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Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment

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In opinions addressing whether graduate students, medical residents, and disabled workers in nonstandard work arrangements are employees under the National Labor Relations Act, I analyze partisan differences in how National Labor Relations Board members, under the previous two US presidents, confronted the contradictory permeation of wage-labor into relatively noncommodified relationships. I argue that Republicans mediated the contradictions by interpreting indicia of employer property rights as status authority. They constructed employment as a contractual relationship consummated through exchange relations and demarcated a nonmarket social sphere in which to locate the relationships before them. This construction suppressed the class dimension of employment and the connection between relations of production and relations in production (Burawoy 1979). Democrats mediated the contradictions by recognizing them in part and arguing that the workers were engaged in commodity production. They proposed the Act as a means for workers to negotiate "differentiated ties" (Zelizer 2005) in nonstandard employment.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> National Labor Relations Act (1935, sec. 157)

INTRODUCTION

The National Labor Relations Act (2010) (NLRA or the Act), originally passed in 1935 as the Wagner Act, allowed certain democratic rights that Americans held only against the state—rights to association and self-organization—to be asserted by employees against employers as well. Within the legal order of a capitalist democracy, it denied de jure the employer's absolute dominion over the enterprise and productive property.

Since the 1970s, the industrial model of employment contemplated by the Act's creators—direct, full-time, long-term employment—has shriveled. "Nonstandard," "contingent," or "precarious" work—myriad forms of indirect, part-time, and short-term

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employment that defy simple categorization under existing law (Carré, DuRivage, and Tilly 1994; Benner 2002; Stone 2006; Kalleberg 2009) has proliferated in its stead. In one form or another, courts and agencies must confront an inherently sociological question: Under what circumstances are persons who are required to render specific labor services in exchange for monetary remuneration by a payer "employees" and when are they not? The answer requires analysis of a legally mediated social relationship between buyers and sellers of labor services, the nature and very existence of which is at issue: decision makers can, by the way they conceptualize this relationship and formulate the rationale for their rulings, recognize it or make it disappear.

I analyze the reasoning by which the National Labor Relations Board (NLRB), the agency Congress created to administer the NLRA, determined whether certain nonstandard workers were statutory "employees" and thus possessed the rights of association and self-organization. Is a graduate student research assistant (RA) or teaching assistant (TA) a university employee as well as a student? Is a medical school graduate in a residency program an employee or only a student? Is a disabled person working as a janitor while enrolled in a rehabilitation program an employee or only a "client"? These workers sell labor services to a buyer in the course of receiving services from that buyer in their capacity as nonmarket actors. Their relationships objectively embody the contradictory, partial transformation of nonmarket relationships (between, e.g., a faculty mentor and a graduate student) into labor market relationships (between a university and an RA). These are multistranded relationships. In performing the same activities, the worker simultaneously produces saleable services for an organization (patient care, undergraduate teaching, and building cleaning) and receives services from that organization (medical training, graduate education, and rehabilitation). In the act of consuming labor power that the university has purchased from students, for example, the university "sells" graduate students education, both as a social service—in its status as a public goods provider—and as a commodity enhancing students' lifetime earning capacity.

I evaluate opinions decided, under Democratic President William Clinton and Republican President George W. Bush, by partisan blocs of the five-member tribunal in Washington, DC that presides over the NLRB (the Board). Through textual analysis, I reveal how Board members conceived of, and constructed, the social content of the employment relationship.

In his presidential address at the Annual American Sociological Association Meeting in 2008, Arne Kalleberg (2009) commended recent scholarly attention to the growth of nonstandard work. Despite this, he argued that scholars still "tended to take the employment relationship for granted" (11). A dearth of scholarship integrating sociology and law limits our understanding of the ongoing transformations in US labor/capital relations. It is not only a lack of job security, low wages, or employers' transfer of capital risks to workers that makes nonstandard employment "precarious," but the legal ambiguity regarding who is an employee. How an agency defines an employee by administrative fiat is decisive of who receives what protection, for instance, under health and safety, social insurance, and minimum wage laws. Many workers are "precarious" on the ontological level of being unrecognizable by law.[1]

1. I thank Ching Kwan Lee for this insight.

My textual analysis intends not to take the employment relationship "for granted" but to illustrate how legal decision makers struggle with the emergent contradictions in nonstandard work arrangements that tend to obscure the "command relation" at the heart of employment (Deakin 2006). The immediate significance of the NLRB rulings that I analyze is the legal status of particular workers' rights to take collective action, form unions, and collectively bargain. *Brown University* (2004) denied these rights to 882,000 graduate students at private institutions,[2] and *Brevard Achievement Center* (2004) affected 45,000 disabled workers (ARW 2008).

The NLRB's reasoning is consequential for work arrangements extending beyond these cases, however. The Republican-majority decisions exemplify a tendency of the NLRB, other agencies, and the courts to interpret collective bargaining laws so as to deprive almost 24 percent of the US workforce of its rights (ARW 2008). While I examine cases dealing with a subset of nonstandard work, the analysis bears on whether, how, and to what extent Democratic and Republican decision makers differ in determining which rationales of the NLRA apply to the institutional arrangements of labor and capital today.

I employ Duncan Kennedy's (2006, 28) conception of legal reasoning as formulating and applying "subsystems within consciousness" that "mediate contradictions of experience" through "an arrangement of the elements that makes the problem less salient." I analyze the arrangement of intellectual constructs, abstractions, and simplifications by which Board members mediate contradictions inherent in the permeation of wage-labor into noncommodified relations. Because common law employment doctrine embodies a historical fusion of status and contract, Board members must attempt to reconcile these contradictory transformations using likewise contradictory legal conceptions that structure these very relations.

Following Max Weber (1976, 50), I define employment as a relationship entailing the payer's "exploitation of other people's labor on a contractual basis." I understand employment as a legally mediated social relationship—one constituted by objective relations of material interchange, legal rules, and historical modalities of legal (Kennedy 2006) and social consciousness. The ideal forms—legal rules and forms of consciousness—are not epiphenomenal interpretations, but constitutive of, and intrinsic to, material relations as "different aspects (or 'moments') of the actual practical activity of men and women" (Zeitlin 1980, 14; see also Tomlins 1995; Zatz 2008). Therefore, Board members' arrangement of the elements both reveals their conceptions of and constructs employment's social content—the members create new legal-practical relations from legal-ideational forms, suppressing or revealing what I argue are the class and contractual dimensions of employment.[3]

I find that Republicans evoked and refurbished liberal distinctions between status and contract and between a hierarchical, nonmarket sphere of sympathetic, personal relations and an egalitarian market sphere of abstract and competitive relations. Republican opinions argued that the graduate students, residents, and disabled janitors were

2. In *New York University* (2010), the new Democrat-majority Board held that it would reconsider *Brown*.

3. Because this is a sociolegal—not a doctrinal—analysis, I do not adjudicate among Board members' competing interpretations of precedent or legislative history.

not employees because they were not in "primarily economic" (*Brevard* 985) relationships. They equated "primarily economic" with contractual relations consummated in a self-regulating market (see Polanyi 1957). They reconstructed and located the relationships at issue in a nonmarket sphere where the Act was inapplicable. By discursively exploiting the assimilation of status to contract in common law employment, Republicans interpreted indicia in these cases consistent with employer property rights as incidents of status authority and the parties' mutual interests. By denying the relationship between relations *of* production and relations *in* production (see Burawoy 1979), they suppressed employment's class dimension and negated the Act as an instrument to curb employer property rights in favor of expanding worker rights to contract freely and achieve greater self-determination.

Democrats' reasoning "made the problem less salient" in part by recognizing the contradictory plexus of market and nonmarket relations in these cases and suggesting the Act as a means for social actors to navigate it. Democrats attempted to apply the common law agency standard and decided that the students, residents, and disabled persons were employees. They argued that wage-labor had pervaded educational and therapeutic relations, and the workers were engaged in commodity production even as they and their employers sought to realize noncommercial ends within the same relationships and even within the same interchanges. By emphasizing that competitive market dynamics shaped how the putative employers organized production, Democrats came closer to recognizing a connection between relations of production and relations in production. Their "differentiated ties" approach (Zelizer 2005) intimated that by protecting the right of self-organization, the Act could help workers not only determine the *terms* of commodification in their relationships but also the *extent* of commodification, including the preservation of noncommodified relational strands.

BACKGROUND AND METHOD

The NLRA and NLRB

The NLRA, as amended by the Labor-Management Relations Act (1947) (Taft-Hartley Act) and the Labor-Management Reporting and Disclosure Act (1959) (Landrum-Griffin Act), is the principal statute governing labor relations in the United States. With (important) exceptions, it covers all private-sector employees.[4] Congress created the NLRB to enforce the NLRA. The president appoints the five Board members, including a chairperson, with the Senate's consent, for staggered five-year terms.

Most Board observers find that Democratic members are more "labor friendly," and Republicans more "employer friendly," in their policies and rates of favorable decisions (see Moe 1985; Cooke *et al.* 1995; Gross 1995; C. Williamson 2001). Evaluations of the Bush and Clinton Boards support this picture (see Brudney 2005; Gould 2005; Hiatt

4. The NLRA does not cover public-sector employees, workers under the Railway Labor Act's (2010) jurisdiction, domestic and agricultural workers, independent contractors, supervisors, managers, or persons working for spouses or parents.

and Becker 2005; Liebman 2007). Several have noted the Bush Board's tendency to exclude nonstandard workers from the NLRA (see Bannister 2005; Dunn 2005; Fisk and Malamud 2008). However, we know little about how Board members' understanding of the employment relationship—which underlies their understanding of the Act's political economy and purposes—are patterned by political affiliation.

Nonstandard Work and Commodification

Scholars examining the economy of nonstandard employment are rediscovering Karl Polanyi (see Silver 2008). Polanyi (1957, 130) theorized a historical "double movement" of labor commodification followed by a social countermovement of decommodification. I suggest that contemporary labor struggles over nonstandard work represent a synchronous double movement, as struggles not only about the terms of commodification but also over the extent of commodification.[5] For instance, scholars have provided evidence that professionals and graduate students have unionized in part to protect themselves from the commodification of their work (Crain 2004; Rhoads and Rhoades 2005).

Looking at coupling, care relationships, and household commerce, Viviana Zelizer (2005) addressed the relationship between commodification and multistranded relationships, investigating how social actors develop practices and stories to navigate intermingling intimate and economic ties. She argues that legal actors often adopt "separate spheres," or "hostile worlds," positions, meaning that they try to erect clear boundaries between economic and intimate spheres to prevent reciprocal contamination and disorganization (22–28). She argues, however, that people regularly adopt practices to maintain "differentiated ties" that allow intimacy and economic transactions to coexist (22, 35), for example, by denoting certain monetary transfers as "gifts" rather than payment for services (28).

Noah Zatz (2008) analyzed the employment status of prison labor to show how legal decision makers address the cohabitation of wage-labor and nonmarket relations. He refers to these relationships as "paid nonmarket work" (897). Zatz discerned two contrasting approaches: (1) an "exclusive market" approach, in which decision makers require that employment conform to the liberal contractual ideal of a voluntary, arm's-length, bargained-for exchange in a competitive market for commercial advantage (882, 884–92, 901–02); and (2) a "productive work" approach, in which decision makers ask whether the putative employees produce fungible goods or services for the putative employer (892–900). Zatz argues that decision makers evoke cultural tropes to make these approaches cognizable (929). Drawing on Zelizer (2005), he argues that they thereby mark employment as a contingent relational ensemble (Zatz 2008, 951). One trope he identifies that I find in the Republican Board decisions is the association of employment with independence (930–34). Like Zatz and Zelizer, I show that Board

5. I use "commodification" in the Weberian sense as the subsumption of the elements of social relations into factors produced and available for sale as private goods or services on the market (see Collins 1980).

members' interpretation of the facts is not based on autonomous legal conceptions, but on social conceptions as well that modulate these legal conceptions (cf. Klare 1982, 1359).

Data

I analyze eight opinions in four cases—two Clinton Board and two Bush Board cases, comprised of four Democrat-majority opinions and four Republican-majority opinions.[6] In *Boston Medical Center Corp.* (1999) (*BMC*), a Clinton Board majority of three Democrats found that medical school graduates in residency programs were statutory employees. Republicans Brame and Hurtgen wrote separate dissents. In *New York University* (2000) (*NYU*), a Clinton Board majority of two Democrats held that graduate assistants—graduate students working as TAs and RAs—were employees. Hurtgen concurred. In *Brown University* (2004), a Bush Board majority of three Republicans overturned *NYU* and held that graduate students serving as TAs, RAs, and proctors were not employees. The two Democrats dissented. In *Brevard Achievement Center* (2004), a Bush Board majority of three Republicans held that disabled persons enrolled in a rehabilitation program while working as janitors at a federal space base were not employees. The program had contracted with the government to provide cleaning services, under a statute promoting disabled persons' employment. In sum, the four Democratic-bloc opinions argued that graduate students (*NYU* and *Brown*), medical residents (*BMC*), and disabled persons in sheltered workshops (*Brevard*) were NLRA employees. The four Republican opinions argued that they were not. The exception to the partisan pattern was Hurtgen's concurring *NYU* opinion.

I limit the analysis to Clinton and Bush Boards cases because they present the Board's most recent engagements with "paid nonmarket work" (Zatz 2008, 897). This limitation controls for large doctrinal shifts since, over this period, the Supreme Court issued no pertinent decisions and Congress did not amend the NLRA.

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6. These cases represent all precedential Clinton and Bush Board cases examining paid nonmarket work (see Zatz 2008, 897). Four cases that were delegated to three-member panels bear mention, however. In two uncited 2007 cases—*Research Foundation of the State University of New York* and *Research Foundation of the City University of New York*—a panel of one Democrat and two Republicans found RAs to be employees. The panel found *Brown* inapplicable because the university used a corporate intermediary to administer its research and serve as formal employer. While seemingly inconsistent with Republicans' "primarily economic" analysis, the decisions reflect a prevailing paradigm in labor law in which formal corporate boundaries trump the substantive organization of productive relations (see Newman 2002; Stone 2006). In *Goodwill Industries of North Georgia* (2007), one Democrat and two Republicans held that disabled janitors whose employer contracted with the federal government under the same program as in *Brevard* were employees under *Brevard*'s "typically industrial" standard. The case is difficult to distinguish on the facts from *Brevard*, but the Board's reasoning similarly focused on whether the workers consumed social services in performing their work and on the issue of sympathetic intersubjective relations with supervisors. Three Clinton Board Democrats found employee status in another sheltered workshop case, *Davis Memorial Goodwill Industries* (1995). *Davis* included no substantive discussion of employee status in approving the regional director's application of the "primarily rehabilitative" standard, and the DC Circuit overturned the decision.

Law and the Employment Relationship

Below, I limn the contradictory contractual and class dimensions of employment. I then show how the common law's fusion of household status authority and contract "imprint[s]" this social structure (Tomlins 1995, 64; see Stepan-Norris and Zeitlin 2003, 133).

Social Structure and Employment

Weber (1976, 50) formulated the employment relationship as the specific historical "form of the utilization of capital" in "the exploitation of other people's labor on a contractual basis." In other words, insofar as a relationship exists between a person performing labor and a person who possesses the authority, on a contractual basis, to determine the utilization of that person's capacity to labor, it is an employment relationship. I argue that employment is constituted by both a relationship of class exploitation and a contract between equal and free persons that veils this class dimension.

In *Capital,* Karl Marx (2005, 492) describes a "sphere of circulation" "within whose boundaries the sale and purchase of labour power goes on":

> [A] very Eden of the innate rights of man. There alone rule Freedom, Equality, Property, and Bentham. Freedom, because both buyer and seller of a commodity, say of labour power, are constrained only by their own free will. They contract as free agents, and the agreement they come to is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself.

I theorize a realm of exchange ("sphere of circulation") and realm of production (Marx 2005, 506) in contractual and class dimensions of employment. In the contractual dimension, buyers and sellers of labor services meet in the exchange realm as equals bearing freedom of contract. Bargaining power here depends on labor supply-and-demand levels and negotiating wit, all independent of the distribution of productive property.[7] By contrast, in the class dimension of the exchange realm, equality and true freedom of contract are absent. Bargaining power depends in part on labor supply and, especially, on one's ownership and control of productive property.[8] Because the buyer of labor services is in the class that monopolizes productive property and the seller depends more on the sale's consummation (labor supply is relatively inelastic), the buyer's power tends to be greater than that of the single seller (Offe and Wiesenthal 1980; Tomlins 1992).

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7. One could also include here "transaction costs," for example, asymmetric information, that make bargaining more costly for one party than the other. In the contractual dimension, these costs are allegedly independent of the distribution of productive property (e.g., costs may be attributable to "asset specificity") (see O. Williamson 1987).

8. Ownership and control of productive property, in part, determines labor supply. When employers reorganize production to "de-skill" work, for example, this tends to increase labor supply (Braverman 1975).

TABLE 1.
The Employment Relationship

	Contractual Dimension	Class Dimension
Realm of Exchange	Procedural equality Freedom of contract Bargaining power depends on supply/demand levels and negotiating wit Competitive	No true freedom of contract or equality for worker Bargaining power depends on ownership and control of productive property
Realm of Production	Employer has property right to organize production, including to control labor process	Employer exploits worker Employer property rights are deprivation of employee contract rights and self-determination Worker consents to employer domination

In the production realm of the contractual dimension, the employer has property rights—in the living commodity purchased—to organize and control the labor process. "From his point of view, the labour process is nothing more than the consumption of the commodity purchased" (Marx 2005, 498). In the class dimension, this property right to control the labor process appears both as the exploitation of the worker—the process by which the employer controls the worker's expenditure of labor power (Wright 2002)—and the worker's consent to domination in the necessarily cooperative productive process. In the class dimension of the production realm, employer property rights also thereby appear as the worker's alienation from his/her self-creating activity. Table 1 summarizes this schema.

In the class dimension, the realms of exchange and production are not discrete. As noted above, the contractual agreement registers the worker's weaker power in the exchange realm. Further, labor is a false commodity: labor power is inalienable from the seller (Polanyi 1957; Offe and Wiesenthal 1980). The seller of labor power formally parts with its use value (and realizes its exchange value) by turning over control of this "commodity" to the buyer. However, buyer and seller often find that the contract regarding the rate of exchange of labor power entered into the exchange realm does not specify to their mutual satisfaction *how much* use value—actualized labor power or labor—the buyer may attempt to squeeze from the inalienable commodity, or *in what manner* the buyer may squeeze it (a lack of specification inscribed by common law). The buyer's insistence on utilizing labor power as an incident of the property right to control the factors purchased for production clashes with the seller's attempt to mitigate the rate of exploitation and loss of control over self-creating activity. Thus, exploitation occurs both in (1) the agreement to contractual terms in the exchange realm, in that the worker must agree to work a full day and provide surplus labor time (or, for our purposes, to work long hours for low wages) due to his/her lack of control or ownership of productive property and (2) the process of labor control and extraction in the production realm (see Wright 2002). The

contractual dimension obscures the class relationship and link between the exchange and production realms and, thus, between relations *of* production and relations *in* production.

Burawoy (1979, 15) defined "relations of production" as the social relations in a class society by which "surplus labor is expropriated from the direct or immediate producers." Relations of production refer to workers' lack of control of productive property vis-à-vis employers' monopoly. Burawoy distinguished these from "relations in production," the "set of relations into which men and women enter as they confront nature, as they transform raw material into objects of their imagination" in the labor process. For instance, relations in production include shop-floor relations between workers and management. In employment's class dimension, relations of production shape relations in production.

Origins of the Modern Legal Definition of Employment: A Fusion of Status and Contract

Section 2(3) of the Act (codified at 29 USC § 152) defines "employee" as "any employee" not excluded by the Act. The Supreme Court has ruled that "any employee" refers to the common law agency doctrine of the master-servant relationship (*NLRB v. Town & Country Electric, Inc.* 1995). This doctrine defines employment as a relationship in which an individual performs services for another, for payment, under the other's direction and control.

As a nineteenth-century judicial fusion of contract and status, the agency doctrine generates the Table 1 schema and tension between employment's class and contractual dimensions. Contract was a legal mechanism intended to facilitate the individual's ability to design the incidents of relationships meant to further "discrete objective[s]" (Selznick 1969, 54). The law would sanctify contracts conditioned on "mutual bargaining sufficiently free of power disparities" (Tomlins 1992, 88). Contract created and protected a "tenuous and temporary association," not "open-ended obligations" (Selznick 1969, 54). Therefore, as Atleson (1983, 13) pointed out, if employment were a *true* contract, we would expect that "all the ambiguous sections or unanticipated questions dealing, for instance, with the level of energy to be expended, working conditions, [and] disciplinary authority, and employee integrity, could not be exclusively and authoritatively interpreted by the employer." Yet this was never the case—courts treated the labor contract as creating a continuing relationship, not as the outcome of "free bargaining and mutual assent" (Atleson 1983, 11; see Selznick 1969).

Because employers sought more control than the contract mechanism provided, courts fused the employment contract with master-servant doctrine, whose "focus on . . . subservience, and one-directional joint endeavor, fitted nicely with the needs of the enterprise" (Atleson 1983, 13). The master-servant relationship was a status arrangement based on the domestic model, in which "it was never contemplated that the parties would design their own relationship" (Fox 1974, 185). From the rib of the preindustrial master's "personal" household authority, nineteenth-century US courts fashioned an implied contract term granting employers a plenary *property right* to

control how employees performed their contracts (Tomlins 1992, 74, 83). Status was transformed into a property right (74, 83). While "it was contract and not property which lawfully gave employers power to direct the workforce," the "alleged move from status to contract obscures the very special kind of contract that emerged" (Atleson 1983, 15).

The fusion of status and contract in the agency doctrine manifests as a tension between property and contractual rights in the production realm of employment's class dimension (Table 1, lower right). As Marx suggested, the employer formally concludes a contract in the exchange realm by hiring the worker. However, the agency doctrine gave employers legal authority, via a status-cum-property right, to "seek to enlarge the return" (Atleson 1983, 15) in the productive process. This authority appears in that context as a *deprivation of the worker's right to contract freely* over the conditions of employment—a legal expression of labor's false commodity nature.

Competing Interpretations of the Act and the Private/Public Distinction

The NLRA protects workers' rights to association and collective action for mutual aid or protection. Section 8 forbids employers from interfering with these rights or discriminating on this basis. It also requires that employers bargain with workers' freely chosen representatives over the "terms and conditions of employment."

By encouraging collective bargaining over "terms and conditions of employment," the Act has the potential to purge the status elements from the employment contract and empower workers to design the incidents of their own relationships. The "terms and conditions of employment" over which the Act directs employers to bargain with organized employees are the very same property rights that the common law afforded to employers to control workers' performance of the labor contract. The buyer of labor power seeks full control over how to mix labor with other inputs to production in order to increase the exchange value of the inputs; thus, the "terms and conditions" of employment are the buyer's property rights to organize production (see Table 1).[9] While common law left the "controlling authority of the employer . . . legally inscribed on their contract in a manner that left it outside the realm of negotiation" (Tomlins 1992, 90), the Act places this authority inside "the realm of negotiation."

The NLRA Preamble (codified at 29 USC § 151) declares it national policy to protect workers' freedom of association and encourage collective bargaining. The Act's more radical proponents and early administrators hoped that it would help workers achieve self-determination by redistributing bargaining power (Gross 1985). The language of the original Act seems to recognize employment's class dimension. By protecting the "right of employees to organize and bargain collectively," the Act would reduce the "inequality of bargaining power between employees *who do not possess full freedom of association or actual liberty of contract* and employers who are organized in the corporate or other forms of ownership association" (NLRA Preamble, emphasis added). The Preamble suggests that assisting workers in pooling their bargaining power was necessary

9. Legal realists identified a similar tension between property and contractual rights in courts' attempts to delimit the bounds of legitimate business competition (see Horwitz 1992).

for a private ordering system to function (Klare 1982, 1391) or for parties to avail themselves of the right that contract conferred to design their own relationships so that the contracts would reflect true assent. A greater equality of bargaining power would increase "the purchasing power of wage earners" and promote the "stabilization of competitive wage rates and working conditions" (NLRA Preamble). Although the Act's proponents had various expectations, they included several substantive ends, as reflected in the Preamble and statutory provisions: industrial peace, industrial democracy, increased aggregate demand, and a more equal distribution of social wealth (Klare 1978).

For legal decision makers, employment's contradictory class and contractual dimensions appear as a tension in national labor policy between substantive and procedural justice (Klare 1978; Gross 1994). Encouraging collective bargaining conforms to the principles of voluntarism and procedural equality: employers and workers are not required to reach an agreement—only to bargain. The protection of a procedural right suggests a state disinterested in the outcomes of private transactions and committed to a system that preserves the selection of ends by employers and employees. This is procedural justice (Unger 1976). On the other hand, the Act sanctions state interference in employment to address a disparity in bargaining power, which, according to the Preamble, creates substantively unacceptable results. This evinces a state interest in substantive justice (Klare 1978, 309).

Since the Supreme Court's ruling in *NLRB v. Jones & Laughlin Steel Corp.* (1937) declaring the Act constitutional, federal courts, Congress, and the Board have tendered competing interpretations, which, overall, have tended to favor employer property rights over employee self-determination and to displace the Act's substantive rationales—apart from industrial peace—while elevating the rationale of procedural justice. I summarize a few interpretive strands.

Certain early NLRB cases interpreted the Act to locate more employer property rights in the domain of negotiation (Gross 1981; see Brody 2004). A 1938 NLRB trial examiner ruling against Emerson Electric held that the employer did not have sole authority to decide the "book of rules" (Stepan-Norris and Zeitlin 2003, 176).[10]

However, several early Supreme Court decisions restricted the concerted activities in which workers could engage by interpreting them as interferences with employer property rights rather than legitimate economic pressure. *NLRB v. Fansteel Metallurgical Corp.* (1939) ruled that sit-down strikes were unprotected. *NLRB v. MacKay Radio & Telegraph Co.* (1938) ruled that employers had the right to permanently replace economic strikers. (Employers did not rely largely on the decision, however, until President Reagan terminated striking air-traffic controllers in 1981.)

Supreme Court decisions distinguishing issues of "management prerogative" from mandatory collective bargaining subjects—or employer property rights from employee contract rights—also reflect competing interpretations of the Act's role in promoting a bargaining regime that would enable workers to design their own relationships (Selznick 1969). For example, *Fibreboard Paper Products Corp. v. NLRB* (1964) held that an employer was required to bargain over a decision to subcontract maintenance

10. The Board in *Emerson Electric Manufacturing Co.* (1939) found that Emerson did not violate the NLRA only because the employee rules book that Emerson issued was consistent with the union contract.

work performed by its unionized employees, holding that subcontracting was one of the "terms and conditions of employment." However *First National Maintenance Corp. v. NLRB* (1981) ruled that an employer did not have to bargain with employees over plant closings or most other job-eliminating decisions.

The 1947 Taft-Hartley amendments introduced further confusion as to the Act's understanding of employment as a class relationship and the extent of its redistributive purposes. The amendments, inter alia, prohibited certain "unfair labor practices" by unions (including secondary economic pressure), protected employer "free speech" rights, outlawed closed shops, permitted states to outlaw union shops, and excluded independent contractors and supervisors. Although concerns over discrimination by unions provided some impetus for the amendments (Millis 1950, 280), Taft-Hartley was drafted almost entirely by the antiunion lobby (Gross 1981; Horwitz 1992). Decision makers have appealed to the amendments to argue that the Act's primary purposes are promoting industrial peace and protecting the formal procedural freedoms of individual workers (Gross 1985, 1995).[11]

Decision makers often constructed a public/private distinction to mediate the opposition between property and contract and between the Act's interventionist policy purposes and common law employment's private, contractual nature (Klare 1982, 1362–64). Karl Klare (1982, 1359) showed that this distinction was pervasive in US labor law, not "just as a background motif but very often as an essential ingredient of the grounds of decision." Decision makers deployed this conceptual apparatus to argue that "industry and commerce can only function on a largely authoritarian basis," and "basic principles of democracy do not apply in the workplace" (1417). For example, courts justified withdrawing NLRA protection from certain collective bargaining subjects—such as capital investment decisions—by classifying them as private matters at the "core of entrepreneurial control" and not sufficiently suffused by a public interest in worker democracy (1402).

Section 2(3)

The history of Section 2(3) also reflects these competing interpretations. It states: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer" (codified at 29 USC § 152). In *Briggs Manufacturing* (1947, 570), the Board, quoting legislative history, argued that this phrase meant that Congress understood that "self-organization of employees may extend beyond a single plant or employer." This interpretation recognized employment's class dimension by defining relations *of* production, rather than only relations *in* production, as the Act's province. The original Act also did not exclude supervisors from Section 2(3), and, in 1947, the Supreme Court found foremen to be employees in *Packard Motor Car Co. v. NLRB* (1947).

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11. Others suggest that the development of binding arbitration as a key policy of Post-WWII "industrial pluralism" also negated the original Act's premise of unequal bargaining power (see Stone 1981; Klare 1982, 1407). For a different view, see Metzgar (2000).

As noted, Taft-Hartley excluded supervisors and independent contractors. Further, federal courts, Taft-Hartley (in banning secondary boycotts), and the Supreme Court (*Lechmere, Inc. v. NLRB* 1992) effectively restricted "any employee" to those of a particular employer. In *NLRB v. Bell Aerospace Co.* (1974), the Court excluded from the Act's coverage workers performing managerial functions. Recent decisions have expanded the supervisory and managerial exclusions. *NLRB v. Health Care & Retirement Corp. of America* (1994) found certain nurses to be supervisors. In *Oakwood Healthcare, Inc.* (2006), the Bush Board expanded the supervisory exclusion in response to the Court's decision in *NLRB v. Kentucky River Community Care* (2001) directing the Board to review its interpretation.

In *Leland Stanford Junior University* (1974, 623), the NLRB introduced the "primarily students" standard, which found that RAs were not employees and which the Clinton and Bush Board Republicans later adapted. *St. Clare's Hospital & Health Center* (1977), which revised *Cedars-Sinai Medical Center* (1976) and found that residents were "primarily students," prefigured Board Republicans' market/nonmarket sphere distinction for determining employee status. *St. Clare's* (1977, 1002) did not discuss agency principles but argued that because residents performed services that were "directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees." By contrast, the Clinton and Bush Board Democrats' position that employment need not be primarily economic follows the *Cedars-Sinai* dissent. *Brevard* Republicans relied on two 1991 cases—*Goodwill Industries of Tidewater* and *Goodwill Industries of Denver*—to argue that the standard for determining employee status in sheltered workshops was whether the relationship was "primarily rehabilitative" versus "guided primarily by business considerations, such that it can be characterized as 'typically industrial'" (*Brevard* 2004, 984).

THE SOCIAL CONTENT OF EMPLOYMENT

Legal Standards

Partisan differences in Board members' attempts to apprehend these nonstandard work arrangements are first apparent in their selection of legal standards to determine employee status. Republicans adapted *St. Clare's* "primarily employees" standard, and, in *Brevard*, the similar "typically industrial" standard. They interpreted these as imposing exclusive market criteria on employment (Zatz 2008), taking a separate spheres position (Zelizer 2005). Democrats argued that the agency standard explicated by the Supreme Court was dispositive, and they interpreted this standard according to productive work criteria (Zatz 2008), tolerant of differentiated ties (Zelizer 2005).

For example, in *BMC* (1999), which overturned *Cedars-Sinai* and *St. Clare's*, Democrats relied on the Supreme Court decision in *Sure-Tan, Inc. v. NLRB* (1984, 891–92), which held that undocumented workers were "plainly" statutory employees and that "any employee" referred to the master-servant agency doctrine. They also cited the Court's *Town & Country* decision, which clarified that an NLRA employee was anyone who performed services for another subject to the other's right of control for payment. Since "house staff work for an employer within the meaning of the Act,"

"house staff are compensated for their services," and "house staff provide patient care for the Hospital," they were employees (*BMC* 160). In addition, the *NYU* (2000, 1205) majority argued that graduate students could have both an economic and noneconomic relationship with the university: "We reject the contention . . . that, because the graduate assistants may be 'predominately students,' they cannot be statutory employees." In contrast, the Republican majority in *Brown* (2004, 487), citing *Leland Stanford*, *Cedars-Sinai*, and *St. Clare's*, argued that the correct standard by which to determine graduate students' employee status was not the agency standard, but the assessment of whether students' relationship to the university was "primarily educational, not economic."

The Realm of Exchange

Using relational material from the exchange realm, Republicans reconstructed the relationships before them to comprise noncommercial motivations, the absence of discrete arm's-length bargains and voluntary exchanges, irrational accounting, and restricted employer bargaining agency. This reconstruction evoked the distinction between "status" and "contract."

In a status-based society, ascriptive labels and consumption-based group membership determine with whom one enters personal or exchange relationships and the content of those relationships. By contrast, in a contract-based society, people meet as impersonal equals in the competitive market and determine the nature and content of relationships through voluntary exchanges unencumbered by other social ligaments (Maine 1917). In contract, persons have the right to sell their labor in the marketplace unhindered and unassisted by these other ligaments. The validity of their contractual agreements requires a bargain and consideration—the goal of material gain must motivate both parties to enter the exchange, and each must offer something of material value to elicit the other's agreement: "The only force that brings them together and puts them in relation with each other is the selfishness, the gain, and the private interests of each" (Marx 2005, 492).

Republicans constructed employment as a contractual relationship consummated in the exchange realm of a self-regulating market populated by rational, autonomous parties bearing a procedural freedom of contract. They constructed the absence of these elements in the *Brown*, *Brevard*, and *BMC* relationships to deny a contractual and, ergo, "primarily economic," relationship.

Democrats did not accentuate relational material from the exchange realm and reconstruct the nonstandard work relationships as status relationships. They did not require a bargain and consideration evinced by rational accounting, and they found workers' contractual terms and ongoing economic conflict with their organizations probative of employment.

Motivation for Entering the Relationship

As evidence that the relationships were not "primarily economic," Republicans sought to show that the university, residency program, and rehabilitation program

entered the money/service exchanges to pursue public, noncommercial ends (*BMC* 180; *Brown* 484). For example, Brevard's work programs were "for the benefit of their clients, not to maximize profits and secure an economic advantage" (*Brevard* 985). To create and circulate use value was the organizations' maximand—not to create exchange value.

Republicans also imputed nonmaterial or indirectly material interests to the workers. Brame contrasted residents' interest in moonlighting with their interest in residency programs: "Moonlighting residents are employees: they work primarily for compensation" (*BMC* 171). "The primary purpose for which a physician undertakes a residency, in contrast, is to gain certification in a specialty—not the wages, benefits, or working conditions that the residency program affords" (*BMC* 177; see also *Brown* 488, 489, 492).

Republicans thus imposed the requirement of a bargained-for exchange with contractual consideration on employment. They sought to show that the workers did not induce their organizations to hire them by tendering valuable services and that the organizations did not offer payment to elicit the workers' agreement to provide teaching, cleaning, or patient-care services. For example, "Brown recognizes the need for financial support to meet the costs of a graduate education" (*Brown* 489), and "Brown considers academic merit and financial need when offering various forms of support" (485, see also 483). *Brevard* Republicans noted that program admission required federal certification that an individual was "severely disabled" (*Brevard* 982, see also 985). In his dissent in *BMC*, Brame emphasized that residency programs were required to select applicants "on the basis of their preparedness and ability to benefit from the program" (*BMC* 172). Programs received residents through a "computerized 'match' process," and "agree to accept applicants chosen by an algorithm rather than through individual selection or negotiations" (176). He contrasted this lack of bargain to a hospital's hiring of moonlighting residents "based solely on their M.D. degree and state medical license" (177).

Democrats rejected the premises that workers' educational or rehabilitative interests precluded their interest in material compensation and that their nonmaterial purposes rendered the relationship noneconomic (see *BMC* 159, 160; *NYU* 1207, 1220). "[E]conomic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship" (*Brevard* 991).

Dissenting *Brown* Democrats also emphasized, however, that the university's interest in graduate student labor was, in large part, market-impelled cost minimization. Quoting a study, they argued, "as financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, overworked . . . graduate students to meet instructional needs" (*Brown* 497). "The reason for the widespread shift . . . is simple: cost savings. Graduate student teachers earn a fraction of the earnings of faculty members" (498).

Voluntary, Discrete, Arm's-Length Bargains

Republicans emphasized the absence of discrete, arm's-length bargains between the workers and organizations, including a lack of voluntariness on the workers' part. They stressed that institutions apart from the market (higher education, professional

training, and rehabilitation) brought the parties together and that workers encountered their putative employers by virtue of their statuses as graduate students, medical school graduates, and certified disabled persons rather than as impersonal market participants.

According to the Republicans, the putative employees' license to provide teaching, research, patient care, and cleaning services for these organizations—and their pay—were contingent on their statuses in the other institutions and, as noted above, based on noncommercial criteria rather than applicable work skills or experience. *Brown* Republicans emphasized that persons could serve as TAs, RAs, or proctors only if they were first students (*Brown* 488). Students were "admitted into, not hired by" the university, and "their status as a graduate student assistant is contingent on their continued enrollment as students" (488). *Brown* Republicans made this point at least seven times (see 484, 485, 487, 488, 492). Likewise, Brame contrasted residents' relationships with their programs to their hospital moonlighting work, which, "whether performed at the same institution as their residency program or a different institution, is governed by a separate contract unrelated to their residency" (*BMC* 177). Hurtgen, who dissented in *BMC*, concurred in *NYU only* because "it is undisputed that working as a graduate assistant is *not* a requirement for completing graduate education" (*NYU* 1209). In addition, in *Brevard*, Republicans argued that the disabled janitors' permission to work was incidental to their participation in the rehabilitation program (*Brevard* 982, 983, 987) and, in *Brown*, reasoned that workers' receipt of pay was contingent on their statuses within nonmarket institutions: students were not paid for work, but received "financial support" "because they are students" (*Brown* 489, see also 488; *BMC*, 177).

Contractual Terms, Rational Accounting, and Exchange

The lack of evidence of the organizations' rational accounting in determining the terms of the agreements also evinced the absence of a bargained-for exchange to Republicans. The form of graduate student and resident compensation—stipends and tuition versus hourly wages—and its determination—by student status (*Brown*) and residency program year "as opposed to merit-based pay" (*BMC* 172)—evinced a "primarily educational" relationship (*Brown* 488, 489; see *BMC* 175). "[P]ayments are based on status" (*BMC* 177), and "the amount of stipend received is the same regardless of the number of hours spent performing services" (*Brown* 486, see also 485, 489). "We also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not 'consideration for work.' It is financial aid to a student" (488).

The source of funds and destination of monies from the sale of students' production to others also suggested a status-based accounting and lack of a payment/services exchange: graduate student funding was "at the discretion of each department and based on the availability of funds" (*Brown* 485). "[F]unds for students largely come from Brown's financial aid budget rather than its instructional budget" (489).[12] RA funding

12. While the *Brown* majority did *not* contest that the students were common law employees (*Brown* 491), Republican Schaumber did, contending that they were "not 'hired,'" their work was not "'for' the university," and their stipends were "not a quid pro quo for services rendered" (495 n.9).

came from "external grants from outside Brown" (485). Brame emphasized that Medicare subsidies helped fund residency programs and that "it is not clear that the entity which pays the stipend is in all cases the entity which is reimbursed for the services provided to the patient" (*BMC* 177).

Democrats sought to show that the relationships involved reciprocal expectations and thus an exchange meeting the agency standard. Graduate students had "expectations placed upon them other than their academic achievement, in exchange for compensation" (*Brown* 497, see also 497 n.13). *Brevard* dissenters noted that Brevard required disabled janitors to meet the same production standards as the nondisabled janitors who worked alongside them for the same hourly wages (*Brevard* 990–91).

Democratic opinions did not interpret contractual terms as status indicators. For example, *NYU* Democrats, quoting *Seattle Opera Ass'n* (2000), suggested that employment did not require rational accounting: "[T]o find individuals not to be employees because they are compensated at less than the minimum wage, or because their compensation is less than a living wage, contravenes the stated principles of the Act" (*NYU* 1207). Contrary to Republicans, graduate students' low wages (*Brown* 494), residents' "notoriously long hours" and the comparatively higher wages they received performing the same work while moonlighting (*BMC* 153, 156), and the *lack* of a rational relation between compensation and the value of workers' services were probative of employment.[13] *Brown* Democrats suggested that these contractual terms reflected students' weak bargaining power: "Graduate assistantships are modest, even at top schools. It stands to reason that graduate student wages are low because, to quote Sec. 1 of the Act, the 'inequality of bargaining power' between schools and graduate employees has the effect of 'depressing wage rates'" (*Brown* 494 n.7; see also *BMC* 153–54, 156; *NYU* 1207).

Democrats did not cite a property differential between workers and their organizations in referencing labor market dynamics—that is, their understanding *could* be consistent with employment's contractual dimension in which bargaining power is a function of relative supply and demand somehow independent of the distribution of productive property. Yet, by suggesting that contractual terms reflected a balance of power warranting Board intervention to correct substantively unacceptable outcomes, Democrats, in part, tendered exchange relations as evidence of relations of production, alluding to the Act's redistributive potential.

Republicans' status constructions mediated the contradictory transformation of these relationships by enabling the Republicans to avoid apprehending contractual terms as evidence of relations of production or unacceptable distributive outcomes that the Act should modify. For example, *Brown* Republicans suppressed employment's class dimension by interpreting graduate students' lack of employment benefits as evidence of status rather than a bargaining outcome reflecting students' unorganized position and lack of productive property (*Brown* 486).

13. However, *BMC* Democrats also argued that residents' receipt of benefits in common with the hospital's standard employees, for example, fringe benefits and sick leave, were "reflective of employee status" (*BMC* 160).

Employer Bargaining Agency

Republicans constructed the relationships in contradistinction to employment's contractual dimension by emphasizing the lack of voluntariness on the putative employer's part as well. They argued that a bevy of regulations and institutions—government regulations (see *Brevard* 982, 984), standards collectively determined by private employers (see *BMC* 176, 179–80), and production organized on an interenterprise basis (*BMC* 182)[14]—prescribed shared decision making for the putative employers or otherwise limited their individual bargaining agency. They suggested that because others governed the who, what, where, and when of the agreements, the organizations could not enter instrumental wage/labor exchanges based on their rational calculations as autonomous market participants. For example, Brame argued that the Act "presupposes that employment terms are under the control of the employer" (178), though "many of these subjects are governed by national standards imposed on hospitals, residency programs, and their faculty on a national basis by accreditation agencies" (179–80). The fact that ownership, program design and administration, and supervision were dispersed among several decision makers—a national accreditation council, attending physicians ("attendings"), the hospital, and the medical school—also negated an employment relationship (172, 176, 179, 182).

In contrast, *BMC* Democrats found it insignificant that residency programs were not perfectly autonomous: "[W]e note that there are often restrictions on bargaining due to outside influences, e.g., contracts an employer may have with other concerns. . . . An employer is always free to persuade a union that it cannot bargain over matters" (*BMC* 164).

Economic Conflict and Collective Bargaining Experience

To sustain their status interpretation of these relationships, Republicans had to dismiss or ignore the express economic conflict between the parties that precipitated the cases. *Brown* Republicans, for example, dismissed as irrelevant the dissent's suggestion that the "changing financial and corporate structure of universities may have given rise to graduate student organizing" because the putative employees were "students" and "academic reality" had not changed since the 1977 *St. Clare's* decision (*Brown* 492).

Democrats suggested that the conflict between the putative employees and employers over working conditions and pay was evidence of employment. *Brevard* Democrats noted that the disabled janitors were clashing with Brevard over "typical" employment matters, including health benefits, full-time job availability, and transportation reimbursement (*Brevard* 992). *Brown* dissenters argued that the "academy is also

14. Republicans' dispute with the organizations' limited bargaining agency is not particular to productive arrangements that integrate market and nonmarket relations but suggests that the Act should not apply to increasingly prevalent arrangements in which capital owners organize production on a "networked" basis (Davis 2009). Brame argued, for example, that "[c]ollective bargaining . . . presupposes a bipolar relationship between one employer and a relatively stable group of employees. By imposing the Act's alien processes on graduate medical education, the majority jeopardizes this delicate web of relationships" (*BMC* 182).

a workplace for many graduate students, and disputes over work-related issues are common" (*Brown* 497). Democrats also highlighted the prevalence and success of collective bargaining by graduate students and residents, including parties before the Board, with none of the consequences portended by the Republicans (see *BMC* 163; *Brown* 499).[15]

The Realm of Production

Using relational material from the production realm, Republicans imputed direct, sympathetic, intersubjective relations in production between the workers and organizations, and they constructed these relations as normatively hierarchical. They also highlighted workers' consumption of their own labor and the workers' failed standing as independent bearers of labor power. Democrats did not accent intersubjective relations, but focused on the workers' production of fungible services. They argued that competitive market dynamics shaped relations in production.

According to Marx and Habermas, a formally democratic, capitalist society tends to split the individual simultaneously into bourgeois and human being (Habermas 1991), or "egoistic" and "communal" being (Marx 2005). The latter inhabits a sphere of personal, subjective interactions, whereas market interactions are arm's-length, objective, and competitive (Habermas 1991).

Republicans' reconstruction of the relationships before them quashed this duality by locating them exclusively in an idealized, nonmarket sphere of civil society, akin to a phase of Habermas's (1991, 27) bourgeois "public sphere" as a domain of interaction for private, public-oriented persons free from government intervention. (As discussed below, however, a domestic-like hierarchy rather than equality marked Republicans' sphere.) This sphere was Republicans' foil to their understanding of employment as a contractual relationship consummated in the exchange realm (Table 1).

Democrats' reconstructions of the nonstandard work relationships partially recognized this duality. Rather than sort the relationships into "separate spheres" (Zelizer 2005, 22), Democrats suggested that the Act could help individuals negotiate intertwining commodified and noncommodified ties. They also appealed, however, to the Act's limited reach as an instrument of procedural equality to avoid directly engaging it.

Intersubjective Relations in Production

Republicans repeatedly evoked the sympathetic, direct, and individualized relationships between workers and putative employers in the productive process. They contrasted these relationships with their understanding of employment in the *exchange realm* as antagonistic, impersonal, and infected by material self-interest (Table 1). They

15. BMC's predecessor, Boston City Hospital, and the union had a collective bargaining relationship since 1969. The hospital was a public institution, so state law governed the relationship. The hospital's consolidation with a private institution placed the merged entity under federal jurisdiction. By the time the Board decided *Brown*, NYU and graduate students had reached a collective agreement.

also contrasted them with the supposedly indirect nature of employee/employer relationships in unionized workplaces (see *BMC* 178; *Brown* 488).

> [T]he educational process . . . is an intensely personal one. . . . not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. . . . [I]n many respects, collective treatment is "the very antithesis of personal individualized education." (*Brown* 489–90, citing *St. Clare's* 1002; see *BMC* 178)

Accordingly, they reasoned, these personal, individual relationships should not be subject to collective bargaining, which was based on "arms length" relationships (*Brown* 489).

Republicans emphasized workers' relationships with supervisors rather than with their organizations. For example, they focused on graduate student and resident relationships with faculty and attendings—not the university or residency program: "'It is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship.' Thus, the student-teacher relationship is based on the 'mutual interest in the advancement of the student's education,' while the employer-employee relationship is 'largely predicated on the often conflicting interests' over economic issues" (*Brown* 489, citing *St. Clare's* 1002; see *BMC* 178). "Although technically the principal investigator on a grant, the faculty member's role is more akin to teacher, mentor, or advisor of students" (*Brown* 285). *Brevard* Republicans emphasized janitors' relationships with trainers and counselors (*Brevard* 983, 986).

Organization of the Labor Process

Republicans attempted to show that the organizations designed their labor processes to meet workers' noncommercial interests rather than an interest in minimizing service provision costs (cf. Zatz 2008, 892). Attending physicians assigned clinical duties "based on the residents' demonstrated skill and educational needs," and assignments were coordinated with didactic lectures (*BMC* 174). These were "quite the opposite of employer assignments, which address the employer's needs . . . to achieve maximum output" (176). By contrast, "[m]oonlighting residents are assigned work based on usual considerations of efficiency and the employer's needs" (177, see also 172). Brame emphasized that third parties dictated that program design meet residents' "educational needs" (173, 174). *Brown* Republicans argued that while "undergraduate enrollment patterns play a role in the assignment of many TAs, faculty often attempt to accommodate the specific educational needs of graduate students" (*Brown* 485). "In the end, decisions over who, what, where, and when to assist faculty members as a TA generally are made by the faculty member and the respective department involved, in conjunction with the administration. These are precisely the individuals or bodies that control the academic life of the TA" (485).

Democrats sought to show that the market had already intruded on educational and rehabilitative relationships: competitive market forces shaped the labor process. "[B]usiness considerations" guided the student/university relationship (*NYU* 1207), and the genesis of graduate student teaching was in the university's attempt to cut costs (*Brown* 497, 498, see also 494, 500). TA assignments were based on university "instructional needs" and "tied to undergraduate enrollment" (497). *BMC* Democrats cited an amici brief noting, "modifications in Federal and state reimbursement programs, and the programs and policies designed to promote competition among health care providers, are generating new economic pressures" that "profoundly affect the work environment of house staff" (*BMC* 158). Thus, the Democrats reasoned that the hospital and university's interests as market actors selling services to patients and undergraduates shaped how they organized the labor process.

Controlling the Labor Process

Republicans interpreted the manner in which the organizations controlled the labor process as evidence against employment on two counts. First, the absence of a cost-efficient direction of labor indicated the putative employer was not a selfish, rational market participant. Second, sympathetic intersubjective relations were inconsistent with employment.

Brevard Republicans repeatedly argued that the absence of traditional discipline and supervision in the disabled janitors' labor process evinced a primarily rehabilitative relationship (*Brevard* 983, 986–87, 989). Disabled janitors worked under a "supervisory structure designed to maximize the rehabilitative and training aspects of the program" (983). As evidence that a cost-efficient direction of labor was missing, *Brown* Republicans likewise argued that RAs often performed research under the supervision of the same faculty who "teach or advise the graduate assistant student in their coursework or dissertation preparation" (*Brown* 489).

Brevard Republicans went further, noting that although the rehabilitation program "assigns its clients and nondisabled employees the same amount of work each day and expects a certain level of quality . . . the record reflects that clients are permitted to work at their own pace." They emphasized that "clients" received "counseling" for mistakes, while nondisabled janitors were subject to disciplinary procedures (*Brevard* 983).

In suggesting that the lack of penal supervision weighed against employment *even* when workers met production standards (Republicans note that disabled janitors were directed to repeat flawed work (*Brevard* 983), *Brevard* Republicans interpreted evidence consistent with "consent" to employer domination (see Burawoy 1979; Atleson 1983) as demonstrative of a nonmarket relationship. They overlooked the fact that "despotic" control is not the only means by which employers procure consent—employers frequently organize relations in production in ways that obscure the authority exercised and lead workers to perceive consent as a fulfillment of elective interests (see Burawoy 1979). Brevard's "counseling-oriented model of discipline" (*Brevard* 986)—and the fact that "problems are dealt with through additional training rather than discipline" (987)—was consistent with exploitation. Here, Republicans may appear to

understand alienation in the production realm as a feature of employment, thus recognizing its class dimension; however, in suggesting that the presence or absence of alienation depends on intersubjective relations, they divorce alienation from exploitation. Contrary to a class understanding of employment, this denies a connection between capitalist relations of production and relations in production.

An element of the agency definition of employment is that an individual work under another's right of "direction and control"; however, Democrats did not interpret this to require that the labor process be designed or directed according to a rational, cost-minimizing schedule or to require penal supervision. They found Brevard's imposition of production and quality standards on the disabled janitors indicative of employment (*Brevard* 990; see also *Brown* 495 n.9).

Mutual Interests and the Market

As indicated above, Republicans suggested and argued that the workers and their organizations had concrete mutual interests (see *Brown* 487, 489, 490; *Brevard* 985–86; *BMC* 178) and proffered this as evidence against an employment relationship: the "mutual interest of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship" (*Brown* 489, quoting *St. Clare's* 1002).

According to the Republicans, concrete mutual interests removed the relationships from the market sphere: persons come together in the market as buyers and sellers of commodities selfishly pursuing exogenous, irreducibly individual ends; therefore, market exchange resolves only in compromise (see Habermas 1991, 197–99). Parties to a successful exchange experience a meeting of minds as an intersection of the means by which they can each realize and express nongeneralizable interests—they do not realize concrete mutual interests. Evoking this trope, Republicans argue that the Act was intended to apply when parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*Brown* 488). The Act was "premised on the view that there is a fundamental conflict between the interests of the employers and employees" (*BMC* 178; *Brown* 487–88). Therefore, "educational concerns are largely irrelevant to wages, hours, and working conditions" (*Brown* 489), the items of competitive negotiation in the exchange realm of employment's contractual dimension.

Modes of conflict resolution also differ between market and nonmarket spheres. Citizens were to resolve competing, private interests in the market, leaving in the public sphere matters that could be resolved through reasoned debate, in their capacity as subjective, public-oriented persons (see Poggi 1978, 118–20; Habermas 1991). Republicans suggested that the mutual goals inherent in these educational and rehabilitative relationships should not be subject to the "'warfare,' including strikes and lockouts" contemplated by the Act (*BMC* 180, 182). "These tools also fit poorly with graduate medical education" (180). Republicans contrasted the relationships at issue with "arms-length economic relationships" in which "there can be areas of conflict between employers and employees that, if the parties cannot reach an agreement, can be resolved through a contest of economic strength" (*Brown* 985). Their denial of bargaining rights

to students and residents is evocative of Weber's (1959, 193) observation about status: "[S]tatus absolutely abhors that which is essential to the market: higgling. . . . [O]ccasionally it taboos higgling for the members of a status group in general."

Republicans again seem to interpret indicia of employee "consent" in employment's class dimension—necessary cooperation in production (Table 1, lower right)—as evidence of a nonmarket relationship. Cooperation in the productive process—a cooperation conditioned by relations of production—appears *solely* as "intensely personal" (*Brown* 489, quoting *St. Clare's* 1002), "inherently . . . individualized" (*BMC* 178) direct student/faculty, resident/attendings, and janitor/trainer relationships animated by a "mutuality of goals" (*Brown* 490, see also 487, 489, 490; *BMC* 178). Thus, absent are the "conflicting interests present in traditional, primarily economic employment relationships" (*Brevard* 985–86). This reshaping of the public/private distinction around mutual interests and personal relations nonetheless has similar consequences for workers—to "induce consent to hierarchy by disguising it" (Klare 1982, 1417).

Hierarchy and Dependence

Unlike Habermas's public sphere, the Republicans' sphere is hierarchical. Republicans invoked a contrast between the bureaucratic domination of the capitalist firm and patrimonial domination within a status-based entity by emphasizing the "inherently inequalitarian" (*BMC* 178), dependent nature of student/faculty, resident/attendings, and janitor/trainer relationships.

Republicans interpreted the putative employers' supervision and control as evidence of a noneconomic relationship rather than satisfaction of the agency standard's "direction and control" requirement: the disabled janitors were in the rehabilitative program because they could not yet "enter into the mainstream of economic society" (*Brevard* 988, see also 983). Brevard's "mission" was to help them "become independent members of the community" (982). Likewise, residents' patient care work was a "prelude to a physician's independent medical practice" (*BMC* 174). The purpose of care assignments was to enable residents "to leave the institution and practice medicine independently" (176, see also 172, 173, 180). However, residents were employees when performing the same work as moonlighters, given that they moonlighted "without the supervision and review imposed by their residency program" (177). Furthermore, graduate students were "guided, instructed, assigned, assisted, and corrected in the performance of their assistantship duties" by faculty (*Brown* 487, quoting *Adelphi University* 640). "TAs generally do not teach independently" (489). By contrast, Democrats interpreted the organizations' careful supervision of the workers as evidence that they labored under the "direction and control" of the payer, satisfying the agency standard.

By invoking a patrimonial sphere, Republicans reconceptualized employee subordination to employer property rights as "noneconomic" indicia consistent with employment's class dimension in the production realm. Republicans interpreted worker submission in patient care, building cleaning, and teaching or research as reflecting the desirable hierarchy of educational and rehabilitative relationships. Brame, for example, conflated the purported equality of the *exchange realm* in employment's contractual

dimension (Table 1, upper left) with employer property rights in the *production realm* when arguing that hierarchy in the productive process was incompatible with the Act's purposes (Table 1, lower right): The "employment relationship should ideally represent a bargain struck by equals with at least a rough parity of bargaining strength" (*BMC* 178), but "education by its very nature—the transfer of knowledge from those who know to those who don't—is ineradicably authoritarian to some degree" (178–79). "Because education requires inequality, the concept of bargaining parity on which the Act is based" is "simply inapplicable" (179). "[T]he teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of instruction" (178). Republicans refracted relationships of subordination between students and universities, residents and residency programs, and janitors and Brevard through the prism of a nonmarket sphere to appear as normative, paternal hierarchies between students and *faculty*, residents and *attending physicians*, and janitors and *trainers* and *counselors*. Republicans contrasted this hierarchy with the competitive equality in the exchange realm of employment's contractual dimension.

This patrimonial nonmarket sphere elided the relationship between relations *in* production and relations *of* production by denying a relationship between inequality in the exchange realm and inequality in production. By interpreting the employer's contract-based right to extract as much value as possible from the purchased commodity as a normatively hierarchical, nonmarket relationship, Republicans harnessed the remnants of status authority in the employment relationship that had been transformed into employer property rights. To return to Atleson's (1983, 15) point on employment's legal origins, the "alleged move from status to contract obscures the very special kind of contract that emerged"—a contract that afforded the buyer of labor services a property right in the seller.

Production?

Republican opinions minimized or ignored the value of services the workers produced. Apart from accentuating the absence of the liberal contractual ideal—such as a lack of rational accounting and the role of nonmarket institutions in directing labor market allocation processes—Republicans emphasized workers' consumption of graduate education, professional training, and rehabilitation in the course of laboring: "[C]linical services provided by the resident benefit the resident, by furthering his or her education, not the hospital" (*BMC* 176).[16] "[I]n light of the substantial costs of operating a residency program" it was not "clear that any of the parties to the transaction derives a net financial gain from the residents' clinical activities" (177).

While denying the workers capital valorization, Republicans did not seem to deny that workers produced services with exchange value or fungible services, however, despite the lack of an "exclusive market" contractual exchange: *Brevard* Republicans acknowledged that the federal base where the janitors worked previously contracted

16. The *BMC* majority found residents analogous to apprentices, who the NLRB recognized as employees. However, residents' educational consumption distinguished them from apprentices for Republican dissenter Brame (see *BMC* 180).

with a for-profit corporation for cleaning services (*Brevard* 982 n. 2). And, they noted that Brevard's disabled and nondisabled employees "perform the same janitorial and custodial tasks" and "work the same hours" (*Brevard* 983). However, Republicans emphasized the therapeutic value that the disabled workers received from janitorial work (983–84, 988, 989). As evidence of this value, they noted that disabled janitors routinely transitioned to unsheltered employment (983). Republicans referred to the janitors as clients—without quotes—emphasizing their receipt of a social service from Brevard. Democrats referred to the "supposed 'clients'" (992). Moreover, the educational value that graduate students received from teaching and researching was *Brown* Republicans' central thesis (*Brown* 483, 484, 485, 488, 489, 491, 492). Citing *St. Clare's* (1977), they emphasized the identity between graduate students' consumption of services by a service provider and their expenditure of labor power: research and teaching work "reflect[ed] the essence of what Brown *offers* to students" (488, emphasis added), was an "integral component of their academic development" (483), and "part and parcel of the core elements of the Ph.D. degree" (488). Brown's brochures "all point to graduate programs steeped in the education of graduate students through research and teaching" (484).

Democrats sought to show that the workers produced valuable, fungible services for their organizations (see *BMC* 159, 161; *NYU* 1206; *Brown* 497; see also Zatz 2009). *BMC* Democrats emphasized that residents performed the same tasks in their programs as they did while moonlighting (*BMC* 156). Rather than find that patient care work was "simply the means by which the learning process is carried out" (159, quoting *Cedars-Sinai* 253), they cited the "considerable services the Hospital receives from the house staff" (160–61). They rejected Brevard's contention that the janitors' work was only "part of the training of learning to be responsible" (*Brevard* 991 n. 9), noting, "in [Brevard's] view, the disabled janitors are engaged in 'training' just by performing their routine job assignments, such as mopping floors. [Brevard] did not explain why the nondisabled janitors' performance of the same routine tasks apparently is just 'work'" (991 n. 9). Democrats also emphasized students and residents' ability to work independently—residents even conducted surgery and wrote "do not resuscitate" orders (see *NYU* 1207; *BMC* 154).

Workers' receipt of abundant training, education, and rehabilitation through the labor process did not negate employee status for Democrats (see *BMC* 161; *NYU* 1207; *Brevard* 989, 990). "That they also obtain educational benefits from their employment does not detract from this fact" (*BMC* 161).

Republicans argued that the services workers received from their organizations *outside* of working that did not allegedly benefit the employers by helping the workers perform their duties, such as seminars (see *Brown*; *BMC*) and mental health counseling (see *Brevard*), weighed against employment. According to the Republicans, the provision of such services was "consistent with a rehabilitative, rather than profit-seeking, purpose" (*Brevard* 986). However, this rationale appears secondary to Republicans' arguments that what negated a finding of employment was workers' receipt of services *through* their expenditure of labor power.

Furthermore, except in the Democrats' majority *BMC* opinion, neither Republicans nor Democrats found decisive the relative time spent engaged in providing labor services versus engaged in other activities with the putative employer. *BMC* Democrats

found it "[m]ost noteworthy" that "house staff spend up to eighty percent of their time at the Hospital engaged in direct patient care" (*BMC* 160). Republican dissenter Brame did not find this significant, since, as noted, residents' exchange relations suggested status, and residents received professional training by working. In response to NYU's contention that graduate students spent only 15 percent of the time in their programs working as assistants, *NYU* Democrats argued that "this ignores the critical and undisputed evidence that the graduate assistants, just like the house staff, perform work for their Employer, under their employer's control" (*NYU* 1207). *Brown* Republicans argued that graduate students' "principal time commitment at Brown is focused on obtaining a degree" (*Brown* 492), but, as noted, primarily emphasized students' receipt of education through their work.

For Democrats, the provision of services for pay under the organization's direction and control evinced employee status, regardless of the relative time spent working or the benefits received outside of working or through working. For Republicans, workers' consumption of their own labor, their putative dependence, and the design and direction of the labor process around their individualized, nonmarket interests showed that the workers were not engaged in commodity production or exchange: They never parted with the use value of their labor to realize its exchange value. Their work produced reflexive use value, or "concrete labor" (Habermas 1975, 66)—labor oriented toward use values.

Collective Bargaining: Adulteration or Differentiated Ties?

As discussed above, Republicans suggested that collective bargaining was incompatible with individualized, sympathetic relationships. They also argued that collective bargaining would interfere with their necessary hierarchy, impeding parties' mutual, public goals: "imposing" collective bargaining on Brevard's relationship with its "clients" could "interfere with the rehabilitation process itself" (*Brevard* 988) and holding residents to be employees would "be revolutionary" because it would subject educational decisions to the Act (*BMC* 181).

Republicans reconceptualized all employer property rights that had become intertwined with noncommodified relational ties as noneconomic issues, including "educational decisionmaking" (*Brown* 489) and "traditional academic freedoms" (490), for which "collective bargaining is not particularly well suited" (490). Citing *St. Clare's*, *Brown* Republicans argued, "collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions" (490).

Democrats explicitly criticized Republicans for sweeping all employer property rights under nonmarket rubrics: "[T]he majority defines 'academic freedom' so broadly that it is necessarily incompatible with *any* constraint on the managerial prerogatives of university administrators" (*Brown* 500, emphasis in original). Democrats acknowledged the intertwining of market and nonmarket relational strands: "economic concerns have already intruded on academic relationships" (500). *Brown* dissenters critiqued the majority for "seeing the academic world as somehow removed from the economic realm

that labor law addresses—as if there was no room in the ivory tower for a sweatshop" (494).

Further, Democrats suggested that the Act could assist parties in negotiating "differentiated ties" (Zelizer 2005, 298): collective bargaining could clarify different relational strands, strengthen noneconomic relational strands, and assist organizations in meeting noncommercial goals. They argued that collective bargaining was not likely to harm medical education or patient care (see *BMC* 164–65), encroach on the university's academic freedom (see *NYU* 1208), or impede rehabilitation (see *Brevard* 989–95). *Brown* Democrats accused the majority of eliding the fact that bargaining would occur between "representatives of the university and graduate students' unions, not individual mentors and their students" (*Brown* 494). They cited studies suggesting that "clarification of roles and employment policies can *enhance* mentoring relationships" (499, see also 500). Likewise, *BMC* Democrats noted that the residency program had even used collective-bargaining agreements to satisfy accreditation standards (*BMC* 157).

Republicans depicted worker organization as the "group treatment of represented individuals" that would usher indirect, abstract relations into rehabilitative and educational processes (*Brown* 490); Democrats argued that collective bargaining was "dynamic" (*BMC* 164; see also *NYU* 1208, citing *BMC*) and "capable of adjusting to new and changing work contexts and demands" (*BMC* 165). *Brevard* dissenters suggested that union organization could create a collective forum for developing civic competencies. They reasoned that applying the Act to the disabled janitors would further federal laws seeking to incorporate disabled persons into mainstream society: "The process of learning about and evaluating the advantages and disadvantages of union representation and collective bargaining involves these skills. Should such employees actually select union representation, they might achieve even greater gains by participating in bargaining, grievance processing, and internal union governance" (*Brevard* 995, see also 989).

Klare (1982, 1405) argued that following World War II, legal decision makers would invoke labor law's public/private distinction to limit employee rights to concerted action by appealing to a fictive public opinion, "an illusory moral sentiment of an illusory community." An influential scholar, for example, justified the Taft-Hartley Congress's antilabor policies as reflecting a "deep-seated community sentiment" against work stoppages (1405). In the present cases, by locating the relationships at issue in spheres of imputed educational and rehabilitative consensus, Republicans similarly justified their refusal to facilitate a private ordering pursuant to the requests of the workers (cf. Habermas 1991, 199).

Democrats defended the Act's applicability to "differentiated ties" by appealing to voluntarism. They suggested that Republicans were not recognizing social actors' mutual interests in protecting noncommodified relationships and public goals, but were confounding the expressed interest of one set of parties—workers. Democrats argued that graduate students cared about academic freedom and were unlikely to bargain it away (*Brown* 500). Further, the Democrats maintained that to assume that residents would imperil their education through collective bargaining "gives little credit to the intelligence and ingenuity of the parties" (*BMC* 165). *BMC* Democrats also criticized Brame for suggesting that endowing residents with the rights of

statutory employees "would make them any less loyal to their employer or to their patients" (164). Likewise, *Brevard* dissenters argued that the majority opinion was "paternalistic. . . . [D]isabled workers are capable of evaluating the merits of union representation'" (*Brevard* 995). Republicans were "denying these disabled workers the freedom to decide for themselves" (994), and exposing the workers, should they take collective workplace action, to legal employer retaliation, which would not likely benefit their rehabilitation (995). Democrats indicated that organized workers and employers should have the right to determine the content and contours of their relationships (see *BMC* 164).

These Democratic arguments appear to recognize a role for the Act in the contemporaneous double movement (cf. Polanyi 1957) proposed above—that the Act might assist workers not only in struggles to determine the terms of commodification but also in struggles to preserve and structure decommodified relational strands. *Brown* dissenters quoted extensively a scholarly study showing the "context" of graduate student unionization that suggests that the Democrats understood these struggles as impossible to segregate institutionally: As university "mega-complexes" adopted "management strategies that entailed belt-tightening and restructuring of the academic workplace," "[e]xpansion of doctoral degree production has continued nonetheless. . . . The discrepancy between ideals and realities prompt graduate students to consider unionization as a viable solution to their concerns and an avenue to redress their sense of powerlessness." "Among the primary reasons for graduate student unionization is the lengthened time required to complete a degree" (*Brown* 498).

The Tension between Property and Contract

The examination of Republicans' and Democrats' construction of employment's social content and their reconstruction of the relationships before them reveals differences in how they attempted to mediate the identity between employer property rights over production and the "terms and conditions of employment" that the Act subjects to negotiation. As discussed, Republicans navigated this stormy interface of employment's class and contractual dimensions by reconceptualizing employer property rights as nonmarket educational and rehabilitative prerogatives, thus withdrawing them from the domain of negotiation protected by the Act. Democrats rendered the contract/property tension less salient by appealing to voluntarism and the many successful collective bargaining relationships involving students and residents (see *BMC* 163; *Brown* 493, 499). Democrats also avoided the tension by appealing to employers' ability to protect their property and the Act's rationales of procedural justice and industrial peace (rather than substantive justice). *Brown* dissenters noted, for example, that graduate students and NYU had signed a contract with a "management and academic rights" clause (*Brown* 499) following the *NYU* decision. In response to NYU's foreboding that collective bargaining would harm academic freedom, Democrats contended that the Act does "not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation . . . is likely to promote industrial peace" (*NYU* 1208, quoting *Jones & Laughlin* 45).

CONCLUSION

The long-term, direct, full-time, wage-labor bargain between one employer and a group of employees within proprietary firm boundaries was briefly—between the 1950s and 1970s—the politically dominant, concrete form that relations in production assumed within capitalist relations of production in the United States. Today, decision makers must determine how the rationales of the NLRA apply to a variety of expanding and contradictory labor/capital configurations, including those in which individuals receive services from a party in their capacity as nonmarket actors at the same time that they expend labor power for payment under the direction and control of that party.

In arranging relational elements to determine whether graduate students, medical residents, and disabled persons in sheltered workshops were NLRA employees, Board members constructed employment's social content as a legal-practical relation. Their constructions mediated the contradictory imbrication of wage-labor and noncommodified relations within these nonstandard work arrangements, thereby tending to hide or reveal employment's class dimension and to promote or suppress the Act's redistributive potential as an instrument of substantive justice.

As relationships between sellers and buyers of labor services permeate spheres of life formerly reserved for relatively noninstrumental interchange, the Republican opinions in *BMC*, *Brevard*, and *Brown* represent an attempt to reconceptualize as "noneconomic" a bundle of nonstandard work arrangements. Republicans sought to render the contradictory, partial transformation of these relations less salient by denying their sociolegal ambiguity. Using relational material from the exchange and production realms of employment, they reconstructed these work arrangements as status relations in a nonmarket—and thus noneconomic—sphere of civil society marked by normative hierarchy, concrete and mutual interests, and sympathetic personal relationships. In contradistinction, they constructed employment as an "exclusive market" relationship (Zatz 2008), or contractual relationship consummated in employment's exchange realm (see Table 1). To distinguish the market from a domestic-like public sphere, Republicans elaborated liberal motifs and interlaced them with indicia of the common law's assimilation of household status authority into an egalitarian contractual regime.

Their interpretation seemed to deny the Act's potential to realize substantive justice through redistribution. Republicans apprehended neither the terms of the employment contract nor relations *in* production as evidence of relations *of* production—a bargaining outcome inscribing relative power and property differences. Neither wages, hours, and working conditions, nor workers' attempts to organize around these issues, provided evidence of unequal bargaining power that would warrant Board intervention. If all contractual terms and indicia of employer property rights are merely status markers and evidence of a noneconomic relationship, bargaining power seems inscrutable. Republicans' position recalls the liberal trope that bargaining power is a function of "natural" supply and demand, as well as negotiating wit, and not resultant of a relationship between relatively propertyless sellers of labor services and organized capital.

Republicans inverted labor law's paradigmatic public/private distinction to render state intervention *only* appropriate in the market. Rather than "positing a 'private' domain of life that is not presumptively constrained by democratic norms" (Klare 1982,

1419), Republicans posited a "public" domain that was not to be so encumbered by the Board "injecting collective bargaining" (*Brevard* 988) into it. In recasting a public/private distinction to argue that education and rehabilitation—rather than industry—could "only function on a largely authoritarian basis" (Klare 1982, 1417), Republicans presented their opinions as state *inaction* that prevented instrumental rationality from adulterating these relationships rather than as state intervention protecting employer property rights against worker self-determination.

In attempting to apply the agency standard without the restrictions of an "exclusive market," Democrats filled the social content of employment with productive work criteria. They attempted to show that the workers were engaged in commodity production as, and for, market actors, regardless of their receipt of valuable services through their work. Their opinions came closer to acknowledging employment's class dimension by acknowledging a potential link between relations of production and relations in production.[17] Democrats suggested that competitive service markets (and, in *Brown*, labor markets) shaped workers' contractual terms and labor processes. They also argued that economic concerns prompted the disabled janitors, graduate students, and residents to organize.

Democratic opinions attempted to make less salient the contradictory transformation of these relationships by recognizing their intertwining market and nonmarket strands and proposing the institution of collective bargaining as a way for parties to negotiate "differentiated ties" (Zelizer 2005). Their opinions suggest an opening for protecting nonstandard workers under the Act on the basis that, today, boundaries between struggles to decommodify social life and struggles over the terms of commodification are increasingly blurred.

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17. As noted previously, only in a footnote did Democrats expressly reference the workers' unequal bargaining power (see *Brown* 494 n.7).

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