Employees are also eligible for family and medical leave,[197] equal pay,[198] and minimum wage and overtime rules.[199] Meanwhile, employers owe fiduciary

192. *Cf.* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) ("[T]he desire for political power cannot be destroyed, but at most, channeled into different forms . . . [and] every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.").

193. *Cf.* Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1147, 1149 (2011) (describing campaign finance regulations as "the regulatory equivalent of whack-a-mole").

194. *Cf.* Racabi, *supra* note 45 (observing the availability of legal levers outside of employee status).

195. The following examples are drawn from Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 800 (2018) (detailing the implication of employment status classification); Racabi, *supra* note 45, at 1177.

196. Title VII, 42 U.S.C. § 2000(e)(2) (2018); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112; ADEA, 29 U.S.C. § 623 (2018).

197. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

198. Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d).

199. FLSA, 29 U.S.C. §§ 206–207.

duties to their employees when handling their health and retirement benefits[200] and must provide a safe work environment.[201] Employers are also prohibited from interfering with concerted activities of their employees and with their right to join a union under the NLRA.[202]

Because of this binary landscape, the legal line separating employees from independent contractors carries tremendous weight. Perhaps because the stakes are so high, finding a clear legal rule for where that line is drawn has always proved challenging.[203] Because statutory language offers circular definitions for what constitutes an "employee,"[204] courts and other tribunals that apply these definitions resort to common law tests focused on various organizational features of the employee-employer relationship.[205] Chief among those tests is the common law control test.[206] The greater the degree of control the purported employer has over its purported employee, the more likely a court is to find that the worker is an employee.[207] Meanwhile, the Fair Labor Standards Act (FLSA) uses the "economic realities" test to determine whether a worker is an employee or an independent contractor.[208] The FLSA defines an "employee" as "any individual employed by an employer,"[209] and "employ" is defined as "to suffer or permit to work."[210] Together, the "control" and "economic realities" tests and a combination of the two

200. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1104(a).

201. Occupational Safety and Health (OSH) Act of 1970, 29 U.S.C. § 654.

202. NLRA, 29 U.S.C. § 158 (2018).

203. *See also* LINDER, *supra* note 53, at 13.

204. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296 (2001); Das Acevedo, *supra* note 195, at 801.

205. *See, e.g.*, Carlson, *supra* note 204, at 299.

206. *See* RESTATEMENT OF EMP'T LAW § 1.01 cmt. d (AM. LAW INST. 2015); RESTATEMENT (THIRD) OF AGENCY § 7.07(f) (AM. LAW. INST. 2006) ("[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work."); Cmty. for Creative Non-Violence v. Reid 490 U.S. 730, 751–52 (1989); Das Acevedo, *supra* note 195, at 795; Carlson, *supra* note 204, at 299.

207. This test is also used to determine employment status for vicarious liability in tort law and as a fallback position for cases where courts struggle with finding guidance with the language of federal statutes. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448–51 (2003) (regarding the ADA); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (using the common law test in cases of circular statutory definitions of "employee"); Speen v. Crown Clothing Corp., 102 F.3d 625, 630–32 (1st Cir. 1996) (regarding the ADEA); Wilde v. Cty. of Kandiyohi, 15 F.3d 103, 105–06 (8th Cir. 1994) (regarding Title VII); Carlson, *supra* note 204, at 298. This test is also used for tax filing purposes. The Internal Revenue Code, 26 U.S.C. § 3121(d) (2018), defines "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."

208. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985).

209. FLSA § 3(d), 29 U.S.C. § 203(e) (2018).

210. *Id.* § 203(g).

referred to as "hybrid tests,"[211] along with the "entrepreneurial opportunities" test (examining "significant entrepreneurial opportunity for gain or loss")[212] and variations thereof, cover most of the employment classification terrain.

However, an important outlier has since emerged: the ABC test. Under the ABC test, employee status is effectively the legal default. For a worker to be classified as an independent contractor, as opposed to an employee, three conditions must be met: a) the worker is free from control; b) the service the worker provides is outside the usual course of the business for which the service is performed; and c) the worker is customarily engaged in an independently established trade or business.[213] The ABC test is considered the most inclusive and least ambiguous among the current array of classification tests.[214]

Regardless of their supposed robustness, a known Achilles heel of all classification tests is their reliance on the employer's organizational features, a core aspect of the employer prerogative, to determine employment status. Employers' ability to tweak and modify organizational practices is a main contributor to the characterization of employment-classification litigation as a "losing war."[215]

As a result of employers' control over the primary elements of classification tests, scholars have advocated for employer classification tests that do not rely on bright line rules and criteria that employers can easily evade. For example, Guy Davidov has cautioned against reducing the ambiguity of employee classification tests, suggesting that doing so may enable employers to use their prerogative to misclassify their workers as independent contractors:

> [Employment classification] is an area in which some degree of indeterminacy is necessary. . . . If we set in legislation a specific list of

211. *See, e.g.*, Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 248 (1997).

212. FedEx Home Delivery, Inc. v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009); NLRB v. Friendly Cab Co., 512 F.3d 1090, 1097–99 (9th Cir. 2008); Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002); RESTATEMENT OF EMP'T LAW § 1.01 cmt. d (AM. LAW INST. 2015); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE. L. REV. 353, 355 (2011).

213. Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statues*, 18 U. PA. J.L. SOC. CHANGE 53, 65 (2015); Dubal, *An Uber Ambivalence*, *supra* note 189, at 8; *see also* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018) (detailing the ABC test).

214. *See, e.g.*, Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 882 (1995); Benjamin Sachs, *Law and Politics in Employee Classification,* ONLABOR (Apr. 30, 2019), https://onlabor.org/law-and-politics-in-employee-classification/ [https://perma.cc/EDM3-LQWV]; Dubal, *An Uber Ambivalence*, *supra* note 189, at 8.

215. Dubal, *Winning the Battle*, *supra* note 189, at 795; Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 280–82 (2011).

> criteria for clear-cut determination [of employment status], it will be easy for employers to work around them and evade the law. To prevent evasion as much as possible and provide solutions for new work arrangements, it is necessary to leave a wide margin of discretion for courts.[216]

Like Davidov, other scholars have argued that clear classification rules enable employers to more easily maneuver around them.[217] Thus, the solution is to muddy the waters of the classification tests. Work law must sacrifice clarity to preempt employers' use of their prerogative to evade work law.

Tweaking organizational structures is just one way employers use their prerogative to frustrate workplace policies and dodge work law. Other examples include outsourcing work—whether in response to classification risks or as run-of-the-mill fissuring of the workplace—which exacerbates legal and organizational gaps between "core" and "peripheral" workers by reducing the effectiveness of legal enforcement.[218] Employers can stymie termination laws that attempt to curb gender or racial discrimination by using their prerogative to hire less "risky" employees.[219] In addition, employers can transition to using employee manuals to counter judicial attempts to read job-security guarantees into employer statements.[220]

In the case of Uber, the company proposed outsourcings its fleet of drivers to smaller franchisors as a way to evade employee classification. Franchising is a strategy to maintain brand name while externalizing labor costs to smaller business owners, but that is infamous for severely limiting workers' rights and decreasing worker power.[221] Although some legal solutions that protect franchise workers' rights do exist,[222] work law offers no silver bullet. Thus, for those pushing for the inclusion of Uber drivers as employees as a means to increasing drivers' workplace power, fissuring is considered detrimental.[223] Yet, it is also clear that it is well within Uber's prerogative to arrange and rearrange its organizational structure as it pleases and transition to a franchise model. By capping Uber's prerogative to classify workers as drivers at its discretion, regulators and advocates may incidentally

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216. Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, 6 SPANISH LAB. L. & EMP. REL. J. 6, 9 (2017), https://e-revistas.uc3m.es/in.//a/view/ [https://perma.cc/4S3R-UCNB].

217. Anne Davies, *Employment Law*, *in* SHAM TRANSACTIONS 176, 187 (Edwin Simpson & Miranda Stewart eds., 2013) ("[I]it is arguable that a degree of uncertainty is beneficial. In a situation of inequality of bargaining power of the kind commonly found in employment cases, any certainty offered by the law is open to exploitation by the more powerful party.").

218. DAVID WEIL, THE FISSURED WORKPLACE 89 (2013).

219. *See, e.g.*, Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1079 (2019); Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunities in Conflict*, 60 STAN. L. REV. 73, 83 (2003).

220. Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 354 (2008).

221. WEIL, *supra* note 218, at 130.

222. *Id*.

223. Dubal, *The Pitfalls of Uber and Lyft as Franchisors*, *supra* note 188.

encourage Uber to use its prerogative to rearrange its organizational structure to counteract the reclassification. Due to the *whack-a-mole* effect, attempts to regulate one issue, such as the classification of workers, out of the employer prerogative is potentially frustrated by the employer using its remaining uncapped, unilateral authority, such as control over organizational structure, to avoid regulation.

The "losing war" of employment classification demonstrates a hidden effect of the employer prerogative—the ability of employers to use their prerogative to hamper regulatory and redistributive attempts at the workplace. These organizational transformations can be done ad hoc and after the regulatory or redistributive intervention, or they could be used as a threat before the regulatory change happens in an attempt to thwart such change. In both scenarios, these transformations can severely hinder the prospect of work law reform.

C. The Regulatory Cage-Jeopardy Effect

> And the bramble said unto the trees, if in truth ye anoint me king over you, then come and put your trust in my shadow: and if not, let fire come out of the bramble, and devour the cedars of Lebanon.[224]

The second mechanism that ties the employer prerogative to the failure of progressive politics or redistributive workplace actions is called the *regulatory cage-jeopardy* effect. I define this effect as employers' use of their prerogative to punish workers, the greater public, and other stakeholders in response to redistributive risks. In other words, the *regulatory cage-jeopardy* effect is an employer's retaliation against progressive policies.

While the *whack-a-mole* effect makes fruitless the regulators' or activists' attempts to tie one hand of the employer prerogative by keeping the employer's other hand free, the *regulatory cage-jeopardy* effect is different. The *regulatory cage-jeopardy* effect both threatens to undermine support for a redistributive policy or action and aids the employer in mobilizing a coalition in opposition. The employer does so by using its prerogative to implicitly or explicitly place in jeopardy an interest important to advocates or regulators over which the employer already has control. The prerogative here works as a loaded gun, ready to counter progressive policy initiatives. Work law advocates are then forced to act within a "cage" made from the employer's prerogative.

Work law is filled with examples of *regulatory cage-jeopardy* effect at both the macro market level the micro individual employer level. On a macro level, many argue that regulations and workplace redistributive actions have a detrimental effect on the market. For example, in a 1981 ruling, an appeals

224. *Judges* 9:15.

court in Tennessee resisted curbing the employment-at-will doctrine because of a concern that doing so would negatively impact the free market:

> [B]ased upon our review of [employment at will] we are compelled to note that any substantial change in the [at will] rule should first be microscopically analyzed regarding its effect on the commerce of this state. There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized . . . . Tennessee has made enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives. The impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.[225]

Other macro-level examples of the *regulatory cage-jeopardy* effect abound in work law. Many believe that increasing the minimum wage might result in increased unemployment;[226] while others posit that imposing state- or city-wide workplace regulations will lead to capital flight to neighboring states or jurisdictions,[227] and so forth. In work law jargon, these sorts of concerns are commonly referred to as "regulatory dilemmas."[228] Large-scale regulatory dilemmas are considered inevitable in a market economy and plague workplace policy discussions. For example, at a 1992 congressional hearing on regulatory intervention in workplace safety and health, one testifying witness urged Congress to consider the harm that such a reform would have on the market, and in turn, workers' individual wealth:

> Government regulations often have significant impact on the income and wealth of workers. To the extent that firms cannot pass on regulatory compliance cost increase to consumers, firms will absorb these costs by cutting wages, and by reducing employment . . . . If government regulations force firms out of business or into overseas production, employment of American workers will be reduced, making workers less healthy by reducing their income. OSHA should estimate whether the possible effect of compliance costs on workers' health will outweigh the health improvements that may result from decreased exposure to the regulated substance.[229]

On the more micro, individual employer level, employers make direct threats of retribution where they perceive encroachment on their own

225. Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396–97 (Tenn. Ct. App. 1981).

226. *See, e.g.*, Alan Manning, *The Elusive Employment Effect of the Minimum Wage*, J. ECON. PERSP. (forthcoming Dec. 2021).

227. JOHN T. CUDDINGTON, CAPITAL FLIGHT: ESTIMATES, ISSUES AND EXPLANATIONS 2 (1986); TORBEN IVERSEN & DAVID SOSKICE, DEMOCRACY AND PROSPERITY (2019).

228. Eric Tucker, *Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?*, 39 INDUS. L.J. 99, 100 (2010).

229. *Hearings on H.R. 3160, The Comprehensive Occupational Safety and Health Reform: Hearing Before the H. Comm. On Educ. & Lab*., 102nd Cong. 153–55 (1992) (letter of James B. MacRae Jr., Acting Administrator & Deputy Administrator, Office of Information & Regulatory Affairs).

interests. For example, employers commonly warn organizing workers that union involvement might jeopardize the formal, hard-earned terms and conditions workers have gained thus far. Employers might remind employees that collective bargaining negotiations start from a "clean slate" and are legally binding on everyone. It is also common for employers to state that the workplace's informal nature will drastically change following unionization. Employers imply that after unionization, workers will lose personal access to managers or a shared "family-like" culture. In one recent example, organizing graduate students have been told that their efforts might to jeopardize their relationships with professors, implicitly risking their educational experience and future opportunities. In more extreme cases, the employer states that the business's mere existence depends on the presence of specific workplace interventions or the lack of others.[230] While law poses some limits on such threatening rhetoric, it poses few, if any, limits on the ability of employers to use their prerogative to carry out their threats.[231] When employers describe these possible horrid futures, they place in jeopardy vital worker interests. The goal of such tactics is to stop unionization by chipping away at its support base and by building worker opposition to the union.

In describing these measures, I do not claim that employers always act on their threats or that work law interventions necessarily cause adverse effects. For example, sometimes the employer is bluffing and will not close the workplace. But sometimes the employer is not bluffing and will shut down the workplace in response to a policy intervention. Instead of an empirical claim, I offer a common legal denominator. The legal theme shared by both the macro- and micro-level *regulatory cage-jeopardy* effect is a sufficiently robust employer prerogative that allows employers to attach a price tag to every attempt to shift power in the workplace.

The case of Uber effectively demonstrates the dynamics of the *regulatory cage-jeopardy* effect. Facing relentless legal attacks on its business model and claims that its drivers are misclassified employees, Uber has offered selected constituencies and the broader public a dystopian vision of what a possible future of employee-status Uber drivers might look like. Although it is difficult to quantify how this vision has affected regulators or judges or resonated with the broader public, it is hard to entirely discount the effects of Uber's efforts.

230. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) (finding that an employer can shut down its business in retaliation against unionization).

231. For a possible rationale for restricting employers' rhetoric, see Sachs, *Status Quo Vulnerability*, *supra* note 3, at 353.

1. Threatening Flexibility

Currently, Uber drivers in the United States have a significant degree of control over when and where they work. Indeed, an essential part of Uber's argument for excluding it, and other gig-economy companies, from the employee classification regulatory structure is the claim that employee status offers lower levels of work-time/free-time scheduling flexibility than independent contractor status. A significant part of Uber's narrative regarding the adverse outcomes of classifying its drivers as employees is the notion that drivers will be exchanging flexibility for employee status.

Uber's argument about the loss of flexibility was not undertaken in vain. Both large-scale surveys and small-scale ethnographic work has found that platform workers, and Uber drivers in particular, deem control over work-time scheduling essential.[232] The flexibility debate rests on some false, and some true, legal premises. Legally speaking, there is nothing that prevents an entity classified as an employer from making its workplace flexible. But there is also nothing that prevents an employer from deciding that it will not make its workplace flexible.[233] For example, Uber can create a flexible workplace, but can choose to do so only during the summer, or only for those drivers working in downtown areas. In sum, Uber can create flexibility wherever it is profitable, according to whatever economic or regulatory goals the company has in a particular region, at a specific time.[234] By conditioning flexibility, the prized workplace good, upon the failure of a particular legal intervention—employee classification—Uber places harming drivers' essential interests at the centerpiece of its policy intervention pushback, thus fostering support for its policy agenda across various sectors of its driver community.

Veena Dubal, in studying the Uber flexibility, found that drivers were concerned that if Uber were forced to classify them as employees that they

232. Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 INDUS. & LAB. REL. REV. 705, 717 (2016). On the importance of flexibility for independent contractors in general and Uber drivers in particular, see Dubal, *Winning the Battle*, *supra* note 189, at 796; Dubal, *An Uber Ambivalence*, *supra* note 189.

233. *See, e.g.*, Benjamin Sachs, *Uber: Employee Status and "Flexibility,"* ONLABOR (Sept. 25, 2015), https://onlabor.org/uber-employee-status-and-flexibility/ [https://perma.cc/379C-BAEW]; Benjamin Sachs, *Enough with the Flexibility Trope*, ONLABOR (May 15, 2018), https://onlabor.org/enough-with-the-flexibility-trope/ [https://perma.cc/JA53-JE7P]; Cynthia Estlund, *Why Flexibility Is Not Just a Trope*, ONLABOR (May 17, 2018), https://onlabor.org/why-flexibility-is-not-just-a-trope/ [https://perma.cc/WU9W-GZ2E]; Benjamin Sachs, *Uber, Flexibility and Employee Status*, ONLABOR (May 18, 2018), https://onlabor.org/uber-flexibility-and-employee-status/ [https://perma.cc/CH2X-VCL6].

234. *See* Helen Devereux & Emma Wadsworth, *Work Scheduling and Work Location Control in Precarious and 'Permanent' Employment*, 32 ECON. & LAB. REL. REV. 230 (2021) (connecting precarious work with arbitrary scheduling practices).

might lose their flexibility.[235] Legally speaking, these drivers are not wrong. Although Uber might be bluffing and will not change its organizational structure in response to reclassification, it is clear that if deemed an employer, Uber would have the prerogative to control the timing and location of its drivers' work.[236] Accordingly, whether a bluff or not, Uber may wield the lever of threatening to flex this legal authority during regulatory and political struggles.

2. Mass Layoffs and Business Relocation

In response to California's passage of AB5 and the ensuing legal attacks on Uber's business model, Uber stated that it would consider leaving California if either a court ordered it to classify its drivers as employees or Proposition 22 failed to pass. Uber also stated that it might lay off almost a million workers if it were forced to classify its drivers as employee-status workers.[237] Although Uber offered few specifics about these proposed actions, it is clear that these responses would have resided within the employer prerogative.

These kinds of suggested extreme moves add to the list of other possible threats that Uber made to other stakeholders such as passengers. For example, Uber, in its regulatory campaigns, has suggested that classifying drivers as employees would raise prices for passengers and limit the availability of rides.[238]

Legally, the employer prerogative to terminate employees as a byproduct of business restructuring is well entrenched.[239] Workers, their advocates, and their communities have a theoretically interesting but overall unsuccessful history of legal efforts to limit management's authority to relocate plants or engage in mass layoffs.[240] The most significant legal tool

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235. *See* Dubal, *An Uber Ambivalence*, *supra* note 189, at 21 ("While [drivers] need and want protections, many recognize the immense structural and instrumental powers of the corporations, and they fear what kinds of control gig companies might exert if they feel authorized to behave as employers. Workers are particularly worried about losing on-the-job scheduling flexibility.").

236. *See* Racabi, *supra* note 45, at 25 (considering the effects of employment status on Uber's ability to control drivers' schedules under varied state regulatory regimes).

237. *Supra* note 191 and accompanying text; *see generally supra* Part III.B.

238. *See, e.g.*, Sabeel Rahman, & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism*, 47 POL. & SOC'Y 177 (2019) (describing Uber's use of its platform to rally consumers to lobby on its behalf).

239. Simon Deakin & Wanjiru Njoya, *The Legal Framework of Employment Relations*, *in* THE SAGE HANDBOOK OF INDUSTRIAL RELATIONS 284, 297 (2008) ("[T]he law generally respects the 'managerial prerogative' to dismiss workers as a cost-cutting measure.").

240. *See, e.g.*, Local 1330, United Steel Workers of Am. v. U.S. Steel Corp., 631 F.2d 1264, 1282 (6th Cir. 1980) (holding that plaintiffs are not entitled to a court order directing the defendant to stay in operation and denying relief); City of Oakland v. Oakland Raiders, 646 P.2d 835, 845 (Cal. 1982) (in bank) (holding the City could use the power of eminent domain to prevent the departure of a major enterprise); Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding*

arising out of these struggles, which culminated in the economic transformations of the 1990s, is the Worker Adjustment and Retraining Notification (WARN) Act, which makes it mandatory for companies to give prior notice before mass layoffs.[241] But as with other facets of work law, the WARN Act is substantively weak and lacks effective enforcement mechanisms.[242]

The prerogative to engage in mass layoffs and relocate operations has a devastating effect on workers, their families, and their communities. It is *exactly* because of those pains that this authority gives employers significant political power. Attempts to regulate Uber as a workplace have always been undertaken, and will perhaps always be undertaken, in the explicit shadow of Uber wielding its power in this way. This has significant political implications. The potential to use such power can sway judges from making clear legal determinations. It can help nudge politicians and political communities into acting against such regulations. It can convince the broader public not to risk such harm in exchange for a lax regulatory structure.

In response to the legal proceedings that followed the passage of AB5, Uber CEO Dara Khosrowshahi issued the following statement:

> We think we comply by the laws, but if the judge and the court find that we're not and don't give us a stay . . . then we'll have to essentially shut down Uber until November when the voters decide. It would be really unfortunate, at a historical time of unemployment in California.[243]

Additionally, in the course of filing an appeal on a court order mandating it to classify its drivers as employees, Uber issued a press statement claiming that "the consequences to drivers and the public from the impending shutdown will be catastrophic."[244]

Industrial Base, 81 GEO. L.J. 1757 (1993); Aimee Edmondson & Charles N. Davis, *Prisoners of Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. L. & POL'Y 317, 345 (2011); Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189 (2020); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 222 (1995).

241. Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101–2109 (2018) (requiring employers who employ at least 100 workers and who intend to shut down to give sixty days' notice to unions, workers, and state and local government officials). If proper notice is not given, workers are entitled to back pay. *Id.* § 2104. For an early attempt to consider the application of the WARN Act on COVID-related layoffs, *see* Jackson Lewis P.C., *Class Action Trends Report, Fall 2020: A Pandemic Resurgence, Without WARN-ing*, 71 LAB. L.J. 255 (2020).

242. *Plant Closings, Workers' Rights, and the WARN Act's 20th Anniversary: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. 2 (2008) (opening statement of Sen. Sherrod Brown) ("The Government Accountability Office found that less than one-third of mass layoffs are even covered by the WARN Act because of the act's many loopholes. Most employers who are covered fail to comply with the law either out of ignorance or because the penalties and enforcement are so weak that they can, in fact, be ignored.").

243. Justin Wise, *Uber CEO Says App Will Temporarily Shut Down in California if New Ruling Upheld*, MSN (Aug. 12, 2020), https://www.msn.com/en-us/news/po/uceo-says-app-will-temporarily-shut-down-in-california-if-new-ruling-upheld/ar-B [ht://perma.cc/4EML-FGU3].

244. Dave Lee, *Uber and Lyft's California Operations Hang in Balance*, FIN. TIMES (Aug. 17, 2020), https://www.ft.com/content/6e351f6b-4c15-4110-bb3b-19e2e58988ce [https://perma.cc/P2U9-A6ZD];

Statements such as these were one of the causes for the passage of Proposition 22, the ballot initiative exempting Uber from AB5 and its employment classification requirements. Early exit polls found that 53 percent of those who voted in favor of Proposition 22 said they did so to ensure that Uber would continue operating.[245] From a legal standpoint, these voters were not wrong—there are no viable legal limits that could have prevented Uber from executing on its threat of ceasing its California operations. Broad employer prerogative combined with the mechanisms that legally entrench it, enables employers to place all workplace regulatory and redistributive efforts in the cage of implicit and explicit jeopardy. This is the *regulatory cage-jeopardy* effect in full throttle; with great workplace power comes great political power.

If work law's interventions to shift workplace power are locked in a political cage, the scope of such interventions is defined by the length of the rope tying those goals to the prerogative's peg. Work law is forbidden from traveling too far before it is yanked back. The following Part suggests removing that peg by abolishing the employer prerogative and replacing it with a better default rule.

IV. WHAT ARE THE ALTERNATIVES?

Fifty-three years ago, in 1969, Philip Selznick offered four historical reasons that "weaken the claim of management to untrammeled power."[246] First, he noted that the moral and legal implications of management's claim run against "the whole course of institutional change."[247] Second, he argued that the "commitment of modern management to rationality" would push employers to cohere with "rational" union and public expectations.[248] Third, he suggested that the importance of "continued operation" for management would compel it to voluntarily accept union-like arbitration for most uses of employer authority.[249] Fourth, he observed that "broad cultural changes" subverted the public's acceptance of "claims to managerial prerogative."[250]

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see Jeremy B. White, *Uber and Lyft Threaten to Take Their Cars and Go Home*, POLITICO CAL. (Aug. 19, 2020), https://www.politico.com/states/california/story/2020/08/19/uber-and-lyft-threaten-to-take-their-cars-and-go-home-1310414 [https://perma.cc/PJ4V-J4U2] (describing Uber's threats of layoffs and suspended service); Sara Ashley O'Brien, *Uber and Lyft Could Shut Down in California This Week. It May Not Help Their Cause*, CNN BUS. (Aug. 16, 2020) https://www.cnn.com/2020/08/16/tech/uber-lyft-california-suspension/index.html [htt://p.cc/6T36-Q] (describing Uber's response to AB5).

245. John Howard, *An Early-Voting Survey of the Ballot Propositions*, CAPITOL WEEKLY (Oct. 28, 2020), https://capitolweekly.net/an-early-voting-survey-of-the-ballot-propositions/ [https://perma.cc/9H7J-YW5T].

246. SELZNICK, *supra* note 16, at 181.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 243.

And yet, here we are. COVID-19 radically changed how work is done and, in particular, *where* it is done.[251] Workers across the United States and the entire world discovered both the pros and cons of working remotely. This massive shift in work arrangements influenced billions of lives around the globe and throughout the labor market, and implicates crucial policy questions of equity, family-work balance, privacy, power, and much more.[252] But when those countless workers needed an answer about where they were allowed to work from, they did not call a union representative, regulator, congressman, arbitrator, or labor advocate. Workers called their bosses. Employers have default, and likely actual, decision-making authority over where work is done. Thus, the entire policy debate about remote working arrangements is performed, if at all, on a secondary level as an intervention into the consensual power of employers. Such interventions are always done in the shadow of the social, doctrinal, and political mechanisms described in this Article's preceding Parts. Therefore, the employer prerogative is acutely relevant for shaping the workplaces of today and tomorrow.

But challenging the prerogative is taboo. As a result, the scope of work law's policy interventions is always defined against the default managerial prerogative, an area into which the law cannot reach. This limit serves to divide work law interventions into two fundamental types. The first type of intervention aims to carve out discrete actions from the employer prerogative by creating specific employee rights and corresponding legal duties on employers, such as by setting a statutory minimum wage. The second type of intervention aims to push the employer prerogative in the right direction by limiting employer market power, such as by pursuing antitrust reform, or by building effective collective worker power. Both types of work law interventions assume that there is a benchmark of the employer prerogative to depart from, work around, cut parts of, or nudge in the right direction.[253]

While the effects of the employer prerogative restrict what we can practically accomplish in the workplace, no matter our specific objectives, the concept of the employer prerogative also limits what we *think* we can do with work law. The default prerogative is held constant even in imaginative, frameworks of what work law should be.

For example, Samuel Bagenstos has suggested that "social equality" should be an animating principle of employment law. In a 2014 article, Bagenstos described that one limit to this principle was that "employment

251. Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & PUB. POL'Y 203, 217 (2021).

252. For some of those considerations, see *id.*

253. *See, e.g.*, Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921 (2020).

law rules should generally not prevent employers from engaging in remunerative business."[254] According to Bagenstos:

> The goal of employment law . . . is not to prevent employers from engaging in managerial or entrepreneurial decisionmaking. Rather, it is to regulate those aspects of employer prerogative that impose significant threats to social equality without sufficient countervailing benefits to society. Managers and owners are typically in the best position to determine what workplace arrangements maximize profitability. And, in general, an increase in profits increases the pool of material goods available to workers in the enterprise and strengthens the economy (which itself benefits workers).[255]

Relatedly, David C. Yamada has suggested rebuilding work law around the concept of "dignity." This conceptual reimagining of work law, however, also appears to be self-limited by the employer prerogative:

> We must change [the current paradigm] in order to build public support for stronger labor protections and better enforcement, and we can do so by making the case for human dignity in the workplace. Within such a "dignitarian" framework, there is plenty of room for market-based competition, entrepreneurship, individual responsibility, and sound management prerogative.[256]

Aside from a practical, pragmatic concern, the default employer prerogative is a theoretical lacuna we impose on ourselves.[257] It is time to imagine alternatives to the employer prerogative. Instead of carving out specific pieces of the prerogative for the state to regulate, or shaping markets to create "countervailing power"[258] to the employer prerogative, we should choose a rule that better achieves the diverse goals we have for work law. These goals, such as reducing economic inequality, delivering good jobs, ending discrimination (on the basis of gender, race, disability, etc.), facilitating worker voice and power, providing dignity and freedom in one's job, building a political community, stopping global warming (or COVID-19 for that matter), should not be *a priori* subjugated to the employer prerogative.

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254. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 U. MICH. L. REV. 225, 239 (2013).

255. *Id*.

256. David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 524–25 (2009).

257. *See, e.g.*, De Stefano, *supra* note 28, at 5 ("Subordination represents a keystone of the notion of private government as outlined in Elizabeth Anderson's writings and is one of the causes of the tension between the contract of employment and liberal values denounced by Hugh Collins. It is worth noting, however, that neither author goes as far as advocating an outright abolition of subordination. The question is rather how to limit and rationalize subordination to make it compatible with liberal values, including republican freedom from arbitrary domination.").

258. Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 656 (2021).

Calls to replace the employer prerogative are not new.[259] In a 2001 article, Cass Sunstein characterized work law as composed of waivable employer rights (i.e., parts of the employer prerogative that can be contractually waived to employees) and of non-waivable employee rights (i.e., regulations that mandate or prohibit specific employer actions or behaviors).[260] Utilizing behavioral economic analysis, Sunstein suggested maintaining some non-waivable core employee rights and turning waivable employer rights into waivable *employee* rights, giving employees the ability to contract out their rights to employers.[261]

Meanwhile, in the context of union-management relationships, Karl Klare suggested that "employees [should] enjoy an inherent . . . right to participation in workplace decision-making. A situation vesting management with exclusive decision-making authority should be the exception requiring special justification."[262] More recently, following on Paul Weiler's famous counterfactual,[263] Mark Harcourt and others suggested changing the default of all workplaces from non-unionized to unionized.[264]

My suggested alternatives to the employer prerogative run along a parallel path and seek to open new conceptual venues for work law interventions. The following Section offers a novel framework for work law interventions that addresses two fundamental questions: (1) who holds default control over workplace interests? and (2) what kind of legal instruments do we allow to reallocate this control? To elaborate on my novel framework, I present a number of examples that help demonstrate my proposed way of thinking about—and implementing—work law interventions.[265]

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259. *See, e.g*, Staughton Lynd, *Ideology and Labor Law*, 36 STAN. L. REV. 1273, 1297–98 (1984) (reviewing ATLESON, *supra* note 44) ("[I]s it not necessary, in order to achieve the objectives of economic democracy and the exercise by workers of 'full freedom' of self-organization . . . to take away from capital the right to make unilateral decisions about the means of production[?]").

260. Sunstein, *supra* note 52, at 208.

261. *Id*. at 214.

262. Klare, *Workplace Democracy*, *supra* note 85, at 51.

263. WEILER, *supra* note 1, at 115–16.

264. Harcourt, *supra* note 15; Mark Harcourt, Gregor Gall, Rinu Vimal Kumar & Richard Croucher, *A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom Not to Associate and Progress Union Representation*, 48 *INDUS. L.J.* 66, 69 (2019); Mark Harcourt, Gregor Gall & Margaret Wilson, *A Union Default for the U.S.*, ONLABOR (July 15, 2020), https://www.onlabor.org/a-union-default-for-the-u-s/ [h://perma.cc/9WPM-UVU6].

265. All examples focus on progressive goals, such as increasing worker and community power in the workplace, but these should be taken, as much as possible, as attesting more to the author's goals (and limited imagination) rather than, I hope, to the utility of the conceptual framework for other possible policy and political aspirations.

A. A New Default

> Once it is accepted that reasons and justifications are to be offered, prerogative must give way to policy. The idea that management can do as it pleases simply because of historic privilege loses credibility and therefore weakens in authority. For such an idea [is] a retreat from reason.[266]

This Section addresses the question: who holds default control over workplace interests? In addressing this question and considering where authority over workplace interests lies before further legal interventions, this Section presents several possible interventions to illustrate possible alternative arrangements to the current workplace control status quo.[267]

1. Employee Prerogative

Imagine an alternative to the employer prerogative, where it is employees, and not the employers, holding by default the levers of workplace control. A clear mirror-image alternative for the default employer prerogative.[268] This means that as we abolish the employer prerogative, we enact an employee prerogative statute allocating default workplace control to employees.

Under the employee prerogative, the control over all workplace interests would be allocated to employees and their governance structures *unless* some valid legal instrument, such as a contract or statute, mandates otherwise. By bestowing prerogative upon the collective of employees, this alternative default rule would use the assignment of prerogative to create collective workers' capacity, from a worker-power-diminishing rule of law to a power-building one. Workers' capacity is expected to grow around new organizational leverage points that employees as a collective now hold, both as a governance issue and as potential leverage in negotiations with management and capital holders.[269]

For example, by changing from the default of the employer prerogative to the employee prerogative, employers would no longer be able to unilaterally decide on whether compensation levels should be set above the

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266. SELZNICK, *supra* note 16, at 182.

267. Some options raise the question of the constitutionality of such measures more starkly than others. As these are tentative examples, I do not engage in defending the constitutionality of any of these proposals.

268. In thinking on this I drew from a thought experiment I read a while back suggesting to flip the assumption of consensual sexual relations in order to create a "fair distribution of risks in sex". *Cf.* Keren, *On Fair Distribution of Risks in Sex*, SEXUAL RELATIONS (Nov. 13, 2012) (Hebrew), https://mea.wordpress.com/2/11/13/risks_of_sex/ [ht://ma.c/B8-VNAZ] ("Imagine a country . . . which solves the complicated legal issue of consent—meaning the question of whether sexual relations [between a man and woman] were consensual—by legislating a law that if . . . sexual intercourse is proven, then the man is convicted of rape." [author's translation]).

269. *See* Racabi, *supra* note 45, at 55.

minimum wage, only employee governance bodies could. This would likely help facilitate an agreement on the issue between employees and their employer or initiate new regulatory interventions in the workplace. Also, employers would no longer enjoy the power to create paid sick leave policies above the mandatory minimum requirements in their locality, but employee governance bodies could, unless restricted by other valid legal decisions. Employers could no longer decide to automate the workplace unless authorized to do so by employee governance bodies or enabling regulations, and so on.

These novel worker governance bodies can parallel the form of hierarchical management and directorates, whereby each worker holds an equal or, to some measure, skewed stake over governance issues, or it might look more like a union governance structure, or perhaps something completely different. Now, due to technological advances in communications and the flattening of the organizational structure of the workplace, the existence of such worker governance bodies is more imaginable and tenable. These governance bodies could be regulated to facilitate effective governance and democratic structure, or they could be unregulated, leaving it to the market and internal politics to sort out governance-related issues.

The advent of an employee prerogative would represent the sharpest break from current law and practice in the default allocation of workplace power and control. Yet, it should be noted that this is a mere default baseline, not a prescription for the status quo, as legal authorities could still intervene in the workplace, as described below.

2. Social Prerogative

Picture an alternative default rule, where instead of employers holding default authority regarding workplace, it is unique governance bodies made up of community stakeholders, such as local government officials, employee representatives, and employers' officers that hold this authority on a tripartite basis. [270] One advantage of this alternative is that it both pushes back against exclusionary instincts that employee groups can foster against community and employer interests and empowers joint governance forums thought of as beneficial to redistributing power in the workplace.

By placing the default decision-making powers in these stakeholder governance bodies, we can directly respond to the *whack-a-mole* effect and *regulatory cage-jeopardy* effect by creating a forum that internalizes the political implications of workplace decision-making. The risks and gains of workplace decision-making will be bargained over directly and explicitly by

270. *Cf.* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1 (2016) (defining "social bargaining" as such a tripartite relation); ALAIN SUPIOT, BEYOND EMPLOYMENT (Oxford Univ. Press 2001) (suggesting to "socialize" parts of employment relations).

all affected parties. Placing the prerogative with all workplace stakeholders embeds the community, with its values, priorities, and risk preferences, in the workplace and pushes stakeholders to cooperate and agree on a broad scope of issues.

This alternative shifts the politics and power levers in the workplace. It provides workers and the community with significant levers of control currently missing from the regulatory landscape. These levers can be used as bargaining chips with capital holders, enhancing the bargaining position of both workers and communities, allowing them to negotiate with the broader political community for the promotion of their interests. Because employers now gain political clout by virtue of having workplace control, reassigning that control to workplace stakeholders would help empower them by providing much-needed political leverage.

3. No Default Prerogative

Instead of employers determining the organizational structure of the workplace by default, we can seriously treat the notion of a company as a bundle of contractual obligations[271] and assign default governance rights to nobody. Under this alternative, we abolish the employer prerogative, but do not grant the default authority to any other stakeholder. Thus, control over workplace interests could only be achieved through the explicit use of a valid legal instrument. This alternative seems like one possible legal endgame for authors such as Elizabeth Anderson, who has described workplace subjugation as "arbitrary, unaccountable power" and the ultimate evil stemming from work.[272]

Tentatively, this kind of no-prerogative economic relationship characterizes work relations outside of employee status, namely those of independent contractors with contracting entities. A firm that contracts with an independent contractor does not hold default legal authority over the manner and means of its work, unless such control is contractually agreed upon. The work contract of an independent contractor does not contain an implicit "subordination" clause or unique loyalty and obedience requirements. Moreover, the firm's utilization of control over the independent contractor leads to the risk that the contractor claims that they were misclassified. [273] Such legal relations perhaps embody what we imagine to be market relations between firms, not within them.

271. *See, e.g.*, Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 10 (2002).

272. *See* ANDERSON, *supra* note 39, at 45.

273. *Id*.

Critics of Anderson have argued that this vision of arm's length economic relations has some disadvantages.[274] Transforming the entire labor market to that without a default prerogative might solve legal subjugation issues but also exposes the weaker party to economic domination. While distinctions can be made between these economic and workplace relations, both can have the same pragmatic effects. For those who aim to use the law as an instrument to shift power in the workplace, including control over workplace interests, releasing some legal leverage, and exchanging it with economic leverage, offers little solace.

Yet, the abolition of the employer prerogative might have some advantages as far as the judicial presumption of the prerogative goes. As discussed in Part II.A, the judicial presumption of the employer prerogative is a crucial factor in limiting the success of workers' constitutional, statutory, and contractual claims in court. Abolishing the employer prerogative presumption, with its heavy cultural and value-laden baggage, could provide a much-needed legal leeway, at least for workers' legal leverage.

4. Separation of Powers Model

Another alternative to default workplace power and control authority is to distribute it according to kind. Here, we take seriously the assertion that the workplace is a school of democracy and follow James Madison's separation of powers model among the three branches of government to develop a conception of an economic *ambition counteracting ambition* model.[275] In this variant, the prerogative would be divided between employers, workers, and the community.

For example, we can divide the prerogative according to substance so that workers have prerogative over the terms and conditions of employment; employers have prerogative over "core" business decisions, and the community has prerogative over hiring and termination procedures that support antidiscrimination and accommodation principles. Similar to the separation of powers utilized across the three branches of government, this separation of workplace powers model might facilitate negotiations between workers, employers, and the broader community.

We can also envision a model even more similar to the three branches of government in which workers would be bestowed with legislative-like

274. Estlund, *supra* note 144.

275. *See* THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1999) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."); *see also* Adrian Vermeule, *Forward: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009) (articulating the theoretical basis for separation of powers theory).

prerogatives, such as enacting workplace policies, employers would possess executive-like functions, such as governing the workplace's day-to-day operations, and the community would have a judiciary-like authority, including the power to balance the employer's executive powers against community values and workers' workplace policy enactments.

This separation of powers alternative would be useful not only for first-order policy and political decision-making, such as the need to empower worker and community control in the workplace, but also for the facilitation of second-order preferences about the proper system in which economic or political power should be managed in society. This alternative model relies on theories suggesting that overconcentration of power with any single entity is bad, and on those that consider a clash of a variety of interests and stakeholders, such as workers, employers, and community members, as delivering some sort of systemic good.

5. Unbundling the Prerogative: Status and Accommodation

Just as property law is considered to create a "bundle of rights,"[276] the default employer prerogative can be conceptualized as a "bundle of prerogatives." This implies another possible answer to the question of default allocation of powers: unbundling the employer prerogative into discrete governance issues allocated to alternative stakeholders by default. This alternative is attractive if one believes that a discussion over the initial allocation of prerogative is too complicated to be done wholesale and instead must be examined based on the merits of each specific workplace interest.[277]

Here, the employer maintains most of its prerogative, but the state hands residual control of some concrete workplace issues to other stakeholders. For example, the state might give decision-making power concerning workplace safety and health to special workers' committees elected democratically at the workplace level. These governing bodies could be bestowed with all workplace safety and health decision-making authority. Another example might concern decision-making authority regarding workplace sexual harassment policies. Here, the state could place this authority in a special workplace committee elected democratically and with guaranteed representation to affected groups.

This unbundling model could also be applied in the context of employee status classification. Currently, it is not within the contractual capacity of parties to a work contract to override whether a worker is legally classified as an employee or as an independent contractor. Instead, courts and agencies

276. *See, e.g.*, James E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 712 (1995).

277. *Cf.* DON HERZOG, SOVEREIGNTY, RIP (2020) (arguing for a retail, as opposed to wholesale, examination of issues involving sovereignty).

use classification tests to determine a worker's contested classification status.[278] Yet, the putative employer usually makes the first move by attempting to classify a worker as an independent contractor. This kind of de facto classification prerogative has led to decades-long classification struggles that have inhibited the enactment of concrete changes in the workplace. Transferring the classification prerogative away from employers, courts, and agencies to employees will enable workers, as a collective to make decisions about their classification status. Locating the classification prerogative with workers would allow them to weigh the long-term benefits of employee status against the risks of their employer taking adverse company actions following reclassification. For example, Uber drivers could weigh the benefits of being deemed employees against the risk that the company would respond by taking away their flexibility.

Another example of unbundling discrete parts of the employer prerogative involves accommodations in the workplace.[279] Under the Americans with Disabilities Act of 1990 (ADA),[280] employers are required to make reasonable accommodations for a qualified individual's disability, unless those accommodations amount to an "undue hardship."[281]

The ADA, by imposing a duty on employers to provide reasonable disability accommodations, has created a legal carve out from the employer's "accommodation prerogative."[282] This accommodation prerogative can be defined as the employer's authority to accommodate individual workers' needs by modifying and individualizing job requirements and assignments. For example, it is an employer's prerogative to decide whether and how to accommodate the work and scheduling needs of an employee who is a single parent or of a bereaved employee.[283] And while ADA accommodation duties are plagued with known issues, covered employees under the ADA are legally *far* better positioned than non-covered workers seeking accommodations.[284] By reallocating the accommodation prerogative from

278. *See supra* Part III.A.

279. *See, e.g.*, Michael A. Stein, Anita Silvers, Bradley Areheart & Leslie P. Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014) (proposing a broader accommodation duty under the ADA).

280. ADA, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 (2018)).

281. ADA §§ 101–107; 42 U.S.C. §§ 12111–12117; *see, e.g.*, Nicole B. Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MOD. L. REV. 121 (2019).

282. *Cf.* Guy Davidov & Guy Mundlak, *Accommodating All? (Or: "Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You")*, 93 BULL. COMP. LAB. REL. 191, 202 § 12.04 (2016) (suggesting expanding disability-like accommodations to all workers' needs).

283. *Id*.

284. Testing whether an accommodation is mandated can be risky, at least in the context of religious accommodations. *See* Charles A. Sullivan, *Retaliation and Requesting Religious Accommodation*, 70 CASE W. RES. L. REV. 381 (2019). This is not to suggest that this legal affordance comes without a price, as the fear of disability con is one. *See, e.g.*, Doron Dorfman, *Fear of the Disability Con: Perceptions of*

employers to other stakeholders, we could expand ADA-like accommodation duties to all workers. For example, this prerogative could be transferred to individual workers, designated employee committees, or an officeholder jointly elected by employers and employees. Transferring this prerogative could create a seismic shift in the relationship between human needs and work. Instead of people adjusting to the workplace, the workplace could adjust to people.

Unbundling the employer prerogative could provide for better, bottom-up, accommodation and de facto regulations of crucial workplace issues. Through unbundling, power would lie in the hands of those most affected by these workplace issues. Additionally, by unbundling the employer prerogative and discretely allocating prerogative rights, employers and stakeholders could be encouraged to bargain over the various rights. The unbundled rights could also be used to provide one party to an asymmetric bargaining relationship with bargaining chips. For example, we could bestow a firm's lowest-paid workers with the prerogative over all issues involving executive compensation.

By assuming away the legal significance of employer decision-making on all workplace-related issues, these substantive divisions of prerogative are distinct from contemporary regulatory regimes. This is not to say that employers will have no input; this suggestion only places the default governing powers with those most likely to be affected by them or those most in need of bargaining power vis-à-vis the employer. For example, why should the default governance of safety and health, sexual harassment, and accommodation be placed with the employer out of all other possible workplace stakeholders? Why make workers fight tooth and nail, legally, politically, and organizationally, to achieve a modicum of control over those workplace issues that affect them the most? Though there might be some good reasons for doing so, the default should be a matter of debate and assessment, not a fundamental premise of work law to be taken for granted.

B. Power Reallocating Institutions

The other side of the default power allocation coin is the legal authority to reallocate workplace power. Here, again, the state, community members, employers, and workers could all reallocate workplace power as a way of promoting specific work law political or policy goals. In this Section, I demonstrate possible ways to reallocate workplace power by offering several brief examples of power reallocating institutions.

Fraud and Special Rights Discourse, 53 L. & SOC'Y REV. 1051 (2019); Nicole B. Porter, *Special Treatment Stigma after the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016).

1. National Management Rights Law

If the employer prerogative is abolished, as described in the previous Section, then one likely candidate for an institutional reallocation of power would be to simply hand the prerogative back to employers. This solution might suit those who consider the current practices of workplace management as not ideal, but too entrenched to drastically reform. But although this back and forth might seem like legal technicality, it has some substantive advantages.

Prerogative could be reallocated back to employers through a mechanism similar to the notorious "management rights" clauses used in collective bargaining agreements. For example, the Delaware version of state public sector management rights law states that:

> [M]atters of inherent managerial policy . . . include, but are not limited to, such areas of discretion or policy as the functions and programs of the . . . employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and the selection and direction of personnel.[285]

This example of a state management rights law could serve as model for a national management rights law that could be enacted following the abolition of the employer prerogative. At the very least, such a management rights law would be a viable option for micro and small businesses, such as those with fewer than ten employees. Although management rights clauses are notorious in labor circles, this power allocating tool has some clear advantages over the current status quo because it would enumerate the employer prerogative into specific items, transforming the prerogative from an abstract principle lucid only to judges on a case-by-case basis into written, bright-line law.

This form of the employer prerogative is more democratically accountable. It would be manageable for reformers to target faults, mobilize support, and reform. It could also provide a benchmark for which movements add substantive, worker- or community-positive values or procedures on top of the employer prerogative.

For example, a national management rights law could impose on employers the general duty to actualize *all aspects* of their regained employer prerogative for "just cause" only, or for "public good" considerations, or only after "due process" was taken, or "without discriminatory effect." This would allow the political community to curb the prerogative arc towards more just applications of it by setting general standards for the managerial prerogative. Such a law could also have time limits and require reenactment by Congress or a special referendum. Given its democratic accountability and political

285. Del. Code tit. 19, § 1305 (2021).

advantages, a management rights law would offer a big step forward from what is now the employer prerogative in its current form.

2. Collective Contracts

Another option for reallocating the employer prerogative from its default position is through the use of contracts. But treating workplace governance as an individual right that workers can individually barter or waive[286] can trigger opportunistic waivers. Employers can then use their superior economic power and information advantage to extract contractual concessions.

Still, following the institution of an alternative default prerogative, employment contracts could be used to build worker power by limiting the use of contractual waivers and voluntary transfers of authority to collective agreements only. These collective contracts, perhaps distinguished from traditional collective bargaining agreements by a looser requirement on the organization representing the workers, could be signed by both employee governing bodies and employers. Stakeholders could also be involved and perhaps regulators could require that community stakeholders have seat in the collective agreement bargaining process.

These collective agreements can be limited in duration, and up for renegotiations on, for example, a bi-yearly calendar. Once expired, the prerogative could reset to its community-based or workers-based default positions.

3. A Reconstructive Agency

A third option is that a new federal administrative agency—a "reconstructive agency"—could be established to reallocate workplace power.[287] This new agency could govern issues similar to those regulated by the NLRB, the Federal Trade Commission (FTC), and the Department of Justice's antitrust department, but would have much greater and revamped authority. This new agency could reallocate workplace governance powers and impose specific governance structures. Roberto Unger, in a broader context, has described a similarly empowered agency:

> The aim of the intervention is to reshape an organization . . . frustrating the effective enjoyment of rights. The characteristic circumstance of frustration is one in which the organization or the practice under scrutiny has seen the rise of disadvantage and marginalization that their victims are powerless to

286. *Cf.* Sunstein, *supra* note 52, at 208 (recognizing the possibility of such contractual waivers even after a change in the default rules).

287. *See, e.g.*, ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 165 (1996) (describing the role of reconstructive institutions).

> escape. Subjugation, localized and therefore remediable is the paradigmatic evil addressed by the reconstructive intervention.[288]

This kind of deep intervention could be called for in cases of an impasse in economic relations, or when broader, cross-firm governance structures are needed, or when claims of minority suppression in the workplace sphere are raised.

A reconstructive agency could hold the authority to reshape the governance defaults and conditions for reallocating power in entire sectors of the economy with the focus on increasing workers' effective community power and voice in the economy. For example, in sectors or firms where the agency concludes that traditional unions have succeeded in creating sufficient legal, economic, and political leverage with employers, the agency could green light a union petition for reinstating the default prerogative to employers. In other sectors, the agency could create a sector-wide safety and health forum of workers so that they could control an issue in need of joint regulations. Or the agency could intervene in a workplace where minority workers argue that they are excluded from decision-making powers by current workplace governance structures.

Agency discretion over the allocation of governance powers could be used to mediate the court's typical concern over second-guessing the substantive views of economic actors, focusing its authority on structural features of how decisions are made rather than their content in particular cases, reacting with the relative flexibility of administrative agencies to fluctuations in the economy, and building expertise in democratically restructuring work.

C. Concluding Thoughts about Alternatives

The proposals discussed throughout the preceding Sections help demystify the employer prerogative as a social determination of legal powers. Now that the prerogative is fair game, political and normative discussions of workplace power and law can start from work law's most basic legal structure. Whether the discussion revolves around achieving pragmatic goals, such as ending sexual harassment in the workplace, or whether the discussion is about how to optimize between abstract social goals, such as "freedom," "justice," or "equality," these discussions can now begin from the level of governance defaults instead of from second-order legal interventions placed on an already sticky and skewed starting position.

One possible objection to my proposed alternatives is that they would radically reform the market economy. However, changing the default employer prerogative does not mean giving up on a market economy. Perhaps surprisingly, none of my suggestions stand for a substantial deviation from

288. *Id.* at 30–31.

how this principle is now treated. Within the workplace, it is law and judges, not market-like economic bargaining, that determines the default governance rule. Free markets, if those are to be found anywhere, are outside the workplace, an "island[] of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk."[289]

This characterization of a market economy would remain true, even following the more aggressive suggested alternatives. Even given a complete abolition of the employer prerogative and instituting collective agreements as the *only* way power can shift from employees to employers, firms not economically sustainable would fail, workers would change jobs, and other firms, with improved products, inner governance, labor relations, technology, and timing, would rise. Markets would still reign. However, my proposals do depart from what is commonly termed the "free enterprise system."[290] This term is used to limit worker-side legal interventions by appealing to a systemic principle superior to those meager constitutional, statutory, or contractual legal intrusions upon which workers base their claims.

The second possible objection to my proposed alternatives is the suggestion that they might be less economically efficient than firms' current governance structures. As an empirical matter, it should be noted that we do not know if the employer prerogative is the most efficient governance rule. Theoretically, from the perspective of work law, it might be more efficient, per Sunstein's suggestion, to exchange, experiment or individualize some default rules in the workplace,[291] or to encourage firms to develop profit making mechanisms that are not constructed on legal arbitrage.[292] It might also prove beneficial to evaluate managerial inputs on firm efficiency by reducing the managerial prerogative on issues like workplace health and safety or sexual harassment policies.

And even if these alternatives are less economically efficient, they still might create socially beneficial results. The ability to govern work, to increase workplace transparency, and to reallocate power to politically

289. Coase, *supra* note 47, at 388. In more contemporary lingo, such islands of control are considered the legally assigned "coordination rights," of employers. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

290. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 225 (1964) (Stewart, J., concurring) (observing that Congress can be persuaded into giving unions "a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy."); Crain Indus., Inc. v. Cass, 810 S.W.2d 910, 914 (Ark. 1991) ("It remains true that 'the employer's prerogative to make independent, good faith judgments about employees is important in our free enterprise system.'") (citation omitted); Clifford v. Cactus Drilling Corp., 353 N.W.2d 469, 474 (Mich. 1984) ("[A]n employer's ability to make and act upon independent assessments of an employee's abilities and job performance as well as business needs is essential to the free-enterprise system.").

291. *Supra* notes 260–61 and accompanying text.

292. *See*, *e.g.*, Dubal, *Winning the Battle*, *supra* note 189 (providing the example of misclassification of workers as independent contractors as a case of companies profiting from legal arbitrage).

marginalized groups of workers are such worthy social causes. In any case, the assignment of sovereignty should not be only weighed by market efficiency, which is a poor benchmark for the political allocation of powers. Relinquishing employer control over the workplace might introduce us to new, better values by which to measure work and working lives outside, or at least, alongside, the market bottom line.[293]

Finally, a lack of employer prerogative would not necessarily entail chaos in the workplace.[294] Some have argued that management rights are simply "a recognition of the fact that somebody must be the boss . . . . People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do."[295]

However, the "somebody must be the boss" argument does not necessarily require that the employer be that boss. Hierarchies and command chains, where they still exist in the labor market, and roles and duties can always be set. Under my proposed alternatives, these roles and duties would simply be fixed by employees, in negotiations with management, or through other legally valid channels as discussed above. An assumption that the management prerogative is a guarantor of order and best practices indicates that one simply missed the television show *The Office*. Organizational leadership and common sense are not derived from default legal rules, nor should we assume that our laws reflect some profound insight that only MBA graduates are bestowed with such traits.

Just as the employer prerogative does not guarantee order and industrial peace, neither do my suggestions. A world without the employer prerogative can look a lot like our world today. But instead of being always tilted towards the interests of employers, a world without the employer prerogative could be tilted in whichever direction we choose to tilt it.

In addition, the oscillating nature of some of work law's most important regulatory regimes, from Republican to Democratic administrations and back again, is also a form of chaos. Consider the predicted shifts in the Occupational Health and Safety Administration's (OSHA) standard-setting, the Department of Labor's enforcement efforts, and the NLRB's rulings

293. *Cf.* Beermann & Singer, *supra* note 54, at 929 (identifying legal baseline as value laden); *see also* ELI COOK, THE PRICING OF PROGRESS: ECONOMIC INDICATORS AND THE CAPITALIZATION OF AMERICAN LIFE (2017) (describing the history of economic measures and their impact on American society).

294. We can distinguish between few concerns for chaos—some regarding the ultimate status quo and others regarding the transition to the new status quo. The above only treats the former issue.

295. Arthur J. Goldberg, *Management's Reserved Rights: A Labor View*, *in* MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS: PROCEEDINGS OF THE 9TH ANNUAL MEETING OF THE NAA 118, 120–21 (1956), cited in Dale, *supra* note 15, at 213.

between the Trump and Biden administrations.[296] Because workers and communities depend on external, highly centralized sources of power for better working conditions, any shift in these government institutions has tremendous ripple effects. The alternatives suggested above offer greater long-term stability because they induce the pluralization and stabilization of work law's sources of power.

CONCLUSION

In this Article, I suggested abolishing the default employer prerogative and replacing it with a better rule. Here, "better" stands for a new default rule that is suited to achieve whichever political, policy or value goals work law advocates seek to accomplish.

The current rule, the default employer prerogative, is *sticky* and *skewed* toward management interests. The tendency of courts to read this default as an inherent feature of the workplace, and as an animating principle of work law, creates a strong judicial presumption against constitutional, statutory, and contractual limitations of employer authority. For most workers in the United States, market power deficiencies and information asymmetries create an impossible obstacle for contractual overrides of the employer prerogative. For example, the employment-at-will doctrine allows employers to create a precarious workplace and contractual environment, where employment is under the employer's unilateral will. Meanwhile, regulatory enforcement gaps and mandatory arbitration clauses and class action waivers notoriously render regulatory workplace interventions as de facto meaningless. The status quo of workplace power is founded on the employer prerogative and cemented by the combined weight of all these socio-political and doctrinal trends.

The employer prerogative itself functions to inhibit politically any shifts in the balance of powers in the workplace. By giving employers a ready-made legal venue to dodge regulatory encroachments, the employer prerogative raises the costs of implementing workplace interventions and diminishes their expected returns. I termed this the *whack-a-mole* effect. The employer prerogative also allows employers to "punish" workers, the broad public, and other workplace stakeholders for engaging in business-adverse workplace actions or promoting redistributive policies. I termed this the *regulatory cage-jeopardy* effect. This effect places all attempted progressive and power-shifting workplace interventions in the cage of explicit and implicit threats of jeopardy.

296. *See, e.g.*, Steven Greenhouse, *What Can Biden Do to Reverse Trump's Assault on Labor Rights?*, THE GUARDIAN (Jan. 9, 2020), https://www.theguardian.com/us-news/2021/jan/09/joe-biden-labor-workers-rights-unions-wages [https://perma.cc/W7MH-SYCD].

However, perhaps the employer prerogative's most sinister effect is convincing work law movements, scholars, and activists that it is a state of nature, a necessary theoretical benchmark for both pragmatic and normative discussions of work law. It is not. The default employer prerogative is a continuous legal and political decision to delegate sovereignty to employers,[297] with substantial costs to workers and the broader community. It is not beyond our collective capacity to treat governance defaults as a dynamic feature of workplace theory and action.

Thus, the Article concluded with suggestions of alternatives to the employer prerogative and suggested new ways to reallocate workplace governance authority, making work law more conducive to shifting power to workers and increasing community control over the workplace.

The goal of these suggestions, and my goal in writing this Article, was not to formulate a policy prescription to be implemented in the new Biden-Harris administration. Instead, my hope is to provoke work law scholars, students, and activists to engage in systemic, political, and imaginative thinking about the relationship between law and workplace power.

297. *Cf.* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927) (identifying questions of property as questions of sovereignty); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 751 (1986) (discussing the sovereignty function of property).