

## DISLOYAL WORKERS AND THE “UN-AMERICAN” LABOR LAW

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*This Article examines the role of exit, voice, and loyalty in structuring the law governing the work relation. We contrast the common law's historical vision of workers as servants who owe a unilateral duty of fealty to the master, with the labor law's depiction of workers as citizens of the firm. The employment-at-will doctrine adopted at common law prioritizes exit as a response to workplace conflict, while the labor law's endorsement of unionism and collective bargaining prioritizes voice, and ultimately furthers worker investment and loyalty to the firm. Yet in the historical contest between the two, the vision of the worker as loyal servant has prevailed, and union organizing and economic pressure strategies have been conceptualized as disloyal, even “un-American” actions aimed at challenging the economic order. Nor has the image of the loyal servant been limited to the labor and employment law context: efforts by public sector workers to voice concerns about workplace issues have been translated into acts of disloyalty in cases predicated on the assertion of constitutional rights.*

*With the demise of the old social contract that embraced unionism, collective bargaining, and long-term job tenure, a new psychological contract has emerged in which workers are entrepreneurs who retain responsibility for their own economic futures, exchanging temporary commitment to the firm for training. In this system, firms coerce worker commitment through covenants not to compete, contractual obligations to refund training costs, and trade secrets claims which tie workers to the*

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*employer in a unilateral relationship of duty while preserving employment-at-will. We argue that the law's suppression of worker voice and efforts to coerce attachment yields a dysfunctional workforce of disloyal and disengaged workers who offer relatively low productivity and poor morale. Moreover, a system of law that suppresses worker voice and coerces attachment is incompatible with our larger political and constitutional democratic values and with the American understanding of citizenship. We suggest that the law's goal should be to foster worker commitment with loyalty, and offer a blueprint for reform.*

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## INTRODUCTION

As George Fletcher observed in his classic work on loyalty,<sup>1</sup> the character of our lives is shaped by relationships with others.<sup>2</sup> Work is among the most important of those relations, defining the communities in which we live and the meaning that we ascribe to our lives.<sup>3</sup> The freedom to engage in such constitutive relationships

1. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 24 (1993).

2. *Id.* at 3.

3. See *id.*; see also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000)

depends upon the individual choice when the relationships sour: to remain and invest, or to leave.<sup>4</sup> In Albert Hirschman's terminology, the choice is between voice and exit.<sup>5</sup> The primacy of exit in consumption-based relationships in the marketplace has profoundly influenced norms in our most important relationships and the law governing them.<sup>6</sup>

Loyalty is a check on exit.<sup>7</sup> Hirschman defines loyalty as "the reluctance to exit in spite of disagreement with the organization of which one is a member."<sup>8</sup> Loyalty describes the psychological bond that influences us to transcend passing discontent and self-interest, persuades us to further the welfare of the relationship or institution over our individual concerns, and motivates us to stay and voice concerns rather than to alleviate conflict through exit.<sup>9</sup> The exit option is nonetheless a critical complement to loyalty, providing the leverage for voice as an instrument of change within the

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(explaining that work is "constitutive of citizenship, community, and even personal identity").

4. FLETCHER, *supra* note 1, at 3.

5. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 3-5 (1970).

6. FLETCHER, *supra* note 1, at 3-4. The pervasive influence of the American preference for exit can be seen in our thinking about such seemingly diverse issues as the rising divorce rate, see Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1925-27 (1999) (suggesting that market norms of impermanence and individualism influence the family); societal pressure on battered women to exit abusive relationships, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 61-71 (1991) (describing battered women's decisions to stay in abusive relationships as an exercise of agency, a reasonable response to the constraints on leaving and to the heightened risk of separation assault that accompanies exit); and the assumption that victims of sexual harassment will leave the employment relationship, see Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1296, 1308-10 (1992) (arguing that sexual harassment victims who choose not to exit are nonetheless exercising agency and internalizing the pain of the harassment while keeping their jobs, and analyzing Anita Hill's decision to remain in an employment relation with her accused harasser Clarence Thomas).

7. Of course, employee economic dependence on a job and the benefits attached to it function as the ultimate shackle. See Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (describing employees as dependent upon the employer for "the substance of life") (quoting FRANK F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951)). Moreover, many scholars have catalogued the intangible but vitally important benefits that employees derive from a job: self-esteem, identity, autonomy, a sense of mastery over their lives, and a feeling of connection to the community. See, e.g., Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 531-35 (1997) (focusing on family security and independence); Schultz, *supra* note 3, at 1886-92 (focusing on citizenship, community, and identity). In some sense, all of these operate as checks on exit.

8. HIRSCHMAN, *supra* note 5, at 98.

9. *Id.*

relationship.<sup>10</sup>

In this Article, we take up the question of the role of exit, loyalty, and voice in the work relation. We examine the historical evolution of the law of work, contrasting the ways in which the common law prioritizes the role of exit with those in which the labor laws prioritize the role of voice and loyalty. Part I recounts the common law origins of the employment-at-will rule. Part II describes early labor organizing efforts by workers who sought to empower themselves collectively vis-à-vis their employers, the quick and decisive reactions by employers seeking to quash the rebellions, and the law's historical alignment with employer interests. Part III outlines the contours of labor law as it evolved, initially supporting worker organizing efforts and later cabining the efficacy of collective action. Part IV explains how common law duties of loyalty owed by workers to employers were incorporated into labor law and influenced collective action. We demonstrate that group action by workers, and particularly the organization and activities of labor unions, is viewed with suspicion and seen as fundamentally disloyal—not only toward employers, but vis-à-vis the state.

In Parts V and VI, we shift our focus to modern employment law, showing how exit triumphed over voice in the contest between the two. We illustrate our argument with a discussion of the suppression of employee voice in the public employee speech cases in Part V. Part VI describes the impact on workers of the primacy of exit, discussing the shift away from permanent long-term employment and employers' use of noncompete covenants to restrict exit and coerce, if not loyalty, attachment to the firm. We argue for a restructuring of the work relation to reinvigorate worker voice and ultimately to engender worker loyalty to the firm. Part VII asserts that coerced attachment and the suppression of voice are both inefficient (unlikely to foster maximum worker productivity) and fundamentally at odds with bedrock constitutional values. Part VIII concludes by sketching the parameters of a proposal for reform.

## I. THE COMMON LAW: EMPLOYMENT-AT-WILL

The vast majority of private sector employees in the United States are employees-at-will, who can be dismissed “for any reason, even for no reason, without legal liability attaching.”<sup>11</sup> Employment-

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10. FLETCHER, *supra* note 1, at 6.

11. Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000) (discussing the history of the employment-at-will doctrine).

at-will is a quintessential product of the American frontier mentality, which privileges exit over voice.<sup>12</sup> Just as the employer may terminate the employment relationship for any reason at all, or for no reason, the employee may quit at any time and for any reason. Employment-at-will rests on the belief that the employment relationship is a fleeting one and expresses the philosophy that employees should have no voice in the workplace.<sup>13</sup>

As scholars have often noted, the employment-at-will doctrine has a curious history. In early English law, there was a presumption that if a hiring did not specify the duration of the employment relationship, it was presumed that the hiring was for a year.<sup>14</sup> The English rule, originating in a preindustrial economy, sought to protect servants from exploitation by masters who “could have the benefit of servants’ labor during the planting and harvest seasons but discharge them to avoid supporting them during the unproductive winter.”<sup>15</sup> The United States, however, soon adopted a different rule.

Employment law’s origins in the United States sprang from the law of master and servant applied to domestic servants, farmhands, and apprentices.<sup>16</sup> During the nineteenth century, with its increasing industrialization, the employment relationship moved from status to contract.<sup>17</sup> Legal thinking in the nineteenth century was heavily influenced by economic individualism, and the courts adopted a laissez-faire attitude toward the employment contract.<sup>18</sup> In 1877, when an Albany lawyer named Horace Wood published his treatise

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12. FLETCHER, *supra* note 1, at 5 (observing that in America, exit has always been preferred to voice because of the “mentality of the frontier” which teaches that solving problems requires “pulling up roots and starting over”).

13. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 133 (1976) (observing that “[i]f 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”).

14. *See id.* at 120 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*425).

15. *Id.* Conversely, the one-year presumption prevented servants who were supported during the hard season from leaving their masters’ service when their labor was most needed. *Id.*

16. Clyde Summers, *Individualism, Collectivism, and Autonomy in American Labor Law*, 5 EMPLOYEE RTS. & EMP. POL’Y J. 453, 453 (2001).

17. *Id.*

18. *Id.* at 455–56. As an example of the courts’ refusal to interfere with employment contracts, Professor Summers cites a typical judicial statement from a case decided in 1884:

[M]en must be left, without interference to buy and sell where they please and to discharge or retain employees at will for good cause or for no cause or even bad cause . . . . It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause.

*Id.* at 454 (citing *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 518 (1884)).

on master and servant law, the employment-at-will rule emerged as the default rule for employment contracts.<sup>19</sup> Wood, recognizing that the presumption of yearly hiring articulated by Blackstone had become an anachronism by the late nineteenth century, argued that master and servant could no longer be considered one of the domestic relations and that “all who were in the employ of another” belonged in the same category.<sup>20</sup> Wood announced the employment-at-will rule thus:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.<sup>21</sup>

Remarkably, this bold statement of the employment-at-will rule had virtually no support in the law. As scholars have noted, the four cases Wood cited as sources for the rule did not, in fact, support it, and his statement that no American court in recent years had approved the English presumption of annual hiring was false.<sup>22</sup> Nonetheless, courts quickly embraced Wood's rule and by 1913 employment-at-will had become the majority rule in America.<sup>23</sup>

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19. John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 649 (2000) (discussing the impact on the law of rapid industrialization, which required employers, employees, lawyers, and judges to “create new rules of free labor from whole cloth”).

20. Feinman, *supra* note 13, at 124 (citing HORACE GRAY WOOD, MASTER AND SERVANT §§ 3–4 (1877)).

21. *Id.* at 126 (citing HORACE GRAY WOOD, MASTER AND SERVANT § 134 (1877)); accord J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341–43 (1974) (asserting that the at-will rule was not supported by the cases cited by Wood or his analysis).

22. Feinman, *supra* note 13, at 126. Feinman's contention that Wood's rule did not have support in the case law of the time has sparked a controversy. Compare Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 118–19 (1982) (agreeing with Feinman that the employment-at-will rule was a new doctrine when it was adopted in the late nineteenth century), with Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood's Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 551–52 (1990) (asserting that the employment-at-will rule existed in 1887), and Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996) (contending that the employment-at-will rule was well accepted by 1910); see also Jay M. Feinman, *The Development of the Employment-At-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 733–40 (1991) (refuting Freed and Polsby's assertion that Wood's rule was generally accepted at the time he announced it).

23. Feinman, *supra* note 13, at 126 (citing CHARLES LABATT, MASTER AND

The employment-at-will rule invited employer abuse. In a seminal article published in 1967, Lawrence Blades cited many instances of employer abuse of the power conferred by the at-will rule and argued for a damage remedy for abusive discharge.<sup>24</sup> More recently, Clyde Summers has catalogued similar abuses of the rule.<sup>25</sup>

Workers responded to employer abuses of the at-will rule in one of two ways. Historically, abusive discharge and unfair treatment on the job prompted union organizing. Workers sought to utilize group leverage to obtain collective bargaining contracts protecting them against unfair treatment, discharge without just cause, and payment of substandard wages and benefits.<sup>26</sup>

More recently, as unions have fallen into disfavor, employees turned to common law tort and contract actions to challenge abusive discharge.<sup>27</sup> For their part, employers devised strategies to restrict exit in situations where employees possessed valuable skills or knowledge that the employer needed in order to maintain its competitive advantage.<sup>28</sup> We take up each of these responses in turn, and evaluate the legal understandings of the role of exit, voice, and loyalty that they spawned.

## II. COLLECTIVE ACTION AS DISLOYALTY AND TREASON

In the late nineteenth and early twentieth centuries, judicial hostility toward organized labor was implacable.<sup>29</sup> State court judges conceived of labor organizing as a criminal conspiracy to injure the public welfare, since demands for wage increases inevitably resulted in higher prices for consumer goods. Prosecutors argued that

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SERVANT § 159 (1913)).

24. See Blades, *supra* note 7, at 1408–09. As illustrations of his thesis, Professor Blades discussed cases in which employers asked employees to falsify data, records, or profit and loss statements and threatened discharge if they refused. *Id.* Blades also cited cases in which employers threatened discharge against workers who testified against them in court or brought lawful claims against the employer, a third party, or a coworker. *Id.*

25. See Summers, *supra* note 16, at 457–60. Professor Summers listed cases in which employers discharged employees for: reporting improper accounting practices, refusing to wear an anti-union button, refusing to comply with an arbitrary rule regarding hairstyles, objecting to racist practices by the operator of an apartment complex, refusing to donate to the employer's favorite charity, performing volunteer work at an AIDS clinic, and continuing a social relationship with a coworker during off-duty hours. *Id.*

26. See *infra* Part II.

27. See *supra* notes 24–25.

28. See *infra* Part VI.B.

29. The history of judicial hostility toward organized labor is meticulously set forth in WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

employers were guardians of the public welfare, protecting the public against “imposition and rapacity.”<sup>30</sup> Between 1880 and 1930, federal and state judges issued 4,300 injunctions against strikes, boycotts, and other concerted activities, which were seen as acts of “moral intimidation.”<sup>31</sup> American courts viewed worker organization and collective pressure activities as disloyal acts by servants toward their masters. Moreover, they considered unions to be dangerously subversive societies creating their own constitutions, rules, and social aims in “an attempt to legislate without constitutional authority”—a direct threat to judicial and legislative authority<sup>32</sup>—and “to compel [employers] to abide by union rather than by state regulation of trade.”<sup>33</sup> Thus, worker organizing and pressure strategies evidenced not only disloyalty to the employer, but contempt for the state and the law itself.<sup>34</sup>

At bottom, courts disapproved of the challenge organized labor, with its appeals to class-consciousness and efforts to engage in class-wide activity, posed to the capitalist system.<sup>35</sup> Indeed, many judges

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30. See *Philadelphia Cordwainers' Case* [Commonwealth v. Pullis], Philadelphia Mayor's Court (1806), reprinted in 3 JOHN R. COMMONS ET AL., A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 61–248 (1958); see also Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 166–89 (1931) (discussing at length the Philadelphia Cordwainers' Case).

31. See, e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (Mass. 1896) (holding that workers cannot strike to secure higher wages); FORBATH, *supra* note 29, at 61, 193–98 (estimating the number of labor injunctions between the years 1880 and 1930).

32. Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 312–13 (1994) (quoting the court in the *Philadelphia Cordwainers* case, the court saw the issue as “whether we shall have an *imperium in imperio* . . . a new legislature consisting of journeyman shoemakers”).

33. James Gray Pope, *The First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 953 (1999) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949)).

34. FORBATH, *supra* note 29, at 83–84 (discussing the hostility of Gilded Age courts to unions' unofficial lawmaking); see also James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 962–72 (1997) (demonstrating how this judicial hostility extended well beyond the Gilded Age into the 1920s).

35. George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 206–07 (1994) (noting a strong tendency in American courts to “disfavor class-wide activity because they perceive it as posing a threat to the system”). As Professor Karl Klare observed in a seminal law review article, the early Supreme Court decisions interpreting the Wagner Act continued to reflect this fear, narrowing the range of permissible union activity to foreclose “the possibility that labor would participate in bringing about fundamental social change.” Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 321 (1978). Professor Klare argued that the Court shaped the very nature of unionism by encouraging unions to accept the social order and to operate within the ground rules laid down by the dominant classes. *Id.*



viewed labor leaders as nothing less than traitors, disloyal not only to their masters, but also to the state. Hence, after Pinkerton detectives and state militia men defeated the great Homestead Strike of 1892, strike leaders were indicted for treason against the state of Pennsylvania.<sup>36</sup> The Chief Justice of the state personally charged the grand jury to indict the strike leaders for treason, observing that the striking men had no more claim on the Homestead works "than has a domestic servant upon the household goods of his employer when he is discharged."<sup>37</sup> The following Sections examine early labor organizing efforts and describe the state's reaction to them as evidencing fundamental disloyalty.

#### A. *The IWW Era*

During the Depression of 1894, a majority of workers at the Pullman Palace Car Company in Pullman, Illinois, joined a new union, the American Railway Union ("ARU").<sup>38</sup> Their president, Eugene Victor Debs, urged all workers to unite, to march together, to vote together, and to fight together "until working men shall receive and enjoy all the fruits of their labor."<sup>39</sup> This militant attitude attracted thousands of railroad employees: by 1895, the ARU had 150,000 members, more than all the other railway brotherhoods combined and only 25,000 fewer members than the American Federation of Labor.<sup>40</sup>

In May 1894, the ARU called a strike against the Pullman Company. It proved a bitter struggle. When switchmen on a number of lines out of Chicago refused to pull switches for Pullman cars they were immediately fired, and thousands of railway workers responded by going on strike.<sup>41</sup> The struggle extended into twenty-seven states and territories, eventually idling a half million men.<sup>42</sup> Debs himself made it clear that the issue was class conflict: "The struggle with the Pullman Company has developed into a contest between the producing classes and the money power of the country."<sup>43</sup> President

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36. JEREMY BRECHER, *STRIKE!* 60 (1972).

37. *Id.* at 61 (citing LEON WOLFF, *LOCKOUT, THE STORY OF THE HOMESTEAD ACT OF 1892: A STUDY OF VIOLENCE, UNIONISM, AND THE CARNEGIE STEEL EMPIRE* 213 (1965)). Despite this appeal, the jury did not convict. See *id.* at 60–61.

38. *Id.* at 78.

39. *Id.* at 78–79 (citing ALMONT LINDSEY, *THE PULLMAN STRIKE* 127 (1964) (quoting CHI. TIMES, June 13, 1894, at 2)).

40. *Id.* at 79–80.

41. *Id.* at 82.

42. *Id.*

43. SAMUEL YELLEN, *AMERICAN LABOR STRUGGLES* 115–16 (1936) (quoting

Grover Cleveland dispatched troops to Chicago, the epicenter of the strike.<sup>44</sup> Meanwhile, Cleveland's Attorney General, Richard Olney, who had served as a lawyer for railroad companies for thirty-five years and who continued to sit on the boards of directors of several railroads caught up in the strike, secured dozens of injunctions reaching from Michigan to California which forbade all strike activity, including speech used to attempt to persuade employees to strike.<sup>45</sup>

The conflict continued to spread across the country.<sup>46</sup> Federal troops, local militia, and deputy marshals hired by the railroad composed an army of 14,000.<sup>47</sup> In California, federal troops entered Los Angeles, Oakland, and Sacramento.<sup>48</sup> By the end of the strike, federal and state troops had also been called out in Nebraska, Iowa, Colorado, Oklahoma, and Illinois.<sup>49</sup> While the government and railroad companies ultimately prevailed in the Pullman strike, Eugene Debs and his message of class conflict thrived: between 1897 and 1904, union membership increased from 447,000 to over 2,000,000.<sup>50</sup>

In 1905, Debs, William Haywood, Mother Jones, and other labor radicals convened a conference in Chicago, which in turn gave rise to the Industrial Workers of the World ("IWW" or "the Wobblies").<sup>51</sup> The IWW declared that "[t]he working class and the employing class have nothing in common,"<sup>52</sup> and committed itself to overthrowing capitalism. IWW rhetoric was couched in Marxist terms, emphasizing class conflict and the antagonistic interests of workers and employers.<sup>53</sup> It engaged in both political and industrial action. Debs

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Eugene Debs, *Public Opinion*, July 5, 1894).

44. BRECHER, *supra* note 36, at 84.

45. *Id.* at 84–85. As the editor of the *Chicago Times* observed, "The object of the injunction is not so much to prevent interference with the trains as to lay a foundation for calling out the federal troops." *Id.* at 85 (citing CHI. TIMES, July 3, 1894, at v. 1).

46. BRECHER, *supra* note 36, at 86–87.

47. *Id.* at 86.

48. *Id.* at 87–88.

49. *Id.* at 89.

50. CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 21 (1993).

51. *Id.*

52. *Id.* at 21 (quoting PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 290 (1964)).

53. David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1064 (1994). The IWW was formed in part in reaction to the American Federation of Labor ("AFL"), which emphasized organizing skilled trade workers along craft lines and was committed to improving the position of workers within a capitalist economy through the negotiation of binding agreements with employers. *Id.* at 1065–66.

ran for President of the United States in 1912 as the Socialist Party candidate.<sup>54</sup> IWW industrial protests were characterized by direct action which included sabotage at the point of production, slowdowns, picket lines, demonstrations, and strikes designed to raise worker consciousness by mobilizing workers around class power.<sup>55</sup>

When local communities tried to prevent the Wobblies from speaking on street corners between 1909 and 1913, a public debate on the parameters of free speech began.<sup>56</sup> The Wobblies utilized widespread civil disobedience, including provoking arrests to clog the prisons and courts and openly violating laws that restricted speech.<sup>57</sup> The Wobblies frequently invoked constitutional rights of free speech in their defense,<sup>58</sup> although they were convinced that the courts would reflect the views of the property-owning class and that “free” speech was limited to that which did not express class conflict or class hatred.<sup>59</sup> They deplored the uselessness of the law, describing the constitutional free speech guarantee as a “‘mere mask of anarchy for the employing class.’”<sup>60</sup>

The United States’ entry into World War I in 1917 triggered a repressive and reactionary era in American history. IWW leaders were charged with deliberately sabotaging America’s war effort.<sup>61</sup> Several thousand IWW leaders were imprisoned; some were deported.<sup>62</sup> As for Debs, federal agents arrested him in 1917 following a fiery speech and charged him with ten violations of the newly enacted Espionage Act.<sup>63</sup> Debs invoked the constitutional right to free speech in his defense, declaring “Gentlemen, I am the smallest part of this trial . . . . There is an infinitely greater issue that is being tried in this court, though you may not be conscious of it. American institutions are on trial here before a court of American

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54. CRAVER, *supra* note 50, at 21–22.

55. Rabban, *supra* note 53, at 1064–65.

56. *See id.* at 1058.

57. *Id.* at 1062.

58. *Id.* at 1075–77.

59. *Id.* at 1115–16.

60. *Id.* at 1117 (quoting The “Constitutional” Joke, *INDUS. WORKER*, Oct. 7, 1909, at 2).

61. CRAVER, *supra* note 50, at 22.

62. *Id.*

63. NICK SALVATORE, *EUGENE V. DEBS, CITIZEN AND SOCIALIST* 294 (1982). That Debs committed no acts that constituted espionage is today beyond dispute; the ten charges brought against him arose out of a speech he gave in Canton, Ohio, in which he noted that corporate leaders had wrapped themselves in a “cloak of loyalty” and were using the war to brand their enemies as traitors. *Id.* at 292.

citizens.”<sup>64</sup> The jury returned a guilty verdict on all charges. On September 14, 1917, Judge D.C. Westenhaver excoriated those “within our borders who would strike the sword from the hand of this nation while she is engaged in defending herself against a foreign and brutal power,” and sentenced Debs to ten years in jail.<sup>65</sup>

Debs and the IWW learned that union organizing not only pitted them against corporate power, it could also lead to their being branded traitors, spies, and saboteurs vis-à-vis the state. Disloyalty to one’s employer, the “master,” implied treason against the Sovereign.

### *B. The West Virginia UMW Insurrection*

Other lessons followed. Perhaps no episode in American labor history better demonstrated that disloyalty to corporate power was also tantamount to treason against the state than the 1921 insurrection of coal miners in southern West Virginia. During World War I, the United Mine Workers (“UMW”) succeeded in organizing the coal fields of northern and central West Virginia.<sup>66</sup> The country’s largest coal mine operators, including the United States Steel Company, the Consolidation Coal Company, and the Island Creek Company, responded by shifting operations to the southern West Virginia coal counties of McDowell, Logan, and Mingo.<sup>67</sup> The UMW tried to counter this strategy by organizing the geographically isolated southern West Virginia coal fields but was met by determined resistance.<sup>68</sup> The coal operators’ primary weapon was an army of Baldwin-Felts detectives who sought to intimidate union supporters and to evict them from company owned housing.<sup>69</sup> On May 19, 1920, eleven Baldwin-Felts detectives arrived in the town of Matewan, West Virginia, to evict union miners who worked for the Red Jacket Coal Company.<sup>70</sup> The Baldwin-Felts detectives were confronted by the mayor and Sid Hatfield, Matewan’s chief of police and a former

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64. *Id.* at 295.

65. *Id.* at 296. Even Judge Westenhaver, however, acknowledged Debs’s sincerity and courage. *Id.*

66. MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS, A BIOGRAPHY 59 (1986) (describing the events that led to the miners’ insurrection of 1921).

67. *Id.* at 59–60.

68. *Id.* at 60.

69. DAVID ALAN CORBIN, LIFE, WORK, AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA MINERS 200–01 (1981) (describing the events that culminated in murders of seven Baldwin-Felts detectives, an event which would be known as the “Matewan Massacre”).

70. *Id.* at 201.

UMW member.<sup>71</sup> A gunfight ensued, resulting in the death of the mayor, two other Matewan citizens, and seven Baldwin-Felts guards.<sup>72</sup>

Following the Matewan massacre, the coal operators brought in more guards and “trainloads” of strike breakers.<sup>73</sup> The union miners distributed weapons; they beat and killed guards and strike breakers.<sup>74</sup> UMW miners dynamited coal operators’ property, burned buildings to the ground, and attacked foremen, superintendents, and other coal company officials who tried to keep the mines operating.<sup>75</sup> When the state government brought in the state police, UMW miners responded by killing three officers.<sup>76</sup>

In the summer of 1921, President Warren G. Harding declared martial law and two contending armies organized in southern West Virginia: an army of 6,000 coal miners and their sympathizers and an opposing army of state troops, Baldwin-Felts guards, and a light bombing squadron.<sup>77</sup> The miners’ army initially defeated the state troops and assumed control of the area south of Charleston to the mountain ranges surrounding Logan and Mingo Counties.<sup>78</sup> The battle raged on for a week while “[a] horrified nation sat back in disbelief as newspapers reported the largest armed conflict in American labor history.”<sup>79</sup>

When the miners’ army finally encountered federal troops, the miners, many of whom were World War I veterans, could not bring themselves to fire on the United States army.<sup>80</sup> The miners’ army had to make the difficult choice between their right to organize and committing treason, between loyalty to their union and loyalty to their country. They chose their country.

Five hundred and fifty miners were nevertheless indicted for

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71. *Id.*

72. *Id.*

73. *Id.* at 202.

74. *Id.* at 203 (noting incidents of violence at eleven mines in Mingo County from October 1920 to May 1921).

75. *Id.*

76. *Id.*

77. DUBOFSKY & VAN TINE, *supra* note 66, at 60.

78. CORBIN, *supra* note 69, at 221.

79. *Id.* at 223 (citing, for example, a *New York Times* headline that read: “Fighting Continues in Mountains/Planes Reported Bombing Miners/Heavy Firing Unabated” (Sept. 3, 1921 at A1)).

80. *Id.* at 236 (observing that “[t]hus it was established beyond question the fact that they [the miners’ army] were not in revolt against constituted authority, but had taken to arms because they believed there was no other way to correct the wrongs” inflicted upon them by the coal operators and a venal state government).

treason against the state of West Virginia.<sup>81</sup> The treason trials were conducted in Charles Town, West Virginia, in the same courthouse where John Brown was tried following his raid on Harper's Ferry.<sup>82</sup> The miners, however, did not see themselves as traitors either to the State of West Virginia or to the United States. On the contrary, the ideology behind the coal miners' insurrection was "Americanism." As David Corbin has eloquently explained:

The Americanism that fired the southern West Virginia miners was not a chauvinistic or imperialistic nationalism, nor one of national honor and power. The Americanism that the miners espoused was one that promised liberty, equality, and dignity to all people, regardless of race, religion, or current condition of servitude. It promised the miners freedom from the absolutism of coal companies, it guaranteed them fundamental rights supposedly inalienable, but conspicuously absent in the company towns . . . . Unionism was seen by the coal diggers as the means by which they could, and would, Americanize the coal fields.<sup>83</sup>

The West Virginia coal miners' view of Americanism proved to be a minority view. The concerted activity undertaken by the miners and their willingness to emphasize solidarity over individualism was, in fact, the antithesis of the majority view of Americanism: fealty to one's employer. It was at odds not only with the master-servant paradigm of the employment relation that had shaped the common law, but with the very underpinnings of capitalism. In the words of a Swedish labor law scholar, collective employee action was "an alien presence in the U.S. landscape."<sup>84</sup>

### III. THE "UN-AMERICAN" LABOR LAW

Out of this bloody history of labor organizing, the Wagner Act was forged. The Wagner Act was the first in a trilogy of Congressional enactments that have come collectively to be called the National Labor Relations Act ("NLRA"),<sup>85</sup> or more popularly, the

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81. *Id.* at 237. The national media, with contempt for the corrupt government of the state of West Virginia, ridiculed the treason charges and uncovered the fact that the coal operators were financing the treason trial. *Id.*

82. *Id.* at 238. Only one miner was found guilty of treason; he jumped bail and was never apprehended. *Id.* at 248-49 n.10.

83. *Id.* at 242.

84. Fahlbeck, *supra* note 32, at 314.

85. The Wagner Act, subsequently amended by the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959, was codified as the NLRA. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

labor laws. The Wagner Act sought to achieve industrial peace and to alleviate industrial strife and the consequent interruption of commerce by authorizing and protecting labor union organizing, and mandating collective bargaining between unions and employers.<sup>86</sup> The Act confers upon employees the right to organize, bargain, strike, and engage in "other concerted activities" for "mutual aid or protection."<sup>87</sup> The Act draws a line between workers on the one hand and those representing the employer's interest on the other (such as supervisors, managers, and confidential employees)<sup>88</sup> and codifies the antagonistic nature of the relationship.<sup>89</sup> Finally, it obligates employers to recognize and bargain in good faith with the majority union selected by employees in an appropriate bargaining unit.<sup>90</sup> The theory of the Act is that protecting employees' rights to organize, to strike, and to compel the employer to bargain will encourage the formation of voluntary labor agreements, "defusing and channeling conflict between labor and management."<sup>91</sup> The right to resort to economic weapons was explicitly preserved in order to prevent impasse at the bargaining table and encourage the resolution of disputes.<sup>92</sup>

The selection of collective bargaining as the preferred means of resolving workplace disputes was no accident in a democratic society. Conferring voice on workers and establishing the vehicles for asserting it—unionization and collective bargaining—was intended to enhance and support the larger political democracy.<sup>93</sup> Moreover, by

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86. See 29 U.S.C. § 151 (2000); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31–32 (1937).

87. 29 U.S.C. §§ 157, 163 (2000).

88. 29 U.S.C. §§ 152(2)–152(3) (2000) (excluding supervisors); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 180–81 (1981) (excluding from coverage confidential employees who assist or act in a confidential relation to persons exercising managerial functions in the field of labor relations); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283–84 (1974) (finding managerial employees impliedly excluded from coverage under the NLRA because they occupy a higher rank than supervisors in the workplace hierarchy).

89. 29 U.S.C. § 158(a)(2) (2000) (prohibiting employer domination or assistance of a labor organization on the rationale that the parties must deal at arms' length with one another in an adversarial posture that recognizes the reality of their conflict of interest); see also Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 505–09 (1992) (describing how the Act constitutes the adversarial relation between labor and employers).

90. 29 U.S.C. §§ 158(a)(5), 158(d) (1994).

91. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1987).

92. See 29 U.S.C. § 163 (1994) (preserving the right to strike); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952).

93. Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. REV. 1286, 1291–92 (1989).

combating feelings of powerlessness and worker alienation, collective bargaining sought to promote efficiency and productivity.<sup>94</sup> Finally, by requiring the exchange of information and establishing a therapeutic outlet for discussion, industrial peace would be achieved. As the Court explained in an early case: "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, hopefully, to mutual agreement."<sup>95</sup>

Labor unions and labor laws have fallen into disfavor over the last three decades. Legislators, judges, and "Americans-at-large" find collective activity by employees to be so inimical to traditional American values that they have "distrust, or even contempt, for employees who want to resort to concerted action."<sup>96</sup> Not only do unionized employees display a suspiciously un-American tendency to emphasize the collective over the individual and to restrain individual competition, they are dependent for their power on the federal government, which through the National Labor Relations Board (NLRB), enforces the National Labor Relations Act.<sup>97</sup> In the area of labor law, the federal government exercises an unprecedented power to limit individual choice. The NLRA authorizes the NLRB to determine the appropriate bargaining unit,<sup>98</sup> imposes union power

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94. *Id.* at 1294–95.

95. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

96. Fahlbeck, *supra* note 32, at 326; *see also* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1582 (1996) (discussing judicial distrust of collective action). The popular distaste for labor unionism has been well-documented. *See* RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 89 (1999); *see also* Stephen F. Befort, *Labor & Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 376–77 (2002) (discussing unionism's poor fit with the "rugged individualism of the American psyche"). Union density is at an all-time low, dropping from one-third of all nonagricultural workers in the 1950s to less than 23% in 1980, and to a new low of 12.9% of the nonagricultural workforce by the end of 2002. *See* Charles B. Craver, *The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence*, 16 LAB. LAW. 123, 148–49 (2000) (describing decline in union membership since the 1950s); *Decline in Membership Continued in 2003 to 12.9 Percent of the Workforce*, *BLS Reports*, Daily Lab. Rep. (BNA) No. 13, at AA–1 (Jan. 22, 2004) [hereinafter *Decline in Membership*].

Union density in the private sector has fallen even more precipitously than these numbers suggest. During the period of decline in the private sector, unionism grew in the public sector. In 2002, 37.2% of public sector workers were union members, and public sector workers comprised 40% of the total union membership. Befort, *supra*, at 362; *Decline in Membership*, *supra*. By contrast, only 8.2% of private sector workers were unionized by 2003. Craver, *supra*, at 148–49; *Decline in Membership*, *supra*.

97. *Cf.* Kristin Bumiller, *Victims in the Shadow of Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 421–39 (noting the disempowering effect of relying on law to obtain vindication of rights).

98. 29 U.S.C. § 159(b) (2000) (conferring on the NLRB the authority to determine



over the minority of workers who voted against the union,<sup>99</sup> and strips the individual worker of the power to bargain individually with her employer. It vests control over an employee's grievance in the union,<sup>100</sup> and in many instances prevents employers and employees, even in nonunionized settings, from voluntarily establishing committees that deal with grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.<sup>101</sup> Thus, labor unions and workers are cast in the role of victims forced to rely upon the federal government for their legitimacy—a uniquely “un-American” posture.<sup>102</sup>

In short, “[t]he demise of collective bargaining [in the United States] has come about as a result of . . . the perceived un-American character of concerted activity *per se* and . . . the truly un-American legal rules to which concerted activity, unions and collective bargaining have given rise in America.”<sup>103</sup> If this conclusion sounds overstated, it accords well with the views of dozens of men and women who testified before Congress regarding the Wagner Act. For example, Whiting Williams, a labor specialist, testified before the Senate Committee on Education and Labor on April 7, 1934.<sup>104</sup> Williams saw the Wagner Act as destroying “free competition,” creating a monopoly power for labor unions, and setting the stage for class conflict that could lead to the rise of a Hitler in America.<sup>105</sup> Whitney H. Eastman, representing the Milwaukee Association of Commerce, stated that the proposed bill favored one class at the

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appropriate bargaining units). The Supreme Court has held that the NLRB has broad discretion to determine appropriate bargaining units. See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 178 (1981).

99. Once certified as the employees' exclusive bargaining representative, the minority that did not vote for the union loses its right to bargain with the employer. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (holding that an employer bargaining with individual employees is “subversive of the mode of collective bargaining which the statute has ordained”).

100. See Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 255–56 (1977) (observing that collective bargaining agreements almost always afford the union exclusive authority to present and settle grievances).

101. This is the ban on “company unions” enshrined in NLRA section 8(a)(2) (codified at 29 U.S.C. § 158(a)(2) (2000)).

102. As Fahlbeck observes, “Americans are not commonly considered to be people in need of the federal government's guidance as to what is in their best interest.” Fahlbeck, *supra* note 32, at 328.

103. *Id.* at 333–34.

104. *To Create a National Labor Board: Hearings on S. 2926 Before the U.S. Senate Comm. on Education and Labor*, 73d Cong. 891–94 (1934) (statement of Whiting Williams, labor specialist).

105. *Id.* at 894.

expense of others and that the bill was "accordingly dangerous to the public welfare and wholly un-American."<sup>106</sup> Testifying before the same committee, Dr. Gus W. Dyer, Professor of Economics at Vanderbilt University, announced that the Wagner Bill "repudiates several fundamental provisions of the Constitution of the United States," specifically "freedom of contract, freedom of press, freedom of speech, and freedom of religion."<sup>107</sup> Furthermore, by enabling the creation of an army of organized workers, the Wagner Bill would allow the establishment "[of] that radical type of socialism known as 'syndicalism,' " which would put all of industry under the control of the workers.<sup>108</sup>

Similarly, Hugh H. C. Weed testified that "it seems to me purely un-American and purely unethical that a law should be passed that would compel the abandonment of that close personal, friendly relationship [between employers and employees] which, after all is said and done, is the finest thing in the business."<sup>109</sup> E.J. Poole introduced into the record an editorial published by the *New York Herald Tribune*.<sup>110</sup> The *Herald Tribune* condemned the bill as a political sellout to the American Federation of Labor, an "un-American and blundering gesture toward the irresponsible labor autocracies."<sup>111</sup> The Chicago Association of Commerce castigated Congress for considering legislation that would privilege one class over another and railed against the bill as "one of the most unfair and un-American measures ever submitted to Congress."<sup>112</sup>

These shrill denunciations of the Wagner Act by the business community were not entirely without foundation. As Karl Klare has persuasively demonstrated, the Wagner Act "was perhaps the most radical piece of legislation ever enacted by the United States Congress."<sup>113</sup> Indeed, Senator Wagner's explicit objective was to

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106. *Id.* at 896 (statement of Whitney H. Eastmant, President, William O. Goodrich Company).

107. *Id.* at 900 (statement of Dr. Gus W. Dyer, Professor, Vanderbilt University).

108. *Id.* at 904.

109. *Id.* at 952 (statement of Hugh H. C. Weed, Vice-president, Carter Carburetor Company).

110. *Id.* at 375; *Hearing on S.1958 Before the Senate Comm. on Educ. & Labor*, 74th Cong. (1935), reprinted in 3 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 375, 375 (1985) (statement of E.J. Poole, Vice President, Carpenter Steel Company).

111. *Id.*

112. *Id.* at 750-51 (statement of George W. Young, President of the Chicago Association of Commerce).

113. Klare, *supra* note 35, at 265.

effect a redistribution of power in the workplace.<sup>114</sup> An expansive reading of the Act might have strengthened labor unions, legitimized class conflict, and threatened the legitimacy of capitalism.<sup>115</sup> However, in a series of cases decided in the Act's infancy, the judiciary interpreted the law in a manner that limited its potential to legitimize class-wide protest, minimized the Act's ability to redistribute power in the workplace, and reaffirmed the dominance of capital over labor in the American market.<sup>116</sup>

In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>117</sup> the United States Supreme Court upheld the constitutionality of the Wagner Act, emphasizing the Act's limitations:

The Act does not compel agreements between employers and employees . . . . It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine. . . ." The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.<sup>118</sup>

In the following year, the Court ruled that an employer can permanently replace strikers<sup>119</sup> despite the Act's provision that nothing in the Act should be construed "so as either to interfere with or impede or diminish in any way the right to strike."<sup>120</sup> In the next few years the Court outlawed the "sit-down strike,"<sup>121</sup> limited protection of strikes during the term of a collective bargaining agreement even where the agreement does not contain a no-strike clause,<sup>122</sup> and held that a worker who suffered loss of employment

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114. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1449 (1993) (discussing Senator Wagner's "program of collective empowerment of workers in the labor market," which had the goal of "redistributing bargaining power by means of independent labor organizations").

115. Feldman, *supra* note 35, at 206–07 (arguing that class-wide collective action by workers can result in a challenge to the legitimacy of capitalism itself); *see also* Christopher D. Cameron, *How "Language of the Law" Limited the American Labor Movement*, 25 U.C. DAVIS L. REV. 1141, 1170 (1992) (observing that "[t]he language of the law," as interpreted by the courts, "is too confining to get the job [of building a strong labor movement] done").

116. *See* Klare, *supra* note 35, at 293–336 (discussing a series of court decisions that "deradicalized" the Wagner Act).

117. 301 U.S. 1 (1937).

118. *Id.* at 45 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 549 (1937)).

119. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

120. 29 U.S.C. § 163 (2000).

121. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248, 253 (1939).

122. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 335–36, 342–46 (1939). As Professor Klare

resulting from an employer's unfair labor practice had a duty to mitigate losses.<sup>123</sup> In the ensuing years, the Court upheld the right of an employer to go out of business despite anti-union motives,<sup>124</sup> held that employers may obtain injunctions against violation of a no-strike clause<sup>125</sup> and held that an employer's decision to close part of an enterprise was not a mandatory topic of bargaining.<sup>126</sup> More recently, the Court limited the Act's coverage of white-collar workers by broadly defining the supervisory<sup>127</sup> and managerial employee exclusions,<sup>128</sup> and curtailed a union's ability to communicate with workers at the workplace.<sup>129</sup>

While the courts played the largest role in deradicalizing the Wagner Act, Congress also made a significant contribution when it passed the Taft-Hartley Act in 1947.<sup>130</sup> The executive branch has also

notes, the agreement not only lacked a "no-strike" clause, it "reserved full liberty of action" to the employees in case of impasse in attempts to resolve misunderstandings between the company and the workers. Klare, *supra* note 35, at 304 (citing *Sands Mfg.*, 306 U.S. at 343).

123. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941). Professor Klare observed that the Court's holding was "unvarnished fiat" which "overruled a considered policy judgment" of the NLRB and "profoundly undercut effective enforcement of the Act." Klare, *supra* note 35, at 334.

124. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269-70, 273-74 (1965). Professor James Atleson has noted that the *Darlington* decision is "startlingly clear in its total disregard for the interests of the employees who have become unemployed due to their support or [sic] a union." JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 141 (1983).

125. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 252-53 (1970). The Court held that employers may obtain injunctions against violation of a no-strike clause, *see id.*, despite the Norris-LaGuardia Act's broad prohibition against injunctions in labor disputes, *see* 29 U.S.C. §§ 101-05 (2002).

126. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

127. *See NLRB v. River Cmty. Care, Inc.*, 532 U.S. 706, 712, 721 (2001); *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 576-80 (1994).

128. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 676-77, 679 (1980) (holding that university faculty members who make recommendations regarding "hiring, tenure, sabbaticals, termination, and promotion" were managerial employees).

129. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540-41 (1992) (permitting employer to prohibit solicitation by nonemployee union organizers in the parking lot).

130. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (2000)); *see* THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* 52-53, 55-56 (1991). Arguably the most important provision of the Taft-Hartley Act was its ban on secondary boycotts, in which striking employees could extend the strike to other companies with important ties to the struck employer. Professor George Feldman, noting the power of secondary boycotts in promoting class-wide activity, theorizes that Congress outlawed secondary boycotts because of their efficacy. Feldman, *supra* note 35, at 207. In previous work, we have argued for the repeal of the secondary boycott ban so as to equalize somewhat the distribution of power between management and unions. Ken Matheny & Marion Crain, *Making Labor's Rhetoric Reality*, 5 GREEN BAG J. 17, 24-25

been reluctant to support worker organization and collective bargaining, especially in times of national crisis. The Reagan Administration's reaction to the air traffic controllers' strike in the 1980s set the tone for the unraveling of government support for collective bargaining.<sup>131</sup> Following the September 11 attacks, the creation of the Department of Homeland Security ("DHS") was delayed for several months due to the Bush Administration's refusal to accept collective bargaining rights for DHS workers, many of whom had possessed bargaining rights in predecessor agencies subsequently merged into the DHS.<sup>132</sup> The Bush Administration has proposed similar retrenchment on collective bargaining rights of workers in other parts of the federal government, including the Department of Defense.<sup>133</sup>

Most recently, Education Secretary Roderick R. Paige disclosed the depth of the Bush Administration's hostility toward unions and worker collective action when he characterized the National Education Association as a "terrorist organization."<sup>134</sup> Paige's subsequent apology and clarification was even more revealing: he emphasized that he had been referring to the union itself, rather than to the teachers who are its members or to the profession, and noted that his comments had been provoked by the NEA's "obstructionist scare tactics"—by which he meant the NEA's threat to sue the Bush Administration for failing to fund the requirements of the "No Child Left Behind" law.<sup>135</sup> Clearly, the Bush Administration views unionism and collective action as disloyal and un-American.

In short, the courts, Congress, and the executive branch have "Americanized" the labor laws. Employer hegemony prevails.<sup>136</sup>

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(2001).

131. See GEOGHEGAN, *supra* note 130, at 231–33.

132. Joseph Slater, *Homeland Security v. Workers' Rights? What the Federal Government Should Learn From History and Experience, and Why*, 6 U. PA. LAB. & EMP. L.J. 1, 295, 297 (2004).

133. *Id.* at 49–50.

134. Amy Goldstein, *Paige Calls NEA a 'Terrorist' Group*, WASH. POST, Feb. 24, 2004, at A19.

135. Robert Tanner, *Education Secretary Attacks Teachers Union*, HERALD-SUN (Durham, N.C.), Feb. 24, 2004, at 3.

136. See ATLESON, *supra* note 124, at 177 (arguing that while "the NLRA has obviously affected employer hegemony to some extent . . . assumptions about inherent employer authority are used to interpret, that is, to narrow the thrust and language" of the labor laws).

#### IV. CONCEPTIONS OF LOYALTY IN THE POST-NLRA WORKPLACE

It has become increasingly clear that the NLRA does not supplant common law master-servant doctrines, particularly the servant's obligation of loyalty to her master. Judges approach labor disputes with a set of assumptions about the employment relationship and workers' proper place in this relationship that influences decision-making irrespective of provisions of the Act or even the Act's underlying policies.<sup>137</sup> Although the NLRA imposes no explicit duty of loyalty, courts and the NLRB have drawn lines between worker actions that are protected and those which are so disloyal to the interests of the employer that they are treated as unprotected under the labor laws. Such duties are unidirectional: workers are required to be loyal to their employers, but employers owe no reciprocal duty of loyalty.<sup>138</sup>

Accordingly, worker protests that disparage in any way the employer's products are deemed unprotected under labor law, despite the explicit (and constitutionally protected) right to picket and boycott. In *NLRB v. Local Union No. 1229*,<sup>139</sup> technicians employed at a television station (Jefferson Standard Broadcasting Company) in Charlotte, North Carolina, peacefully picketed and handbilled during a labor dispute. One of the handbills distributed by the technicians contained stinging criticisms of the station's programming quality.<sup>140</sup> The employer subsequently discharged ten

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137. *Id.* at 91, 180 (discussing the importance of hidden assumptions about the role of management and the place of employees in our society that influence judicial decision-making in labor disputes).

138. *Id.* at 179-80. Atleson observes:

It is a strange form of common enterprise that rests exclusive control in one party, for instance, (1) to impose work orders that must, except in rare cases, be obeyed; (2) to unilaterally decide crucial matters of plant size, product line, the location or continuation of the enterprise despite the impact on the other parties; and (3) to impose these changes generally without warning. The conclusion is that although some obligations are imposed on employees to foster and support a joint productive enterprise, there are no or few corollary obligations upon employers to recognize participatory interests of employees, at least beyond express statutory prohibitions imposed upon employers.

*Id.* at 95 (citations omitted).

139. 346 U.S. 464 (1953).

140. *Id.* at 468. Among other things, the handbill suggested that the station's programming was markedly inferior to that of television stations in New York, Boston, Philadelphia, and Washington. *Id.* The handbill suggested that one reason for the inferior programming was that the television station considered Charlotte to be a "second-class city." *Id.*

technicians for distributing the handbills.<sup>141</sup> The Supreme Court upheld the employer's discharge decision, finding that the employees' distribution of the handbills was "a demonstration of such detrimental disloyalty as to provide 'cause' " for firing the employees.<sup>142</sup> The Court stated:

There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.<sup>143</sup>

The Court made it clear that Congress could not have intended to weaken the "underlying contractual bonds and loyalties of employer and employee."<sup>144</sup> The dissenting justices pointed out that not only did the Act say nothing that could be interpreted as authorizing discharge for disloyalty,<sup>145</sup> if disloyalty were made an exception to the Act's protections, "[m]any of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' . . . ."<sup>146</sup>

Subsequent cases have held that a number of employee actions short of direct product disparagement are unprotected because they are disloyal.<sup>147</sup> Slowdowns, partial strikes, and "quickie" or intermittent strikes in which employees slow down the pace of work while continuing to collect pay checks, are unprotected "disloyal" tactics.<sup>148</sup> Participation by employees in product boycott actions, even

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141. *Id.*

142. *Id.* at 472.

143. *Id.*

144. *Id.* at 473.

145. *Id.* at 479 (Frankfurter, J., dissenting).

146. *Id.* at 479-80 (Frankfurter, J., dissenting).

147. The Board and courts might have chosen to limit *Jefferson Standard* to its facts. Indeed, both the NLRB and the Court emphasized that the workers' picket was susceptible to misinterpretation by the public because the handbills made no reference to a labor dispute and did not indicate that the employees were seeking any benefits for themselves. *Id.* at 472.

148. See *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1004-05 (5th Cir. 1965) (holding that "quickie" strikes of a day's duration were unprotected); *Hoover Co. v. NLRB*, 191 F.2d 380, 385-86 (6th Cir. 1951) (ruling that an effort by nonstriking employees to generate a consumer boycott was unprotected); *Elk Lumber Co.*, 91 N.L.R.B. 333, 338-39 (1950) (holding that a slowdown was unprotected); see also Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 269 (2000) (suggesting that current policy under the Act requires employees "either to gamble on a high-risk traditional strike that exposes them to permanent replacement, or to engage in a short-term work stoppage—and risk being fired," and observing that the courts'

when conducted off the employer's premises and during off-duty time, have been ruled disloyal. In *George A. Hormel & Co. v. NLRB*,<sup>149</sup> a union member who supported the much-publicized strike by Hormel workers in Austin, Minnesota, during the 1980s attended a rally at which speakers called for a boycott of Hormel products.<sup>150</sup> Hormel fired him.<sup>151</sup> Although the Board ordered his reinstatement,<sup>152</sup> the D.C. Circuit held that the Board's ruling was "inconsistent with the statutory policy of preserving the right to discharge an employee for disloyalty."<sup>153</sup> Because the worker's attendance at the rally would, in the court's opinion, cause any reasonable observer to conclude that he supported the boycott, his subjective intent was irrelevant; his disloyalty to his master was objectively established.<sup>154</sup>

Finally, walkouts that are especially harmful to the employer's operations are deemed unprotected. In *Bob Evans Farms, Inc. v. NLRB*,<sup>155</sup> the Seventh Circuit upheld the discharge of fifteen restaurant employees who walked out after a popular supervisor was fired.<sup>156</sup> Without citing any provision of the Act, the court proceeded to analyze whether the employees' impromptu walkout was a

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uneasiness with short-term work stoppages may stem from their relative efficacy as contrasted with the traditional strike). See generally Craig Becker, "Better Than A Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act," 61 U. CHI. L. REV. 351, 353 (1994) (discussing how the NLRA has neutralized the potency of strikes as leverage in bargaining).

149. 962 F.2d 1061 (D.C. Cir. 1992).

150. The employee's support for the Austin workers included wearing a sticker on his helmet supporting the strikers, refusing to cross a picket line, distributing leaflets supporting the strikers, and appearing at a rally at which speakers urged a boycott of Hormel products. *Id.* at 1062-63.

151. *Id.* at 1064.

152. *Id.* at 1064-65.

153. *Id.* at 1065. Apparently unable to find justification in the Act or its legislative history for its position that the Act requires an "objective test of disloyalty," the court cited as authority OLIVER WENDELL HOLMES, *THE COMMON LAW* 54 (M. Howe ed., 1963), wherein it is written, "Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them." *Hormel*, 962 F.2d at 1065. The court considered the Supreme Court's holding in *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984), that a court must accept the construction of the law the agency administers unless the construction conflicts with the unambiguously expressed intent of Congress or is not a permissible construction of the statute. 962 F.2d at 1065. The *Hormel* Court concluded that, under *Chevron*, the administrative law judge's construction of the statute was "not a permissive construction," given the policy of the Act of preserving the right to fire for disloyalty. See *id.* Apparently Holmes's words, quoted above, tipped the balance against traditional *Chevron* deference in this case.

154. *Id.* at 1066.

155. 163 F.3d 1012 (7th Cir. 1998).

156. *Id.* at 1024.



“reasonable”<sup>157</sup> and “appropriate”<sup>158</sup> means of protesting the supervisor’s dismissal. Relying on “common sense,”<sup>159</sup> the court asserted that the Act contains a restriction on the means of protest: an “inherent proportionality requirement.”<sup>160</sup> Because the employees’ sudden decision to walk out during a peak business period caused disruption to the employer’s business, the walkout failed to meet the proportionality requirement.<sup>161</sup> While the court did not explicitly mention that the workers’ protest violated their duty of loyalty to the employer, the court’s opinion resonates with the common law understanding of the employment relation as a master-servant dynamic in which employees owe a duty of loyalty to the

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157. *Id.* at 1022–23. The court determined that the employees had reason to protest their supervisor’s discharge because she enjoyed a close and supportive relationship with the workers she supervised, often acting as an advocate for them with other supervisors, so that her discharge would be likely to produce a downturn in their working conditions. *Id.* at 1022.

158. Although the court acknowledged that a walkout is a species of strike and accordingly generally protected under the Act, the court imposed an additional requirement that the means of protest instigated in response to a supervisor’s discharge be proportional to the complaint asserted: “[E]mployees cannot run an employer out of business solely to make known a minor grievance.” *Id.* at 1023. The court’s proportionality requirement is at odds with section 13 of the Act, which states that “[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike.” National Labor Relations Act, ch. 372, 49 Stat. 449, 457 (1935) (codified as amended at 29 U.S.C. § 163 (2000)).

159. *Bob Evans Farms*, 163 F.3d at 1022–23 (“It belies common sense to suggest that employees are at liberty to resort to the most disruptive form of industrial action to protest even a trivial grievance over working conditions.”). As Professor Atleson has observed, the use of vague terms in judicial opinions often signals that judges are imposing their own values on the employment relationship. See ATLESON, *supra* note 124, at 91 (discussing the “of course rationales” and “shadowy notions” that judges invoke in labor law cases when their holdings have no basis in the NLRA or even the Act’s policies).

160. *Bob Evans Farms*, 163 F.3d at 1023–24 (“[T]he Act does not protect employees who protest a legitimate grievance by recourse to unduly and disproportionately disruptive or intemperate means.”).

161. The court noted that it was so obvious that the employees’ protest in this case was unduly disruptive that there was no need to remand to the Board for application of the proportionality standard. *Id.* at 1024.

The Board and the courts have taken similar positions in cases involving walkouts that pose an undue risk to safety. For example, in *International Protective Services*, the Board upheld the employer’s discharge of strikers who “failed to take reasonable precautions to protect the employer’s operations from such imminent danger as foreseeably would result from their sudden cessation of work.” 339 N.L.R.B. 75, 8–9 (2003). The security guards (who were employed at federal buildings in Alaska) had conducted their strike at a time when government was concerned about bombing; the strike coincided with the anniversary of the Oklahoma City bombings. See also *NLRB v. Fed. Sec., Inc.*, 154 F.3d 751, 752–53, 755 (7th Cir. 1998) (spontaneous walkout by private security guards at public housing project left complex unattended and endangered lives of residents).

employer.<sup>162</sup>

Significantly, the disloyalty cases under the NLRA seem predicated on the assumption that workers and employers share common interests and values. As Professor Jim Atleson has pointed out, only if workers accept and acknowledge the legitimacy of the norms they are defying does their action become a breach of promise or duty.<sup>163</sup> Worse:

In a contractual sense, this view confuses passive acquiescence with active consent. [C]ourts assume that workers, needing jobs, acquiesce in an authoritarian structure regulating their work life. In the employment context, interests do converge, and employer and worker share an interest in the success of the enterprise, although the parties might not define success in the same manner. But it is a peculiar American myth that confuses a limited, often tactical, merger with a commonality of interests.<sup>164</sup>

#### V. THE DUTY OF LOYALTY AT COMMON LAW: THE PUBLIC EMPLOYEE SPEECH CASES

Perhaps, the reader might posit, the unidirectional nature of loyalty under the NLRA is a by-product of the earlier-discussed judicial hostility to collective action, or to unions themselves (particularly in light of their historical connections with socialism and Marxism). Might a more even-handed conception of loyalty govern in the modern workplace at common law?

While the common law signals through the employment-at-will doctrine that the employment relationship can be terminated upon either party's initiative, the common law nevertheless imposes a duty of loyalty on employees.<sup>165</sup> This is so even when the state is the employer and discharge for disloyalty implicates constitutionally grounded rights. A complex calculus arises in which courts try to

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162. The opinion is strikingly reminiscent of nineteenth century pre-NLRA cases in which judges imposed their own views as to what constitutes legitimate employee protest. See WILLIAM B. GOULD, *A PRIMER ON AMERICAN LABOR LAW* 10-14 (3d ed. 1993) (noting the willingness of judges in the nineteenth and early twentieth century to "use their own social and economic predilections to determine" what constituted "legitimate" employee protest).

163. See ATLESON, *supra* note 124, at 94.

164. *Id.*

165. See, e.g., Benjamin Aaron, *Employees' Duty of Loyalty: Introduction and Overview*, 20 COMP. LAB. L. & POL'Y J. 143, 144 (1999) (stating that the duty of loyalty in general "require[s] the employee [to] behave during the period of employment so as to enhance, rather than harm or hinder, the business interests of the employer").

balance the state's legitimate interests as an employer and the public employee's rights as a citizen, but in the end, the duty of loyalty controls the analysis. The most important of these cases involve the public employee's constitutionally protected freedom of speech and the public employer's expectation of loyalty, both to immediate superiors and to the state itself. The public employee speech cases provide a useful lens through which to view the concept of loyalty in the employment relation at common law.

Prior to the twentieth century, the Supreme Court sidestepped the issue by taking what has been termed the "rights/privilege" approach.<sup>166</sup> Under this approach, the Court made no distinction between private sector and public sector employees; because public employment—like private sector employment—was a privilege rather than a right, the public employee had no free speech rights beyond those that a private citizen would possess.<sup>167</sup> Therefore, the Constitution's guarantee of freedom of speech did not apply to public employees, who, like private employees, were subject to the will of the master. The rights/privilege distinction was neatly summed up by Justice Holmes in a case involving a police officer who had been fired for engaging in political activities.<sup>168</sup> Justice Holmes observed that the policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>169</sup> Justice Holmes reasoned that the firing did not abridge the policeman's right to speak because he was, in fact, free to speak.<sup>170</sup> Accordingly, the policeman could be fired without infringing on his constitutional rights.<sup>171</sup>

Justice Holmes's reasoning seemed to suggest that when citizens accept public employment, they waive their constitutional rights, a view for which there is no support in the Constitution.<sup>172</sup> With the emergence of McCarthyism and loyalty oaths in the Red Scare of the 1950s, the Court found the facile rights/privilege approach to be wholly inadequate to protect individual rights. In a series of cases, the Court held that states could not require loyalty oaths, require

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166. See generally Karin B. Hoppmann, *Concern With Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 997–99 (1997) (discussing the origins and defects of the rights/privilege analysis).

167. *Id.* at 998.

168. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

169. *Id.*

170. *Id.* at 517–18.

171. *Id.*

172. See Hoppmann, *supra* note 166, at 998–99 (arguing that Justice Holmes's rights/privilege distinction not only had no support in the Constitution, but was "an anathema to the Bill of Rights").

public employees to periodically list the organizations to which they belonged, or deny government employment because of membership in a disfavored political party.<sup>173</sup> While these cases represented great victories for public employees' right to free speech, the Court still had to determine how to balance these rights with the legitimate interests of the government as employer.

In the 1968 case of *Pickering v. Board of Education*,<sup>174</sup> the Court made its first attempt at striking such a balance. Marvin Pickering was a high school teacher who was fired after he sent a letter to a local newspaper opposing a proposed tax increase for public schools and criticizing the Board of Education's and Superintendent's past handling of money.<sup>175</sup> The Supreme Court acknowledged that public employees have a First Amendment right to speak out on matters of public concern, but the Court also emphasized that governmental employers have an interest in promoting effective public service.<sup>176</sup> Refusing to lay down specific guidelines, the Court emphasized that cases such as *Pickering* can be resolved only by applying a fact-specific balancing test of the employee's free speech rights and the employer's interest in efficient government operations.<sup>177</sup>

An important factor in *Pickering* was the plaintiff's "duty of loyalty" to his employer.<sup>178</sup> The Court found it important that Pickering's comments were directed at the Board of Education, not his immediate superiors or anyone with whom he worked directly.<sup>179</sup> Consequently, the Court did not find a strong countervailing interest of the Board in employee loyalty.<sup>180</sup> Because Pickering's speech was on a matter of public concern and because there was no breach of the duty of loyalty, the Court found in Pickering's favor.<sup>181</sup> It is likely that if one or more of the critical facts in *Pickering* had been different, the

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173. See generally *Keyshian v. Bd of Regents*, 385 U.S. 589, 609–10 (1967) (holding a New York statute requiring loyalty oaths from state university professors unconstitutional); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961) (stating that membership in a political party could not be a basis for the denial of public employment); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (invalidating an Arkansas statute requiring teachers to file affidavits listing organizational affiliations for the previous five years); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) (invalidating Oklahoma's loyalty oath requirement of denying past affiliations with Communists).

174. 391 U.S. 563 (1968).

175. *Id.* at 564–65.

176. *Id.* at 568.

177. *Id.* at 568–73.

178. *Id.* at 568.

179. *Id.* at 569–70.

180. *Id.*

181. *Id.* at 574.

outcome might well have gone against Pickering.<sup>182</sup> If, for example, Pickering's letter had criticized his principal, or if Pickering had been an assistant superintendent and had criticized the Superintendent, he would have been, to use terms of an earlier era, a disloyal servant who had breached his duty of loyalty to his master.<sup>183</sup>

Fifteen years later, the Court revisited the tension between employee free speech rights and the government interest in efficient operations in *Connick v. Myers*.<sup>184</sup> Sheila Myers, an assistant district attorney, circulated a survey among her coworkers regarding their views on issues like the "office transfer policy," "office morale," "confidence in supervisors," and "whether workers felt pressured [by superiors] to work in political campaigns."<sup>185</sup> Myers's supervisor, Connick, fired her for insubordination.<sup>186</sup> The Supreme Court created a new threshold requirement in public employee speech cases and developed a four-part test to be applied when public employers terminate employees in response to employee speech.<sup>187</sup> First, as a threshold matter, the Court made it clear that to be protected an employee's speech must be on a matter of public concern.<sup>188</sup> If an employee survives the threshold test, the Court will then consider (1) the content of the speech, how the speech was conveyed, and where and why the statement was made;<sup>189</sup> (2) whether the speech was a substantial and motivating factor in the discharge;<sup>190</sup> (3) if the first two steps have been resolved in the employee's favor, whether the employer can justify its action;<sup>191</sup> and (4) if the employer meets its burden, a balancing test is applied weighing the right of the employee to comment on matters of public concern against the detrimental impact of the speech and the state's interest in promoting efficient

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182. *Id.* at 570 n.3 (noting that if a "personal and intimate" working relationship had been present between Pickering and those he criticized, the outcome could well have been different); see also Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 10 (1999) (emphasizing the uncertainty of what constitutes a "personal and intimate" working relationship).

183. See Schoen, *supra* note 182, at 10.

184. 461 U.S. 138 (1983).

185. *Id.* at 141.

186. *Id.*

187. Cf. James G. Fahey, *United States v. National Treasury Employees Union: Restrictions on Free Speech of Government Employees and the Rebalancing of Pickering*, 15 ST. LOUIS U. PUB. L. REV. 555, 564-67 (1995) (discussing the implications of the Court's holding in *Connick*).

188. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

189. *Id.* at 147-48.

190. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

191. *Connick*, 461 U.S. at 149-51. The government's burden will vary depending upon the nature of the employee's speech. *Id.* at 150.

public service.<sup>192</sup> The Court concluded in *Connick* that Myers's questionnaire was merely her response to a personal grievance involving an undesirable transfer, and therefore did not touch on matters of public concern.<sup>193</sup> Hence, the Court upheld the discharge. The Court also stressed that Myers's behavior threatened to disrupt the workplace by negatively affecting relations between employees and employers.<sup>194</sup> In other words, Myers was a rebellious servant behaving disloyally rather than quietly submitting to the directives of her master.

In 1984, the Federal Circuit strongly reaffirmed the relevance of the servant's duty of loyalty to his master in *Brown v. Department of Transportation, F.A.A.*<sup>195</sup> Brown was a supervisory air traffic control specialist who made comments regarding the air traffic controllers' strike, in which he, as a supervisor, did not participate.<sup>196</sup> During his off-duty hours, Brown went to the local union hall and exhorted the strikers to "stay together . . . because if you do, you'll win."<sup>197</sup> Unfortunately for Brown, the media broadcast his statement to the entire country, and he was fired.<sup>198</sup> The court acknowledged that Brown's comments were on a matter of public concern; hence, the issue became whether the interest of the agency in promoting efficient public services outweighed Brown's constitutional right to speak.<sup>199</sup> The Court noted the seriousness of the illegal nationwide strike and then focused on Brown's duty of loyalty to the F.A.A.<sup>200</sup> As a supervisor, Brown had a heightened duty to heed the directives of his superiors. Said the court:

Management cannot function effectively unless it operates "with one voice" *vis-a-vis* others. Cohesive operation of management is dependent on the loyalty of inferior management to superior management. This loyalty must be maintained in situations involving management's relations with nonmanagerial employees. For management to countenance disloyalty in such situations would be for management to

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192. *Id.*; *Cf.* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (establishing the balancing test).

193. *Connick*, 461 U.S. at 154.

194. *Id.*

195. 735 F.2d 543 (Fed. Cir. 1984).

196. *Id.* at 545.

197. *Id.*

198. *Id.*

199. *Id.* at 546.

200. *Id.* at 547.

render itself impotent.<sup>201</sup>

Nonetheless, the court found that dismissal was too harsh a penalty and remanded for further consideration of the proper punishment of this disloyal servant.<sup>202</sup>

A number of scholars have observed that the duty of loyalty imposed on employees in the public sector free speech cases undermines free speech protections, since the balancing test employed by the courts already strongly favors management.<sup>203</sup> These scholars acknowledge that the Court's public employee speech cases are deeply influenced by a "private-sector market maximization model," the traditional master-servant image of the employment relation borrowed from the common law, in which management is entitled to demand loyalty from its employees.<sup>204</sup>

The Supreme Court's guidance on how to balance public employees' First Amendment rights and the government/employer's expectation of loyalty has been so vague and contradictory that "uncertainty reigns supreme" among lower courts confronted by these issues.<sup>205</sup> Professor Karin Hoppmann's review of lower court

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201. *Id.* (quoting *Brousseau v. United States*, 640 F.2d 1235, 1249 (Ct. Cl. 1981)).

202. *Id.* at 548–49; *see also* *Waters v. Churchill*, 511 U.S. 661, 664, 681–82 (1994) (remanding for trial where nurse made comments to coworkers over dinner break that were critical of the hospital; issue was whether the hospital reasonably believed that the employee's comments were "disruptive" to operation of its business).

203. *See, e.g.*, Marvin F. Hill, Jr. & James A. Wright, "*Riding with the Cops and Cheering for the Robbers: Employee Speech, Doctrinal Cubbyholes, and the Duty of Loyalty*," 25 PEPP. L. REV. 721, 780–81 (1998) (discussing the factors that make it difficult for a public employee to assert a successful First Amendment claim, and noting that "[t]he clear message for employees is 'keep your mouth shut' and do not criticize anyone in the organizational chain of command").

204. *Id.* at 781–82. Hill and Wright explain:

Like Victor Hugo's Napoleonic France of 1832, the law of employee speech is economics with "the guillotine of dismissal" waiting for those employees who fail to conform. The law reflects the view that management should not have to compete for the loyalty of its workforce even though the public may have an interest in what the employee has to say.

*Id.* at 784.

For a strong argument that silencing public employee speech is harmful, *see* Hoppmann, *supra* note 166, at 1017 (noting that the public benefits when public employees speak out because they are in the best position to inform the public of potential problems in the workplace and that such speech ultimately improves governmental efficiency by providing incentives for government managers to deliver better service to "the real 'boss'—the public").

205. Hoppmann, *supra* note 166, at 1008–09 (noting that the unpredictable outcomes of public employee speech cases leave employees and employers alike uncertain of their rights); *see also* Schoen, *supra* note 182, at 51 (suggesting that the sharp divisions among the justices regarding the protection that should be extended to public employees' speech might have caused the Court to conclude that nothing it can say "would simplify resolution

decisions led her to conclude that the contradictory results have created uncertainty of a degree that has a further chilling effect on protected speech.<sup>206</sup>

In the direct contest between voice (the constitutional right of free speech) and the free market's dependence on exit, then, exit prevailed. In the process, loyalty was once again defined—against the backdrop of the master-servant relationship—as unidirectional in nature.

## VI. THE TRIUMPH OF EXIT: "NO LONG TERM"

Sociologist Richard Sennett has written that the most appropriate motto for our age might be "No long term."<sup>207</sup> Sennett shows how our disdain for loyalty, commitment, and long-term relationships, manifested so clearly in the at-will rule, profoundly impacts the human psyche. One way we make sense of our lives is by creating a coherent narrative that gives order and meaning to our experiences. A major aspect of that narrative is the story of one's work.<sup>208</sup> This framework depends on long-term attachments, which the new economy threatens to destroy.<sup>209</sup>

In March 2000, the *New York Times Magazine* devoted an issue to the topic of "The Liberated, Exploited, Pampered, Frazzled, Uneasy New American Worker." In the introductory article, Michael Lewis noted the disappearance of "The Organization Man," a creature that sociologists contend was the typical corporate employee of the 1950s.<sup>210</sup> Today's corporate employees have little in common with the "Man in the Gray Flannel Suit" of the 1950s and lack any

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of these cases in the lower courts").

206. Hoppmann, *supra* note 166, at 1008–09.

207. RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 22 (1998). For an argument that Sennett's motto of "No long term" exaggerates the loyalty problem, see Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1204–05 (2000) (observing that a better motto would be "Less long term," not "No long term").

208. SENNETT, *supra* note 207, at 42–44 (arguing that the routine of work can compose a life and expressing the fear that the new capitalism, with its emphasis on "momentary impulses, of short-term action, devoid of sustainable routines" will result in a mindless existence).

209. *Id.* at 25 (observing that it is the new economy's fragmenting of time that poses a danger to people's emotional lives).

210. Michael Lewis, *The Artist in the Gray Flannel Pajamas*, N.Y. TIMES, Mar. 5, 2000, § 6 (Magazine), at 45 (observing that "[t]he Organization Man seems as freakish today as a bearded lady or a six-toed foot").



“obvious corporate attachment.”<sup>211</sup> Lewis noted that workers “tended to be dismissive or, at the very least, ironic” in referring to the employers on whom they were economically dependent.<sup>212</sup> In new economy parlance, workers have become “free agents,” willing to sell themselves to the highest bidder.<sup>213</sup>

How is it that corporate loyalty has emerged as a rare commodity in American life? In the 1980s and 1990s corporate management repudiated the old psychological contract<sup>214</sup> that bound workers to their employers: an implicit promise of lifetime employment and predictable advancement in exchange for loyalty and good job performance.<sup>215</sup> Downsizings and reengineering announced to America’s workers that the days of lifelong careers with the same employer were over.<sup>216</sup> A shocking collapse of employee morale followed.<sup>217</sup>

Not surprisingly, workers internalized the “no commitment” philosophy of the new economy and adopted nomadic patterns, shifting from one employer to the next in search of a better deal.<sup>218</sup> By the late 1970s the “recasualization of work”—the pattern that typified capitalism through most of its history—began to spread as millions of long-term jobs were replaced by a rapidly growing number

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211. *Id.* at 46.

212. *Id.*

213. *Id.* at 46–47. Indeed, stock options represent such a substantial percentage of the free agents’ income that they cannot afford to be loyal if there is another employer offering the prospect of more lucrative options. *Id.*

214. PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 20–22 (1999) (describing how longstanding employer practices create expectations among workers that are incorporated into psychological contracts). Behavior in most workplaces depends to a great extent on assumptions about the mutual obligations between employer and employees. These assumptions about mutual responsibilities, future rewards, and fair treatment comprise what psychologists have termed psychological contracts. Usually such contracts are unwritten and are based on employees’ perceptions of the obligations that the employer and employee owe each other. *Id.* at 21–22. For example, new employees “believe that they owe their employer a great deal and that the company owes them relatively little.” *Id.* at 20. However, the longer an employee stays with the company and the more she contributes to its success, the more she believes that the company owes her. *Id.* Most employers have similar beliefs. Studies have shown that so long as employees meet acceptable performance levels, employers reward them with more rights and privileges. *Id.*

215. *Id.* at 21, 32, 69.

216. Adrian Woodridge, *Come Back, Company Man!*, N.Y. TIMES, Mar. 5, 2000, § 6 (Magazine), at 82 (observing that “[d]ownsizing and reengineering made it clear that employees were expendable commodities, not valued resources”).

217. CAPPELLI, *supra* note 214, at 22–23 (discussing the fear that employers feel about the long-term consequences of breaking the old contract).

218. *Id.* at 34.

of temporary and part-time jobs.<sup>219</sup> A large number of independent contractors began to play an increasingly important role in the economy.<sup>220</sup> Katherine Stone sums up the changes of the last thirty years: "Work has become contingent, not in the sense that it is formally defined as short-term or episodic, but in the sense that the attachment between the firm and the worker has been reduced."<sup>221</sup>

In the wake of the repudiation of the old deal, corporate executives and human resources departments labored to articulate a new deal, a new psychological contract. The new contract denounced the job security and employer-dependence that characterized the old contract, substituting an independent, entrepreneurial employee in its stead and committing to training the employee to remain self-sufficient. Peter Cappelli describes the message this way:

You have to accept responsibility for your own personal excellence, be accountable for your commitments, and understand that the customer is the most important factor in our business life. We cannot guarantee you job security any more than we can guarantee our success in the marketplace. Job security is earned by market success. Each of us must keep the company alive, vibrant, competitive, and growing.<sup>222</sup>

Under the new deal, the employer's objective is to gain commitment without loyalty.<sup>223</sup> The employee is transformed into "an independent contractor who has a very contingent relationship

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219. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 540 (2001) (summarizing the evidence showing that the old psychological contract of lifetime employment is becoming an anachronism).

220. *Id.* (noting that their numbers had reached 8.2 million by 1999 according to the Bureau of Labor Statistics).

221. *Id.* at 541.

222. CAPPELLI, *supra* note 214, at 25 (quoting a statement from a CEO to his employees).

223. *Id.* at 216–17 (arguing that employers still need their employees to act in the interest of the enterprise but that loyalty "is not required"). Professor Cappelli writes that former General Electric CEO Jack Welch had been quoted as saying that corporate loyalty is "nonsense"; other executives advise, "if you want loyalty, get a dog." *Id.* at 216. Note, however, that even the new psychological contract demands a certain type of loyalty—what George Fletcher calls "minimal loyalty" is still expected. Minimal loyalty requires only that one not commit an act of betrayal. FLETCHER, *supra* note 1, at 41 (noting that breaches of the duty of minimal loyalty include such evils as adultery, treason, and idolatry). In the employment context, minimal loyalty would require an employee to refrain from product disparagement sabotage, the communication of trade secrets, and so forth. However, minimal loyalty is purely negative; we argue in the next Section that both employers and employees would benefit from a workplace characterized by maximum loyalty—loyalty with commitment. *See id.* at 61 (stating that maximum loyalty implies commitment).

with his current employer.”<sup>224</sup>

A. *The Disengaged, Disloyal Worker*

The survival of the employment-at-will doctrine into the twenty-first century is one of the central paradoxes of American capitalism. Employee loyalty is more important now than it has ever been. The growing service sector demands a high level of commitment to the employer’s goals because of the difficulty of directly supervising and monitoring employee activities in the service sector.<sup>225</sup> Employee loyalty is doubly significant because customer loyalty (and hence, profitability) increases proportionally in relation to employee loyalty.<sup>226</sup> A one-sided psychological contract unilaterally imposed by management is unlikely to elicit the loyalty required in a post-Taylorist workplace where direct monitoring of employee performance is difficult.<sup>227</sup>

Most employers do not enjoy the sort of employee attachment that they need to prosper. In a recent survey of 36,000 American workers and just under 4,400 Canadian workers, Towers Perrin found that a substantial majority of workers (sixty-four percent, or approximately two-thirds of the group surveyed) are only moderately “engaged” in their workplaces.<sup>228</sup> Only seventeen percent of

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224. CAPPELLI, *supra* note 214, at 228; see also Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 731 (2002) (describing the “boundaryless career,” which “does not depend upon traditional notions of advancement within a single hierarchical organization,” but rather “draws its validation and marketability from outside the present employer,” and encourages the employee to move “frequently across the borders of different employers”).

225. Jacoby, *supra* note 207, at 1227–29 (observing that “[o]ne key to customer loyalty is employee loyalty: experienced and satisfied employees are much better at finding and keeping customers than fresh recruits”).

226. *Study Says 30 Percent of Employees Loyal; Rest Feel Trapped or Are at Risk of Leaving*, Daily Lab. Rep. (BNA) No. 169, at A-3 (Sept. 2, 2003) [hereinafter *Study Says Thirty Percent of Employees Loyal*] (reporting results of *The Walker Loyalty Report for Loyalty and Ethics in the Workplace*, a survey conducted by Walker Information); see also Frederick F. Reichheld, *Lead for Loyalty*, 79 HARV. BUS. REV. July-Aug. 2001, at 76 (noting correlation between customer loyalty, employee loyalty, and profitability).

227. Cf. Stone, *supra* note 219, at 529–31 (discussing the scientific management devised by Frederick Winslow Taylor which made employee monitoring highly efficient through the use of time and motion studies). As Stone notes, Taylor’s scientific management is dysfunctional in the new economy, where firms cannot succeed simply by having employees perform their tasks in a reliable but routine manner. “Managers believe they need not merely predictable or even excellent role performance . . . . They need employees to commit their imagination, energies, and intelligence on behalf of the firm.” *Id.* at 556.

228. TOWERS PERRIN, *WORKING TODAY: UNDERSTANDING WHAT DRIVES*

employees are highly engaged, dedicating “discretionary effort” to their work in the form of extra energy, brainpower, and time.<sup>229</sup> Nineteen percent are disengaged (unenthusiastic and “checked out”).<sup>230</sup> An earlier Towers Perrin study probed even deeper, focusing on the emotional connection that workers feel to their work, and seeking to identify the factors that contribute to emotional investment—loyalty—as distinguished from a more intellectual engagement in the work.<sup>231</sup> Those who are emotionally engaged are dedicated at the level of the heart (as opposed to the mind) and feel attachment to the firm (as opposed to ties to their occupation or to their individual careers). Disturbingly, the study results indicated that the majority of workers, fifty-five percent, display either negative or intensely negative feelings toward their work.<sup>232</sup>

Nonetheless, a significant percentage of American workers remain surprisingly committed to their employers.<sup>233</sup> Almost one-third of employees surveyed in the Walker Information Survey “tend to recommend their employer as a good company to work for, limit their outside job searching activities, tend to turn down offers to work elsewhere, contribute ‘above and beyond the call of duty’ at work,

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EMPLOYEE ENGAGEMENT, THE TOWERS PERRIN 2003 TALENT REPORT 6, 30, *available at* [http://www.towersperrin.com/hrservices/webcache/towers/United\\_States/publications/Reports/Talent\\_Report\\_2003/Talent\\_2003.pdf](http://www.towersperrin.com/hrservices/webcache/towers/United_States/publications/Reports/Talent_Report_2003/Talent_2003.pdf) (last visited Apr. 11, 2004) (on file with the North Carolina Law Review). This survey was conducted in April 2003, and its results were reported in the Daily Labor Reports in August 2003. *See Employees Employing ‘Rational Endurance’ To Keep Afloat in Recession, New Study Says*, Daily Lab. Rep. (BNA) No. 168, at A-8 (Aug. 29, 2003). “Engagement” is defined as “employees’ willingness and ability to contribute to company success.” TOWERS PERRIN, *supra*, at 2.

229. *Id.* at 2, 6. The Towers Perrin study distinguishes between highly engaged and moderately engaged workers by measuring emotional investment in the firm as contrasted with a rational, self-interested engagement. *See id.* at 5–6. Senior executives and those working in the nonprofit sector were most likely to be highly engaged in their work. *Id.* at 7.

230. *Id.* at 2–3, 6.

231. *See* TOWERS PERRIN, *WORKING TODAY: EXPLORING EMPLOYEES’ EMOTIONAL CONNECTIONS TO THEIR JOBS: A FIRST LOOK AT NEW TOWERS PERRIN/GANG & GANG RESEARCH* (2003), at 1–2, *available at* [http://www.towersperrin.com/hrservices/webcache/towers/United\\_States/publications/Reports/Working\\_Today\\_Exploring\\_Employees\\_Emotional\\_Connection\\_To\\_Their\\_Jobs/Work\\_experience.pdf](http://www.towersperrin.com/hrservices/webcache/towers/United_States/publications/Reports/Working_Today_Exploring_Employees_Emotional_Connection_To_Their_Jobs/Work_experience.pdf) (last visited Apr. 11, 2004) (on file with the North Carolina Law Review).

232. *Id.* The key factors producing negative emotion were excessive workload (and associated burnout); lack of support from management; concern about job security; lack of challenge in the work; and insufficient recognition for efforts (recognition as distinct from inadequate pay levels). *Id.* at 3–4.

233. FREEMAN & ROGERS, *supra* note 96, at 11 (“More than one-half of nonmanagerial employees describe themselves as having a lot of loyalty to their company, compared with 15 percent who say they have only a little loyalty or no loyalty at all.”).

and plan to stay at their companies for at least two years.”<sup>234</sup> However, such commitment is limited to that group: another one-third feel trapped in their jobs by circumstances or financial need (are committed, but not loyal), and the final one-third are seeking alternative employment (are “at-risk,” neither committed nor loyal).<sup>235</sup>

This data suggests that the triumph of exit in the at-will state has become dysfunctional. Worker turnover is higher where workers are only moderately engaged or disengaged, increasing training costs and resulting in losses of human capital and knowledge to the firm.<sup>236</sup> Worker productivity is directly linked to engagement: highly engaged workers devote discretionary effort to their jobs, improving the organization’s financial performance (particularly in service businesses, where customer service determines profitability); hence, a culture that undermines morale undermines productivity.<sup>237</sup> Finally, negative worker attitudes can influence employee morale at the institutional level, spreading like a virus to workers who were previously moderately or highly engaged.<sup>238</sup>

Employers have sought to elicit commitment through a combination of monitoring, financial incentives, and peer pressure.<sup>239</sup> Others have instituted incentive or positive reinforcement programs which communicate the firm’s gratitude and dependence on the workers’ efforts.<sup>240</sup> However, these strategies have not been sufficient to overcome the disengagement created by the unidirectional loyalty norms operating on the employment relation and the at-will rule’s commitment to the role of exit. In the next Section, we inquire into

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234. *Study Says Thirty Percent of Employees Loyal*, *supra* note 226, at A-3.

235. *Id.* at A-3, A-4.

236. Highly engaged workers were most likely to be stable, with 66% having no plans to leave their current jobs, contrasted with only 36% of moderately engaged workers and 12% of disengaged workers. TOWERS PERRIN, *supra* note 228, at 21.

237. The study also documents the link between customer service, customer loyalty, the company’s improved financial performance, and worker engagement. *Id.* at 9. The earlier Towers Perrin study also demonstrated a strong correlation between positive employee emotion (loyalty) and financial performance/productivity of the firm. *See* TOWERS PERRIN, *supra* note 231, at 2.

238. Disengaged workers were ten times more likely to leave than highly engaged workers, and those who were not actively looking to leave remained open to other opportunities, raising the specter of workers who are marking time and spreading their disaffection to other workers. TOWERS PERRIN, *supra* note 228, at 8–9.

239. CAPPELLI, *supra* note 214, at 217.

240. *See, e.g.,* Lisa Holton, *Strange Currency*, A.B.A. J., Jan. 2004, at 20 (describing a law firm’s “favor card” system, which rewards lawyers and staff for extraordinary contributions with “IOUs” for cash bonuses that then appear in the employee’s next paycheck).

the evolving role of the common law in coercing employee loyalty through reducing exit options.

*B. Enforcing Loyalty by Restricting Exit: Covenants Not To Compete*

One risk of employment-at-will—a risk that is heightened in an information economy and a service-sector market characterized by new and ever more intangible forms of valuable property—is that employees who leave the firm will take with them a great deal of the value that has been “produced” through their labor. Employers have sought to protect their property interests and their investment in employees through top-down enforcement mechanisms designed to enforce worker “loyalty,” or at least to restrict exit. Among these mechanisms are covenants not to compete,<sup>241</sup> contractual obligations to refund training costs or other bonuses if the employee departs before a particular date (by which the employer’s investment can be recovered),<sup>242</sup> breach of fiduciary duty claims,<sup>243</sup> and the application of trade secrets law to protect employer property interests.<sup>244</sup> The remainder of this Section focuses primarily on the most widespread of these legal mechanisms, noncompete covenants, and assesses their enforceability and efficacy in protecting employer property interests.

Early English cases dealing with noncompetes concluded that they were unenforceable restraints of trade.<sup>245</sup> In the sixteenth

241. See generally Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMPLOYEE RTS. & EMP. POL’Y J. 95, 98–99 (1998) (describing development of law regulating enforceability of noncompetes and arguing for enforceability only where the agreement is made in exchange for just cause or term employment).

242. These are the so-called “tuition cases.” See, e.g., *Sands Appliance Serv. Inc. v. Wilson*, 615 N.W.2d 241, 248 (Mich. 2000) (invalidating a “tuition contract” requiring six years of work or reimbursement to the employer of training costs for appliance journeyman).

243. See *Feddeman & Co. v. Langan Assocs.*, 530 S.E.2d 668, 674–75 (Va. 2000) (accounting firm prevailed on breach of fiduciary duty claim against six former directors and employees who left *en masse* for employment with a rival firm); cf. *Dalton v. Camp*, 353 N.C. App. 647, 652–53, 548 S.E.2d 704, 708–09 (2001) (finding no fiduciary duty owed by lower-level employees sufficient to ground an independent tort claim for breach of duty, but affirming existence of general duty of loyalty which may serve as an affirmative defense in a wrongful termination suit).

244. See, e.g., *C & F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1302–03 (Fed. Cir. 2000) (affirming plaintiff’s win on trade secrets claim against competitor employer). See generally Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441 (2001) (discussing historical evolution of trade secrets law and its relation to social practices, including norms concerning employee loyalty).

245. Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625,

century, English society was in the early stages of moving from a medieval economy to capitalism. Part of this transition involved the break-up of the guild system, in which master craftsmen took on apprentices and introduced them to the mysteries of their trade.<sup>246</sup> At this time, some masters attempted to prevent their apprentices from becoming full-fledged members of the guild after their terms expired.<sup>247</sup> In a case decided by the Court of Queen's Bench in 1578, the defendant was a mercer's apprentice who had agreed not to practice his craft for a period of four years following the expiration of his apprenticeship.<sup>248</sup> The defendant breached the covenant, and the master brought suit. The court refused to enforce the noncompete.<sup>249</sup> Similarly, the Court of Queen's Bench refused to enforce a noncompete against an apprentice haberdasher in 1602.<sup>250</sup> The court found the agreement to be "against the benefit of the Commonwealth."<sup>251</sup>

By the late eighteenth and nineteenth centuries, with capitalism in full flower under a developing common law that stressed freedom of contract, some courts began to take a more tolerant view of noncompetes. Indeed, by this time noncompetes had become common as employers sought to protect themselves from loss of customers and trade secrets.<sup>252</sup> During this time, a rule of "reasonableness" developed and continues to influence the law to this day. While different states take a variety of approaches to noncompetes, most will enforce a noncompete if it is: (1) "supported by consideration;" (2) "justified by a legitimate interest of the employer;" and (3) "reasonable in the restrictions it imposes."<sup>253</sup> An employer's interest in limiting competition is not an interest the law

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635-36 (1960).

246. *Id.* at 633.

247. *Id.* at 633-34.

248. *Id.* at 634 (discussing Moore K.B. 115, 72 Eng. Rep. 477 (Q.B. 1578)).

249. *Id.* at 635.

250. *Id.* (discussing Cro. Eliz. 872, 78 Eng. Rep. 1097 (Q.B. 1602)).

251. *Id.* at 635-36 (discussing the court's reliance on *Dyer's Case*, Y.B. Mich., 2 Hen. 5 (C.P. 1414)). In that case, the defendant was a dyer who agreed, as a condition of terminating his indenture, to not practice his trade for six months in the plaintiff's town. *Id.* The defendant claimed that he had satisfied this requirement. *Id.* While the agreement was not a noncompete, the court's holding that such conditions on the practice of a trade were illegal applied with equal force to noncompetes. *Id.* at 636. The court was so outraged by the agreement that it threatened to put the plaintiff in prison until he paid a fine to the king. *Id.*

252. *Id.* at 638 (discussing the "flood" of noncompete cases reaching the English courts in the eighteenth and nineteenth centuries).

253. Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 325 (1999).

will recognize to validate a noncompete, but it is universally recognized that the need to protect trade secrets and other confidential business information provides a legitimate basis for enforcement.<sup>254</sup> Other legitimate employer interests include customer contacts, company goodwill, the uniqueness of the employee's services, and training costs.<sup>255</sup>

In recent years, employers have increasingly used noncompetes to protect their investment in employees and to compensate for a lack of mutual commitment.<sup>256</sup> Courts are receptive to enforcing noncompetes on the grounds that employers have invested training resources in employees.<sup>257</sup> One scholar notes a trend toward finding a protectable employer interest even in generalized skills training, as opposed to specialized training.<sup>258</sup> Thus, courts have enforced noncompetes even when there is little likelihood that the employee could divulge trade secrets or has access to confidential information. For example, courts have enforced noncompetes against: a manicurist,<sup>259</sup> a carpet salesman,<sup>260</sup> a liquor deliveryman,<sup>261</sup> a security guard,<sup>262</sup> an employee of a collection agency,<sup>263</sup> and a claims adjuster.<sup>264</sup> Other examples indicating the breadth of the use of noncompetes include: bartenders,<sup>265</sup> cosmeticians,<sup>266</sup> pest

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254. *Id.* at 326.

255. *Id.* For an overview of protectible interests, what constitutes trade secrets, and reasonableness in general where noncompetes are concerned, see 20 AM. JUR. 3D *Proof of Facts* 715-24 (1993).

256. See Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1164, 1167 (2001).

257. See *id.* at 1193 (noting that there is a "growing judicial sensitivity to employer claims based on costly investments in training and development of employees, regardless of the character of the training provided").

258. *Id.* (citing *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495, 502 (E.D. Ky. 1996) (finding a protectable interest in training expenditures where plaintiff provided two weeks of on-the-job training to security guards), *aff'd*, 156 F.3d 1228 (6th Cir. 1998)).

259. See *Nail Boutique, Inc. v. Church*, 758 S.W. 2d 206, 210-11 (Mo. Ct. App. 1988).

260. See *Reardigan v. Shaw Indus., Inc.*, 518 S.E. 2d 144, 148 (Ga. Ct. App. 1999).

261. See *E. Distrib. Co. v. Flynn*, 567 P.2d 1371, 1376 (Kan. 1977).

262. See *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495, 502 (E.D. Ky. 1996).

263. See *Cent. Adjustment Bureau, Inc. v. Ingram Assoc., Inc.*, 622 S.W.2d 681, 685 (Ky. Ct. App. 1981).

264. See *Hammons v. Big Sandy Claims Serv., Inc.*, 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

265. See *Daiquiri's III on Bourbon, Ltd. v. Wandfluh*, 608 So.2d 222, 224 (La. Ct. App. 1992).

266. See *Carl Coiffure, Inc. v. Mourlot*, 410 S.W.2d 209, 211 (Tex. Civ. App. 1967).



exterminators,<sup>267</sup> garbage collectors,<sup>268</sup> janitors,<sup>269</sup> plumbing suppliers,<sup>270</sup> and undertakers.<sup>271</sup>

At the same time that noncompetes are proliferating in number, their scope is expanding. For example, in *Comprehensive Technologies International, Inc. v. Software Artisans, Inc.*,<sup>272</sup> the court enforced a noncompete that prevented a former executive employee from working in any capacity for a competitor, even as a janitor or file clerk, because the employee had access to confidential information regarding the products and customers of the former employer.<sup>273</sup> Courts are also expanding the categories of legitimate employer interests they are willing to protect, particularly when contact with customers and training costs are involved.<sup>274</sup> Customer lists have been accorded the same importance as trade secrets, at least where the list was compiled from information that was difficult to maintain and has been kept confidential.<sup>275</sup> Indeed, as the definition of trade secrets expands, it becomes increasingly difficult for an employee to avoid learning them, thereby making the enforcement of

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267. See *Orkin Exterminating Co. v. Etheridge*, 582 So.2d 1102, 1104 (Ala. 1991).

268. See *Brewer v. Tracy*, 253 N.W.2d 319, 321–22 (Neb. 1977).

269. See *Royal Servs., Inc. v. Williams*, 334 So.2d 154, 156 (Fla. Dist. Ct. App. 1976).

270. See *Stein Steel & Supply Co. v. Tucker*, 136 S.E.2d 355, 356 (Ga. 1964).

271. See *Folsom Funeral Serv. v. Rodgers*, 372 N.E.2d 532, 533 (Mass. App. Ct. 1978).

272. 3 F.3d 730 (4th Cir. 1993), *vacated per stipulation*, No. 92-1837, 1993 U.S. App. LEXIS 28601 at \*1 (4th Cir. Sept. 30, 1993).

273. *Id.* at 738–39.

274. Stone, *supra* note 224, at 747–48 (2002) (discussing the expanding scope of legitimate employer interests that the courts are willing to protect when deciding when to enforce noncompetes).

275. *Comprehensive Technologies*, 3 F.3d at 749, n.147 (holding that an employer's list of client contacts is a protectible trade secret (citing *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 44 (2d Cir. 1999)); *Suncoast Tours, Inc. v. Lambert Group, Inc.*, No. 98-5627, 1999 U.S. Dist. LEXIS 17635, at \*21–\*25 (D.N.J. Nov. 10, 1999) (finding that when a list of customers is a product of unique skill or creativity, it may constitute a trade secret); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ran*, 67 F. Supp. 2d 764, 775 (E.D. Mich. 1999) (noting that federal courts have held that Merrill Lynch's customer list is a trade secret); *Nobel Biocare USA, Inc. v. Lynch*, No. 99 C 5774, 1999 WL 958501, at \*3 (N.D. Ill. Sept. 15, 1999) (finding that the list of plaintiff's top twenty customers in Illinois was a trade secret); *Wright v. Power Indus. Consultants, Inc.*, 508 S.E.2d 191, 196 (Ga. Ct. App. 1998) (holding that where a business makes a reasonable effort to keep customer lists secret, a court may grant an interlocutory injunction pursuant to the Trade Secrets Act), *overruled in part on other grounds*, 551 S.E.2d 735 (Ga. Ct. App. 2001).

Stone also notes that in recent years the definition of trade secret under the Uniform Trade Secrets Act has expanded dramatically. Stone, *supra* note 224, at 757. A trade secret under the UTSA is information that “(1) derives independent economic value, actual or potential, from not being generally known . . . and not being readily ascertainable and that (2) an employer uses reasonable efforts to keep secret.” *Id.* (citing UNIF. TRADE SECRETS ACT §§ 1(4)(i)-(ii), 14 U.L.A. 438 (1990)).

noncompetes even more likely.<sup>276</sup>

The increased willingness of courts to enforce noncompetes reflects the power of the employer's property interest in its jobs. Courts, persuaded by the risk of harm to the employer's property—ever more broadly defined—have approved the use of noncompetes to increase employee commitment. Nonetheless, many courts remain troubled by the fact that noncompetes contravene a basic precept of capitalism—free competition in the market. A variety of state courts, ranging from relatively pro-employee jurisdictions like California<sup>277</sup> to relatively pro-employer jurisdictions like North Carolina,<sup>278</sup> have been reluctant to enforce noncompetes which undermine this value.<sup>279</sup> Even if the courts are ultimately willing to enforce them, subjecting them to the vagaries of a rule of reasonableness analysis means that litigation will ensue, coercing settlements and increasing employer costs. Moreover, the courts' concern is real. Noncompetes potentially frustrate attainment of the larger goal of enhanced national productivity.

A less costly, more direct, and effective strategy for employee retention would be to increase employee morale and job satisfaction, in turn enhancing loyalty to the firm. The employer interested in reducing turnover and training costs, protecting working relationships between teams of workers, protecting customer relationships, and preventing the leakage of valuable information to its competitors will not be able to accomplish all of these goals with a noncompete clause. Even where such contracts are enforceable, they will be limited by geographic scope and time period. The employer cannot prevent employee turnover, it can only restrict employees' subsequent employment: this is the legacy of the at-will rule. Yet employers need both commitment *and* loyalty. In short, while commitment can be coerced, loyalty cannot.

### C. *Alternatives to Exit: What Do Workers Want?*

In order to create a workplace characterized by both commitment and loyalty, employers should ask, "What do workers

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276. Stone, *supra* note 224, at 757.

277. See CAL. BUS. & PROF. CODE § 16600 (West 1997) (rejecting enforcement of noncompetes). See generally *KGB, Inc. v. Giannoulas*, 164 Cal. Rptr. 571 (Cal. Ct. App. 1980) (discussing rationale for nonenforceability).

278. See, e.g., *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 288–83, 530 S.E.2d 878, 883 (2000) (refusing to enforce noncompete agreement that was overbroad in scope).

279. See Staidl, *supra* note 241, at 97 (describing the significance of free competition rationale in the development of the "reasonableness analysis").

want?" Thanks to the work of Richard Freeman and Joel Rogers, we have solid empirical evidence to begin answering this question.<sup>280</sup> First, the data collected by Freeman and Rogers indicate that a large majority of workers want some assurance of job security and believe that it is unjust to fire an employee unless good cause exists.<sup>281</sup> The idea that an employer may discharge an employee for no reason or for a bad reason is so contrary to intuitive notions of justice that most employees do not believe that employment-at-will is, in fact, the default rule.<sup>282</sup> Freeman and Rogers also found that a large majority want more voice in governing the enterprise.<sup>283</sup> Indeed, most workers want a jointly-run enterprise in which workers elect their own representatives and disputes are resolved through arbitration.<sup>284</sup> While forty-four percent of American employees would like to be represented by a union,<sup>285</sup> most employees want a system of representation that management supports—a cooperatively run labor management relationship rather than the traditional adversarial system implicit in unionization and collective bargaining as defined by the existing labor laws.<sup>286</sup> They believe that having more voice will

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280. FREEMAN & ROGERS, *supra* note 96, at 4–8. Freeman and Rogers conducted an ambitious survey of workers' attitudes, desires, and beliefs by administering an objective survey to more than 2400 workers, as well as a follow-up survey of approximately 800 workers. *Id.* at 3. They strove for objectivity and enlisted the help of academics and management and labor union advisors. *Id.* at 4.

281. *Id.* at 118–21.

282. *Id.* Most employees surveyed, including management employees, believed that the law forbids an employer from dismissing an employee unless the employer has good cause. *Id.* at 118–20. These findings are consistent with those reported by Professor Pauline Kim, who found that eighty-nine percent of the workers in her survey sample erroneously believed that it is illegal for an employer to fire an employee for reasons of personal dislike. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110–11 (1997); see also Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002) (suggesting that employers foster employees' erroneous beliefs through employment practices based upon an exaggerated estimate of the risks and costs of wrongful termination litigation); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 206 (2001) (discussing employees' general ignorance about the law of work and their passionate attachment to fairness).

283. FREEMAN & ROGERS, *supra* note 96, at 41–43. Fifty-eight percent of managers agreed that greater employee voice would be good for the "bottom line" of the enterprise. *Id.* However, most survey respondents stated that managers are resistant to sharing power. *Id.* at 5.

284. *Id.* at 6–7. The desire for arbitration of disputes is consistent with other findings indicating that American workers are not interested in "class struggle." *Id.* at 34–35 (reporting that American workers desire to cooperate with management and are "the antithesis of Karl Marx's vision of a class in conflict with capitalism").

285. *Id.* at 89.

286. *Id.* at 152.

increase productivity, a belief that is consistent with other empirical evidence.<sup>287</sup>

We suggest that engendering worker loyalty by providing some measure of job security and avenues for voice in workplace decisionmaking is a superior strategy because it invests workers in the firm. Survey results support this approach: workers rated employer care and concern for employees along with opportunities for growth and career development as the top motivators for employee loyalty, outstripping financial compensation and contractual barriers to exit.<sup>288</sup> The latter mechanisms may prevent exit, but they do not produce the employee loyalty essential to increased productivity and enhanced customer loyalty.<sup>289</sup> Thus, key factors likely to build worker engagement include a demonstrated interest by the company in employees' well-being, evidenced by honest communication and a two-way dialogue;<sup>290</sup> a sense of control by workers over their work environment and the flow and pace of work;<sup>291</sup> challenging work; accountability for performance and opportunities for development and advancement;<sup>292</sup> and a feeling of shared destiny that creates a community at the workplace.<sup>293</sup> Strong traditional rewards, including pay and benefits packages, remain an essential prerequisite for attracting and retaining employees.<sup>294</sup> Nevertheless, distinctions in these areas are negligible in a recessionary economy and are less important than they will be in an expanding market.<sup>295</sup>

The studies of worker loyalty referenced above have confirmed that the presence of vehicles for employee voice and participation are a major factor in building the foundation for worker loyalty.

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287. *Id.* at 105. Freeman and Rogers write that greater employee voice results in a two to five percent increase in productivity. *Id.* In an earlier work, Freeman and James L. Medoff reported that increased employee voice via labor unions "probably raises social efficiency." RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 247 (1984). The debate continues on whether unions—as distinct from other mechanisms of employee voice—actually enhance or detract from productivity. See generally Slater, *supra* note 132 (describing the effects of public sector labor relations and unions upon the formation of employment policies).

288. *Study Says Thirty Percent of Employees Loyal*, *supra* note 226, at A-3.

289. *Id.* As the company vice president succinctly summarized it, "You can always buy employee retention by throwing more dollars at the situation . . . . [But] [y]ou can't buy loyalty." *Id.*

290. TOWERS PERRIN, *supra* note 228, at 11-12.

291. *Id.* at 14-15, 18.

292. *Id.* at 12-14, 16.

293. See *id.* at 18 (summarizing the results of TOWERS PERRIN, *supra* note 231); see also *supra* note 231 and accompanying text (discussing these results further).

294. *Id.* at 19-22.

295. *Id.* at 22.

Affording workers the opportunity to have input into and control over their work increases investment not only in the jobs/occupations, but to the firm.<sup>296</sup> By stimulating employee interest in the work, the firm reaps the benefits of increased willingness to invest discretionary effort and improved morale, even when the employees so engaged are doing more work than others in terms of volume.<sup>297</sup>

These are not new insights. The essence of loyalty is not exit, but voice. Rather than quitting when she is dissatisfied, the loyal employee voices her discontent.<sup>298</sup> Mechanisms furthering participatory democracy in the workplace have long been thought to counteract feelings of alienation and apathy.<sup>299</sup> Indeed, this was the goal of the Wagner Act—the protection of unionization and adoption of collective bargaining would enhance worker participation and promote democracy in the workplace. Collective bargaining, or “participative management,” as it was once dubbed by a special Task Force to the Secretary of Health, Education and Welfare, sought to resolve the tension between the larger political democracy and the hierarchical structure of the workplace:

Participative management means . . . that workers are enabled to control the aspects of work intimately affecting their lives. It permits the worker to achieve and maintain a sense of personal worth and importance, to grow, to motivate himself, and to receive recognition and approval for what he does. It gives the worker a meaningful voice in decisions in one place where the effects of his voice can be immediately experienced. In a broader sense, it resolves a contradiction in our Nation—between democracy in society and authoritarianism in the workplace.<sup>300</sup>

Unionization and collective bargaining have not, however, proven to be the solution to these problems. Union affiliation correlates negatively with measures of employee satisfaction and loyalty.<sup>301</sup> Perhaps it is time to consider new structures to foster

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296. *See id.* at 25–26.

297. *Id.* at 26. The report explains that stimulating work compensates for workload volume at an emotional/psychological level.

298. HIRSCHMAN, *supra* note 5, at 76–78 (observing that in the face of discontent, the loyal member of any organization chooses voice over exit).

299. *See* ERICH FROMM, *THE SANE SOCIETY* 270–85 (1955) (arguing that worker alienation can be overcome if workers are afforded influence in their workplaces, both at the micro- and macro-levels in the institution).

300. REPORT OF SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *WORK IN AMERICA* 104 (1973).

301. *See Study Says Thirty Percent of Employees Loyal*, *supra* note 226, at A-4. For

worker voice and participation.

## VII. ALIGNING THE WORKPLACE WITH THE CONSTITUTION: WORK AND CITIZENSHIP

Why should we wish to restructure the work relation to give more priority to voice and loyalty than to exit? First, as demonstrated above, the privileging of exit through employment-at-will doctrines is inefficient. Decreased worker morale translates into lower productivity. More significantly, however, the features that characterize the modern workplace—hierarchical, authoritarian, and featuring passive, silent, resentful workers who bring no passion to their work and are largely disengaged—are fundamentally at odds with our constitutional values and our obligations as citizens to the larger community. The norms that we live every day at our workplaces inevitably shape our national political identity.

Work has long been understood as an essential characteristic of full citizenship in a constitutional sense.<sup>302</sup> The workplace is an important locus of community. The sense of community that binds us together as citizens of a nation is nurtured by smaller communities, most frequently organized around occupations, the relationships formed at work, or in the neighborhoods created by the geographical locus of work.<sup>303</sup> Bonds of loyalty foster allegiance to a community that supersedes individual self-interest and breeds a sense of empathy for others, even altruism: "[T]he ethic of loyalty takes relationships as logically prior to the individual."<sup>304</sup> Ultimately, work is the glue that bonds citizens together into a national unit.<sup>305</sup>

The American ideal of independence is grounded upon economic self-sufficiency. Indeed, this is the premise behind the Clinton-era

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example, while about 50% of nonunion workers believed their employers genuinely cared for and were concerned about workers, only 37% of union workers believed this. *Id.* Similarly, 52% of nonunion workers felt that their employer trusts its employees, while only 42% of unionized workers believed this to be the case. *Id.* Overall, the study found, 32% of nonunion workers are "truly loyal," while only 24% of unionized workers fit this description. *Id.*

302. See Schultz, *supra* note 3, at 1886; Karst, *supra* note 7, at 529.

303. See Schultz, *supra* note 3, at 1886.

304. FLETCHER, *supra* note 1, at 15. This contrasts with the view of liberal morality, which envisions individuals as atomistic and self-contained beings who choose to enter into relationships. *Id.* In this respect, the concept of loyalty bears a striking resemblance to the relationship-centered morality that feminist Carol Gilligan identified and described in her classic work on morality in relationships. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 64-105 (1982).

305. See Karst, *supra* note 7, at 529.

reforms to the welfare system, popularly known as “workfare.”<sup>306</sup> The unemployed desperately seek work, not only for its financial rewards, but because it affords individual autonomy and feelings of contribution and belonging to society.<sup>307</sup> “To be a citizen is to be a respected and responsible participant in the public life of the community.”<sup>308</sup> Citizenship is lived through the medium of work.<sup>309</sup>

Moreover, jobs afford income and financial security, essential predicates for American life and the vehicle for attaining the American dream.<sup>310</sup> Basic financial protections, including health care, retirement security, and insurance against injury are all linked to work in the American system. The dreams of rising class status and accompanying social status, respect, and admiration—what we are “worth”—are predicated on work. Our very identities turn on our work and the social meanings that attach to it.<sup>311</sup>

The constitutional norm of equality is also founded upon financial independence. A major legacy of slavery is the racial caste status of African Americans.<sup>312</sup> Our efforts to redress the lingering effects of slavery are heavily targeted toward the medium of work: What use is social and political equality without equality of economic opportunity? As the Congress that enacted Title VII of the Civil Rights Act put it, “The right to vote . . . does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory

306. The Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21, 25, and 42 U.S.C.) (abolishing centralized federal entitlements to welfare and replacing them with a system of block grants to the states, conditioned on work requirements and the imposition of a cap on benefits). See generally Katherine R. Lang, Note, *Fair Work, Not “Workfare”: Examining the Role of Subsidized Jobs in Fulfilling States’ Work Requirements Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 25 FORDHAM URB. L.J. 959, 960–61 (1998) (providing a general overview of the law).

307. See Karst, *supra* note 7, at 531. Work provides a venue for self-actualization, and the opportunity to “experience autonomy from and connectedness with others, and to acquire respect.” Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 44 (1988).

308. Karst, *supra* note 7, at 531.

309. *Id.* See generally JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 63–101 (1991) (describing the role of earning a living in confirming an individual’s full membership in the community and citizenship status).

310. Karst, *supra* note 7, at 532.

311. *Id.* at 533; Schultz, *supra* note 3, at 1928–29.

312. See Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1315–17 (2002) (describing relative economic status of Blacks and Whites and its origins in the job market).

where one's pockets are empty."<sup>313</sup>

Similarly, immigrants have long understood that work is the vehicle through which ethnic caste status can be overcome and social status achieved.<sup>314</sup> As Noel Ignatiev has explained, Irish immigrants struggled to "become white" in order to gain access to jobs so that ultimately they would be seen as "citizens of a democratic republic, with the right to elect and to be elected, to be tried by a jury of their peers, to live wherever they could afford, and to spend, without racially imposed restrictions, whatever money they managed to acquire."<sup>315</sup> The workplace has been a key locus of social integration across racial and ethnic lines,<sup>316</sup> with work law proving far more effective at furthering integration than education or housing law.<sup>317</sup>

Finally, the American democratic system is predicated on participation and the exercise of voice. Intermediate institutions that can provide socialization towards a democratic system are vital to citizens' participation; the workplace is one of the most important "schools of democracy."<sup>318</sup> Unless citizens practice participation in the "minor affairs" of life—in their everyday lived experience at work, for example—democracy loses its meaning.<sup>319</sup>

For all of these reasons, we argue that commitment without loyalty is not only antithetical to the interests of employers and employees, it undermines full citizenship. Some scholars have argued for recognition of a constitutionally grounded right of access to work.<sup>320</sup> Others have urged a social expansion of the meaning of

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313. S. REP. NO. 88-872, at 2513-17 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2355-91 (providing justification for Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000(e)) (2000)).

314. See *id.* at 1321-22 (describing struggle by European immigrants to "become white" in order to acquire preferential status in the labor market).

315. NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 2-3 (1995).

316. Karst, *supra* note 7, at 550-51; Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 4, 17 (2000) (arguing that the workplace is "[t]he single most important arena of racial and ethnic integration").

317. See Cynthia Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 50-53 (1998).

318. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61 (Francis Bowen trans., & Phillips Bradley ed., 1945).

319. See JACQUES MARITAIN, *MAN AND THE STATE* 66-67 (1951) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 341-42 (1862)).

320. See William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1790-92 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1096-112 (1987) (discussing how work's social meaning could be expanded by provision or subsidy of pension benefits, health insurance, and childcare); see also Charles



work, accomplished by redefining work in law and culture, by reimagining the relationship between the state and the market, and by splitting off critical benefits from employment (such as health insurance, retirement security, subsidized day care).<sup>321</sup> We urge a revisioning of the work relation itself. Rather than aspiring to commitment without loyalty, our society should pursue strategies to transform American workplaces to conform with Senator Wagner's vision of high-trust, cooperative organizations—even if the vehicle we choose is not unionism.<sup>322</sup> Our goal should be to foster commitment *with* loyalty.

#### VIII. LOOKING TOWARD THE FUTURE: LOYAL, ENGAGED WORKERS

The hostile reception accorded to labor unionism and to the labor laws themselves offers important insights about the meaning of loyalty that should be instructive in crafting new default rules and vehicles for voice and participation in the workplace. For Senator Wagner, a fundamental goal of labor law was to establish equality between employers and workers.<sup>323</sup> Achieving equality was not an end in itself, but a means to achieving a workplace in which “[s]ocial conflict could be transcended by a cooperative harmony of social groups.”<sup>324</sup> In such a workplace, loyalty would flow from mutual respect and shared responsibility for the enterprise.

Moreover, by encouraging participation and involvement by workers in workplace decisions that cumulatively affect society, as well as by counteracting alienation that accompanies it,<sup>325</sup> collective

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L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1107 (1986) (advocating remaking American law and culture so that everyone has the right to participate in work and enjoy the social support it entails).

321. See, e.g., Karst, *supra* note 7, at 560–62; Schultz, *supra* note 3, at 1885–86.

322. See Barenberg, *supra* note 114, at 1428. Barenberg argues that Senator Wagner believed that collective bargaining, in which employers and employees met as equals would transform businesses from “low-trust adversarial to high trust, cooperative organizations.” *Id.*

323. 78 CONG. REC. 3678–79 (1934), reprinted in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1, 20 (1985) (“The primary requirement for [workplace] cooperation is that employers and employees should possess equality of bargaining power.”).

324. Barenberg, *supra* note 114, at 1428.

325. See FROMM, *supra* note 299, at 121–22 (describing the link between alienation and workers’ perception that they lack control over what they produce, how it is produced, and how it will be used, so that they do not experience the products they make or the services they provide as their own, but instead as something apart from them to which they submit).

bargaining also promoted the larger political democracy.<sup>326</sup>

Wagner's dream of a workplace based on equality and trust evaporated when it encountered the realities of power, class, and status in a capitalist society.<sup>327</sup> Collective bargaining in America proved unsuccessful in altering the vision of the employment relation that had reigned for hundreds of years—the master-servant doctrine. Thus, rather than being elevated to a position as responsible citizens of the enterprises in which they work, employees remain invisible: only the voices of stockholders are heard in the management of the business.<sup>328</sup>

Workers in the modern workplace are akin to a colonized people, ruled by a CEO who is chosen by the real citizens (shareholders) to govern the colonist-employees.<sup>329</sup> The status and power relationships of master and servant live on. While the master might feel a degree of loyalty to a servant, it is a condescending loyalty between unequals, one that is mixed with a certain amount of contempt by the master and a certain amount of resentment by the servant.<sup>330</sup> Always present in the master-servant relationship is the reality of coercion. For Senator Wagner, it was crucial that order in the workplace be the result of assent, not coercion.<sup>331</sup> If we are to build a nation based on workplaces where mutual loyalties engender

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326. Data suggest that union members are more likely to vote in political elections than are nonunion members, although the reasons for this occurrence are disputed. See RICHARD B. FREEMAN, WHAT DO UNIONS DO . . . TO VOTING? 3, 17–18 (Nat'l Bureau of Econ. Research, Working Paper No. 9992, 2003) (on file with the North Carolina Law Review).

327. See ATLESON, *supra* note 124, at 171, 179.

328. MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY 24 (2001); see also Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 398 (1993) (stating that “[i]t has been the dominant American conception of the corporation for many years that a corporation’s primary goal is, and should be, the maximization of shareholder welfare”).

329. KELLY, *supra* note 328, at 151. While the colonist analogy is apt, we prefer the analogy of a legal alien, one who, while she enjoys certain rights and protections, is emphatically not a citizen of the enterprise.

330. There are hopeful examples of workplace cultures that do not fit this mold. They are the exceptions, however, not the norm. See, e.g., Melanie Trotman, *Inside Southwest Airlines, Storied Culture Feels Strains*, WALL ST. J., July 11, 2003, at A1 (describing demise of culture of loyalty and family-style community that once prevailed at Southwest Airlines); *The Mensch of Malden Mills*, at <http://www.cbsnews.com/stories/2003/07/03/60minutes/printable561656.shtml> (July 6, 2003) (describing the efforts of the Malden Mills owner to assist and support employees of his family’s textile mill in the aftermath of a fire which ultimately destroyed the business) (on file with the North Carolina Law Review).

331. Barenberg, *supra* note 114, at 1423. Barenberg notes that for Senator Wagner, “growth and stabilization were always secondary to the achievement of social justice through democratic consent in the workplace.” *Id.*

trust and cooperation, we must rediscover Senator Wagner's vision.

Such a transformation will require fundamental change in the way we perceive the employment relationship. We offer the following blueprint for employee citizenship, with an eye toward prompting discussion at a broader level about the specific forms such changes should take:

1. Change the default rule in the employment relationship from at-will to good cause for dismissal.<sup>332</sup> As Professor Summers has written, employment at will is "the ultimate expression of employer domination over the employee."<sup>333</sup> The hoary employment-at-will doctrine perpetuates the archaic master-servant view of the employment relationship and privileges exit over voice in the workplace. If workers are to be citizens, not servants,<sup>334</sup> employment-at-will must be abolished.
2. Create new avenues for collective employee voice and participation. We have argued elsewhere that the right to engage in collective bargaining should be recast as a civil right.<sup>335</sup> One consequence of recasting collective bargaining as a fundamental human right would be to make collective bargaining available to a far broader array of workers than those who currently may claim the right, including public sector employees in all states and in all federal agencies, supervisors, and even lower to middle level managers.<sup>336</sup>

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332. We are not, of course, the first to argue for a good-cause default rule. See, e.g., David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. PA. L. REV. 975, 993 (1998) ("I propose to change the current employment-at-will default rule to a job-security default rule."); Sunstein, *supra* note 282, at 231 (arguing for a waivable rule favoring job security over employment-at-will).

333. Summers, *supra* note 16, at 467.

334. Stone, *supra* note 224, at 782 (describing organizational citizenship behavior).

335. Matheny & Crain, *supra* note 130, at 22–23; see also Janice R. Bellace, *The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform*, 5 U. PA. J. LAB. & EMP. L. 1, 28 (2002) (arguing that the core value of the Wagner Act, freedom of association, is a fundamental human right); David L. Gregory, *The Right to Unionize As a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 135 (1998) (arguing that the right of workers to organize is a basic human right); James A. Gross, *Workers' Rights As Human Rights*, 4 U. PA. J. LAB. & EMP. L. 479, 489–90 (2002) (same).

336. For an extended argument that the NLRA should be amended to give supervisors and some managers the right to organize and engage in collective bargaining, see Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 1011–23 (1990) (arguing that restructuring the workplace to enable industrial democracy requires a new definition of employee that would include, supervisors, many managerial employees, and confidential employees); see

New representational structures will be required. As Freeman and Rogers found, less than fifty percent of American workers desire representation by a union.<sup>337</sup> As one scholar aptly summarized the issue for the next millenium:

It is not the future of unions in the twenty-first century that should concern us but the future of employee representation. What is critical is the core value underlying the Wagner Act; namely, freedom of association. Section 7 states this eloquently when it says that workers shall have the right to form, join, and assist organizations of their own choosing. What is needed today is government support of this core value that is essential to democracy.<sup>338</sup>

Labor law must support and encourage both traditional collective bargaining and alternative modes of employee representation, including identity caucuses,<sup>339</sup> works councils,<sup>340</sup> and employee representation committees to consult regularly with management about decisions affecting the economic condition of the firm.<sup>341</sup> The hallmark of new forms of employee representation should be "the independence of employee voice."<sup>342</sup>

3. Encourage the peaceful resolution of disputes through interest arbitration. While strikes and lockouts will probably be part of the collective bargaining system for many years to come, if we listen to what workers want, we will create a labor law regime that encourages interest arbitration as a rational alternative to economic warfare.<sup>343</sup> The data reported by

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also Bellace, *supra* note 335, at 29 (noting that the Wagner Act excludes substantial portions of the labor force from coverage and arguing that the United States needs new laws of representation that would include all employees).

337. FREEMAN & ROGERS, *supra* note 96, at 89.

338. Bellace, *supra* note 335, at 28.

339. See Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 61 (1995) (proposing formation of identity caucuses to further issues of particular concern to women workers).

340. See Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, in THE FUTURE OF EMPLOYEE REPRESENTATION 126, 128 (Matthew W. Finkin ed., 1994) (arguing that a works council system based on the German system can be modified to function effectively in the United States).

341. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 963 (1993) (advocating Employee Participation Committees which would consult with management regarding strategic decisions, such as compensation, hiring and training, technological innovations, work assignments, and layoffs).

342. Bellace, *supra* note 335, at 30.

343. We have suggested in a prior essay that interest arbitration is an attractive alternative to the strike and is especially beneficial to lower income, less skilled workers.

Freeman and Rogers clearly indicate that American workers want cooperative relations with their employers.<sup>344</sup> The internecine strife that frequently accompanies strikes and lockouts weakens the bonds of loyalty. The next labor law regime should strongly encourage peaceful resolution of disputes.

### CONCLUSION

Labor and employment law are powerfully influenced by a master-servant conception of the employment relationship and a corollary unidirectional vision of loyalty that privileges exit over voice. The law has shaped the growth of a culture of disengagement and disloyalty at work that undermines market productivity and is inconsistent with our most deeply felt constitutional values. To make employees full citizens of the enterprise, governed by management but possessing rights of participation, the law must eradicate the vestiges of master-servant doctrine and create new structures and opportunities for employee voice. The core value of the Wagner Act—promoting cooperative relations between employers and workers by involving workers in the day to day governance of the workplace in partnership with management—remains as important today as it was in 1935. By strengthening commitment with mutual loyalty at work, we will enhance productivity and breathe new life into bedrock constitutional values, making them part of the daily lived experience of every working American.

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See Matheny & Crain, *supra* note 130, at 25.

344. FREEMAN & ROGERS, *supra* note 96, at 5 (“Employees want a positive relation with management, not a war.”).

