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### Employment Law and Social Equality

Samuel R. Bagenstos

*University of Michigan Law School, sambagen@umich.edu*

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EMPLOYMENT LAW AND SOCIAL EQUALITY

Samuel R. Bagenstos\*

ABSTRACT

*What is the normative justification for individual employment law? For a number of legal scholars, the answer is economic efficiency. Other scholars argue, to the contrary, that employment law protects against (vaguely defined) imbalances of bargaining power and exploitation. Against both of these positions, this paper argues that individual employment law is best understood as advancing a particular conception of equality. That conception, which many legal and political theorists have called social equality, focuses on eliminating hierarchies of social status. Drawing on the author's work elaborating the justification for employment discrimination law, this paper argues that individual employment law is justified as preventing employers from contributing to or entrenching social status hierarchies – and that it is justifiable even if it imposes meaningful costs on employers.*

*The paper argues that the social equality theory can help us critique, defend, elaborate, and extend the rules of individual employment law. It illustrates the point by showing how concerns about social equality, at an inchoate level, underlie some classic arguments against employment-at-will. It also shows how engaging with the question of social equality can enrich analysis of a number of currently salient doctrinal issues in employment law, including questions regarding how the law should protect workers' privacy and political speech, the proper scope of maximum-hours laws and prohibitions on retaliation, and the framework that should govern employment arbitration.*

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\* Professor of Law, University of Michigan Law School. I presented an early version of this paper at the Seventh Annual Colloquium on Current Scholarship in Labor and Employment Law, and I very much appreciate the comments and suggestions made by colloquium participants. Thanks as well to Andrea Taylor and Jennifer Utrecht for their helpful research assistance.

EMPLOYMENT LAW AND SOCIAL EQUALITY

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INTRODUCTION

What is the normative justification for individual employment law?<sup>1</sup> Why should the law regulate the employment relationship in any way distinct from any other contractual relationship? In order to determine what sorts of regulations the law should impose on the employment relationship, we need to answer these questions.

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<sup>1</sup> When I refer in this paper to “individual employment law,” or the shorthand “employment law,” I refer to those legal doctrines that govern the employment relationship but that do not prohibit group-based discrimination (which would be “employment discrimination law”) and do not regulate unionization and collective bargaining (which would be “labor law”). For an argument that distinctions between these three pillars of workplace law are increasingly dissolving—a dissolution to which my argument would, at one level, contribute—see Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163 (2007).

For a number of legal scholars, notably Dean Stewart Schwab and Professor Alan Hyde, the answers to these questions are straightforward. Individual employment law, these scholars argue, is justified if, and to the extent that, it serves the goal of economic efficiency.<sup>2</sup> Employment law rules should thus be explained, assessed, and if necessary reformed, based on whether they make labor markets more efficient.

In line with that argument, employment law scholarship fairly drips with economic-efficiency analysis. The number of employment law articles relying on economic arguments is far, far too numerous to cite or even count them all. But let me just note a couple of telling data points. A leading casebook on employment law employs economic efficiency as its first “strong unifying theme[,]” and it “attempts to use economics to relate seemingly disparate issues and to explore issues in a rigorous way.”<sup>3</sup> Leading defenses and critiques of employment law’s baseline principle—the at-will rule—rely heavily on economic analysis.<sup>4</sup> Indeed, one can find leading scholars offering economic analyses of virtually any employment-law problem.<sup>5</sup> Although much scholarship relating to particular employment-law issues continues to take the form of traditional doctrinal analysis, it is fair to say that economic efficiency provides the only *overarching* normative theory of employment law.

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<sup>2</sup> See Alan Hyde, *What is Labour Law?*, in *BOUNDARIES AND FRONTIERS OF LABOR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 37 (Guy Davidov & Brian Langille, eds., 2006); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 *IND. L.J.* 29 (2001). See also Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 *EMPLOYEE RTS. & EMPLOYMENT POL’Y J.* 87, 89 (2006) (arguing that employment legislation is “typically adopted when market failures”—such as “inelasticity in the supply of labor; collective action problems among workers; low trust and opportunism that prevent the formation of efficient long-term contracts; and information asymmetries”—“prevent atomized markets from reaching efficient results”).

<sup>3</sup> STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS* 10 (5th ed. 2012).

<sup>4</sup> See, e.g., Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 *UCLA L. REV.* 1, 13-14 (2010); Richard A. Epstein, *In Defense of the Contract at Will*, 51 *U. CHI. L. REV.* 947 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Retire Wrongful Discharge Law*, 74 *TEX. L. REV.* 1901 (1996); Cass R. Sunstein, *Switching the Default Rule*, 77 *N.Y.U. L. REV.* 106, 120-122 (2002).

<sup>5</sup> For a recent example, see CHRISTINE JOLLS, *RATIONALITY AND CONSENT IN PRIVACY LAW* (unpublished manuscript, on file with author) (discussing worker privacy protections). For an older example, see Richard McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 21 (1992) (discussing workplace safety protections).

To the extent that scholars challenge economic efficiency as the normative justification for employment law, they tend to argue that the government should regulate the employment relationship in order to rectify imbalances of bargaining power between employers and employees. Employment law, in this view, “[p]rotect[s] the weaker party to the employment contract” against “exploit[ation].”<sup>6</sup> As I argue below, the asymmetric vulnerability of (most) employers and (most) workers is an important building block in justifying employment law. But the concept of unequal bargaining power is notoriously slippery.<sup>7</sup> And the best arguments for imposing duties on employers focus not on fairness to *individual* employees but on the systemic effects—in and out of the workplace—of allowing employers to engage in particular practices.

In this paper, I offer a normative theory of individual employment law that focuses on these sorts of systemic effects. That theory draws on my earlier work that offered a normative justification for employment *discrimination* law.<sup>8</sup> In that earlier work, I argued that employment discrimination law serves the goal of advancing social equality. Although employment discrimination law imposes undeniable costs on employers, I argued that those costs are justified, because employers can properly be required to forego some profit in order to avoid contributing to a system of social inequality.

A very similar argument, I contend, provides a justification for individual employment law. Individual employment law, I argue, can be profitably understood as pervasively promoting social equality. Social equality, as described by a number of scholars, seeks “a society in which people regard and treat one another as equals, in other words a society that is not marked by status divisions such that one can place different people in hierarchically ranked categories.”<sup>9</sup> Specific employment-law

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<sup>6</sup> Stewart J. Schwab, *The Law and Economics Approach to Workplace Regulation*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 91, 111 (Bruce E. Kaufman, ed., 1997) (describing the dominant view “[o]utside the law-and-economics camp”).

<sup>7</sup> See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 615-620 (1982).

<sup>8</sup> See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837-870 (2003).

<sup>9</sup> David Miller, *Equality and Justice*, 10 RATIO 222, 224 (1997). For other recent elaborations of the theory, see Carina Fourie, *What is Social Equality? An Analysis*

doctrines, I argue, can be profitably elaborated, assessed, and critiqued by reference to that conception of equality.

When applied to employment discrimination law, the notion of social equality has had a distinctly group-oriented cast. In my own work on employment discrimination and social equality, for example, I argued that antidiscrimination law should be understood as ensuring that socially salient racial, gender, disability, or other groups do not experience stigma or systematic disadvantage.<sup>10</sup> That, I explained, is what justifies the law's protection of particular classes and prohibition of particular classifications.<sup>11</sup>

But outside of the antidiscrimination precinct, individual employment law does not protect particular classes or axes of identity. Its protections are, in an important sense, universal.<sup>12</sup> The social equality that individual employment law can protect is also universal. It targets not merely those practices that entrench caste-based deprivations but also those practices that would tend to undermine *any* worker's status as an equal to his or her employer, boss, or supervisor. When we explore the application of employment law outside of the discrimination context, we will find that concerns about social equality – although not named as such – lie at the heart of the questions the doctrine asks and answers.

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*of Status Equality as a Strongly Egalitarian Ideal*, 18 RES PUBLICA 107 (2012); T.M. SCANLON, WHEN DOES EQUALITY MATTER? (unpublished manuscript, on file with author). For a recent application to tort law, see Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243 (2011). Other scholars have used the labels "equal citizenship," e.g., Kenneth L. Karst, *The Supreme Court, 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); "social citizenship," e.g., T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); "democratic citizenship," e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 276-278 (1983); or "democratic equality," e.g., Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 289 (1999); to refer to roughly the same idea.

<sup>10</sup> See Bagenstos, *supra* note 8, at 839-840.

<sup>11</sup> See *id.* at 846-848.

<sup>12</sup> A focus on bolstering the rules of individual employment law thus responds to calls for universalistic social-welfare interventions, see, e.g., SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 143-145 (2009), and in particular for interventions in the employment relationship that focus on social class as much as on other group identities, see, e.g., Forbath, *supra* note 9; but cf. Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, \_\_\_ U. TORONTO L.J. \_\_\_ (forthcoming) (arguing that labor and employment law should not entirely abandon the selective approach in favor of a universalistic one).

This is not to say that employment law's rules, as currently structured, always do promote social equality. Indeed, one of the benefits of a social-equality focus is that it offers a critical lens through which we can examine current doctrine. When viewed through that lens, many of today's employment-law rules come up short. But a focus on social equality helps to show that the seemingly disparate critiques of a wide array of doctrines can be profitably understood as stemming from the same underlying goal. Although the general principle of social equality can hardly dictate answers to specific doctrinal questions, it can orient critiques of the current doctrine and ground a case for reform. Or so I hope to show.

I do not, of course, write on a completely clean slate here. In an article on the diverse philosophical foundations of labor and employment law, Dean Horacio Spector devoted four pages to arguing that what he called "equal autonomy" – roughly what I call social equality – offered one of the more promising normative bases for regulation of the workplace.<sup>13</sup> My project here also has undeniable affinities with Professor Noah Zatz's argument that the minimum wage – a paradigm individual-employment regulation – can be justified in civil rights terms.<sup>14</sup> Indeed, Professor Zatz expressly analogized to my earlier antidiscrimination work in support of his argument.<sup>15</sup> Professor Aditi Bagchi also has argued for taking social equality into account in employment law, though she does not offer social equality as an overarching theory of the law in this area.<sup>16</sup> My project has an affinity, too, with Professor David Yamada's argument "that human dignity should supplant 'markets and management' as the central framework for analyzing and shaping American employment law,"<sup>17</sup> – though I think that

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<sup>13</sup> See Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1144-1147 (2006). Professor William Forbath has similarly shown how ideas of social equality played a crucial role in the adoption of (collective) labor law in the United States. See Forbath, *supra* note 9, at 59-60, 69-70.

<sup>14</sup> See Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 5 (arguing that "ongoing resistance to economic reductionism in the realm of civil rights – as occurs in antidiscrimination law – is forging intellectual tools of wider significance" that help us see that economic "analysis arguably misses the point" when justifying the minimum wage).

<sup>15</sup> See *id.* at 42-43.

<sup>16</sup> See Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579.

<sup>17</sup> David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 524 (2009).

social equality, rather than the more multifaceted concept of human dignity, offers a more helpful organizing principle.<sup>18</sup> And it resonates with Professor Richard Michael Fischl's argument that "forthrightly pursuing [workplace law] reform in the name of social values such as democratic and humane ordering" is "a more promising starting point than casting our lot with the supposed laws of supply and demand."<sup>19</sup> But this paper represents, I think, the first systematic effort to describe and defend a social equality theory of individual employment law and to sketch its implications for an array of employment-law doctrines.

My argument proceeds as follows. Part I sets forth the basic normative argument for a social equality theory of employment law. In that part, I first describe the notion of social equality and defend it as an attractive conception of equality. I then turn to examining what sorts of social and institutional practices social equality demands. Finally, I discuss some important limitations of the social equality principle, with a particular focus on employers' interests in avoiding costly regulation.

Part II examines how social equality can help us understand, explain, and critique a wide variety of employment-law doctrines. In that part, I first show how social equality concerns underlie some classic critiques of the employment-at-will rule. I then explain how social equality illuminates a number of enduring and currently hot debates in the employment-law field, including those regarding workers' privacy, out-of-work political speech, and whistleblowing, as well as the role of arbitration in resolving employment disputes and, finally, the coverage of maximum-hour legislation. As I hope to show, employment law pervasively implicates questions of social equality. I end with a brief conclusion.

## I. A SOCIAL EQUALITY THEORY OF EMPLOYMENT LAW

In an article published a decade ago, I argued that employment discrimination law is justified because it prohibits employers from contributing to entrenched social inequalities.<sup>20</sup> I contended that the goal of antidiscrimination law, rather than

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<sup>18</sup> Cf. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (describing various conceptions of dignity in American law, of which equality is only one).

<sup>19</sup> Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market*, 94 MARQ. L. REV. 947, 957-958 (2011).

<sup>20</sup> See Bagenstos, *supra* note 8, at 837-870.

enforcing a rule of interpersonal ethics, was to eliminate a system that entrenched subordination and occupational segregation—key threats to social equality.<sup>21</sup> Employer discrimination, of course, is a central component of such a system. I argued that it was fair to impose liability on a discriminating employer—at least where the employer “can avoid contributing to the social harms of subordination at a reasonable cost”—because such an employer is at fault: “[H]e would rather retain some personal benefit (be it the satisfaction of a taste for discrimination, or the realization of dollars-and-cents profits) than avoid contributing to a subordinating system.”<sup>22</sup> I argued that this justification provided support not only for prohibitions on animus-based discrimination but also for prohibitions on “rational” intentional discrimination—and even for requirements of reasonable accommodation.<sup>23</sup>

In this part, I argue that a roughly parallel argument can be made to justify—and elaborate and evaluate the rules of—individual employment law. I contend that we should understand the goal of individual employment law, like the goal of employment discrimination law, as promoting social equality. But the threats to social equality are different outside of the discrimination context. Where employment discrimination law targets the threats to social equality caused by occupational segregation and group-based subordination, individual employment law should be understood as targeting the threat to social equality posed by a boss’s ability to leverage her economic power over workers into a more general social hierarchy in and out of the workplace. As I show in Part II below, employers have numerous opportunities to exploit this sort of leverage. Many of the key debates in employment law—both the enduring debates and those that are especially “hot” today—can be well understood as focusing on this social equality concern. Just as in the employment discrimination context, the employer is in the best position to avert these threats to social equality, for it is the employer’s acts that construct and entrench a system of social hierarchy. And as with employment discrimination law, individual employment law, properly construed, imposes only a reasonable burden on employers to counteract these threats.

In the remainder of this part, I flesh out that argument. Section A offers a general description and defense of the concept of

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<sup>21</sup> See *id.* at 839-844.

<sup>22</sup> See *id.* at 858.

<sup>23</sup> See *id.*, *passim*.

social equality as it has been articulated by legal and political theorists. Section B draws out what social equality demands of legal and social institutions, with a particular focus on how those demands play out beyond the context of group-based stigma and subordination that has been the major focus of social equality advocates in the legal academy. Finally, Section C discusses the limits on what social equality can legitimately demand of employers.

#### A. *A Description and Defense of Social Equality*

At its most fundamental level, social equality is the idea that—regardless of the various material inequalities that are pervasive and may be inevitable—each of us deserves to be treated as an equal member of our community.<sup>24</sup> We each are thus equally entitled to participate fully in the public life (political and civic) of our democratic republic. We are entitled to be “free from domination.”<sup>25</sup> And we each are entitled to equal “deference or regard”<sup>26</sup> in our everyday relations with others in the community. As Professor Walzer puts it, “[t]his is the lively hope named by the word *equality*: no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves.”<sup>27</sup> Professor Karst captures the point by quoting the following (aspirational) line from Simone de Beauvoir: “[T]he rich American has no grandeur; the poor man no [servility]; human relations in daily life are on a footing of equality.”<sup>28</sup> Perhaps this form of social equality finds its ultimate expression in George Orwell’s observations of Barcelona early in the Spanish Civil War: “Waiters and shop-walkers looked you in the face and treated you as an equal. Servile and even ceremonial forms of speech had temporarily disappeared.”<sup>29</sup> Borrowing from Professor Walzer and philosopher Gerald Gaus, Professor Jason Solomon refers to “a socially-equal society” as “a ‘society of

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<sup>24</sup> See, e.g., WALZER, *supra* note 9, at 277 (describing “[d]emocratic citizenship” as a status in which “[t]here is one norm of proper regard for the entire population of citizens” and in which the norms of respect depend not on social position but on treating ourselves and others as “full and equal member[s]” or “active participant[s]” in the community); Karst, *supra* note 9, at 5 (“The essence of equal citizenship is the dignity of full membership in the society”).

<sup>25</sup> WALZER, *supra* note 9, at xiii.

<sup>26</sup> Karst, *supra* note 9, at 6.

<sup>27</sup> WALZER, *supra* note 9, at xiii.

<sup>28</sup> Karst, *supra* note 24, at 11 (quoting SIMONE DE BEAUVOIR, *AMERICA DAY BY DAY* 261 (1953)).

<sup>29</sup> GEORGE ORWELL, *HOMAGE TO CATALONIA* 5 (1952).

misters,” where . . . everyone from the gardener to the CEO is addressed as ‘mister’” – in other words, a society marked by “the absence of any natural ranking of individuals into those who command and those who obey.”<sup>30</sup>

Why should the law serve this conception of equality? A variety of theoretical perspectives might lead one to find social equality attractive. From a Kantian liberal perspective, one might start from the premise that each individual is of “equal moral worth”<sup>31</sup> and deserves “equal concern and respect.”<sup>32</sup> As Professor Fourie argues, “[a] rather straightforward interpretation of equal moral worth would be likely to consider it incompatible with treating people as inferior or superior.”<sup>33</sup> One might get to the same place from a communitarian perspective. The argument would run that all members of our community deserve equal respect, not by virtue of anything intrinsic to the moral worth of persons, but instead because of their membership in the community.<sup>34</sup> One might also get there by way of the American Republican tradition, which opposed domination, subordination, and hierarchy, and which found expression – among other places – in the adoption of the Thirteenth Amendment.<sup>35</sup>

In legal and philosophical writing, the conception of social equality is typically deployed as an argument against practices that impose group-based harm. This group-based understanding of social equality underlies many commentators’ defenses (including my own) of antidiscrimination law.<sup>36</sup> Professor Karst argues that “even in these applications, the main energies released by the equal

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<sup>30</sup> Solomon, *supra* note 9, at 254 (quoting WALZER, *supra* note 9, at 252; and GERALD GAUS, POLITICAL CONCEPTS AND POLITICAL THEORIES 143 (2000)).

<sup>31</sup> *E.g.*, Anderson, *supra* note 9, at 312; Fourie, *supra* note 9, at 118.

<sup>32</sup> *E.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 6 (2000); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198-199, 273 (1977); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 6 (2008).

<sup>33</sup> Fourie, *supra* note 9, at 118.

<sup>34</sup> Professor Walzer’s arguments tend in this direction, *see* WALZER, *supra* note 9, at 276-277, as do Professor Sandel’s related arguments against certain sorts of commodification. *See*, for example, Chapter 1 of MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012), which I think is best understood as making a communitarian argument that the queue is often a fairer means of distribution than the market.

<sup>35</sup> *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012).

<sup>36</sup> *See, e.g.*, ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996); Karst, *supra* note 9. I cite other examples in Bagenstos, *supra* note 8, at 839-844.

citizenship principle are individualistic.”<sup>37</sup> Whether or not one agrees with *that* assessment, it should be evident that the idea of equal citizenship or social equality has substantial applications even outside of the context of group-based discrimination. Practices that entrench hierarchies based on socio-economic class, for example, clearly raise social equality concerns,<sup>38</sup> as do practices that create other social-status hierarchies.<sup>39</sup> In Part II, I argue that many employment practices—even those that draw no group-based distinctions—raise social equality concerns of the latter sort.

To be sure, one can imagine objections—from both directions—to a focus on social equality. On the one hand, one might argue that social equality does not go far enough as a theory of equality. Any fully satisfying conception of equality, one might argue, must focus on distribution of material goods.<sup>40</sup> And, indeed, in American political discourse, the supporters of social equality have included neoliberals who have used the conception to argue against redistributive welfare policy.<sup>41</sup>

There is much to this point, though political and legal philosophers have gone around and around in debating which of these theories of equality deserves our allegiance. Scholars such as Professors Elizabeth Anderson and Carina Fourie have argued that what I call social equality is in fact the most attractive specifically *egalitarian* conception of equality.<sup>42</sup> Moreover, Professor David Miller and others have narrowed the practical gap between social and distributive equality theories by emphasizing the degree to which a more equal distribution is necessary to secure social equality.<sup>43</sup> But these arguments are not essential to my position. I

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<sup>37</sup> Karst, *supra* note 24, at 8. In a recent article, Professor Karst brings the point full circle by arguing that protecting fundamental individual liberties can advance the equal-citizenship status of members of disadvantaged and stigmatized groups. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007).

<sup>38</sup> See, e.g., Forbath, *supra* note 9.

<sup>39</sup> See Miller, *supra* note 9, at 232.

<sup>40</sup> For an argument against distributive equality as the theory underlying employment discrimination law, see Bagenstos, *supra* note 8, at 840-841.

<sup>41</sup> E.g., MICKEY KAUS, *THE END OF EQUALITY* (1992).

<sup>42</sup> See Anderson, *supra* note 9, at 312-313; Fourie, *supra* note 9, at 108.

<sup>43</sup> See, e.g., Miller, *supra* note 9, at 235 (“If we want our society to be egalitarian, then we will try to shape our distributive practices so that the emergence of hierarchy is discouraged; in particular we will try to avoid the emergence of large-scale, cumulative inequalities of advantage which make it difficult for people to live together on terms of equality, even if politically they are all defined as equals.”).

do not argue that social equality is the only or even the most attractive conception of equality, only that it is the one that is most relevant to understanding, elaborating, and critiquing the body of individual employment law. For that purpose, it is enough that social equality represents at least one attractive conception of equality, and that it is a conception that employment law is well positioned to serve.

As I argue in Part II, the law governing individual employment relationships is in fact especially well positioned to serve the goal of social equality—even if current rules do not always live up to their potential. And while aspects of individual employment law (notably the minimum wage) may also serve more distributive egalitarian goals, much of that body of law is irrelevant to—or even in tension with—those goals.<sup>44</sup> Social equality may in fact be the theory that holds the greatest capacity to explain and justify the overall sweep of individual employment law.

From the other direction, one might argue that social equality—however justifiable as a guide to individual ethics or morality—is not something the state can or should mandate. Such a conception of equality, one might argue, smacks of mind control and the inappropriate imposition of politically correct views on the populace.<sup>45</sup> To be sure, some theorists of social equality—notably Professor Andy Koppelman—argue that the law should engage in a thoroughgoing “project of cultural transformation” that aims to eliminate (without necessarily directly suppressing) those attitudes that sustain social inequality.<sup>46</sup> Such a project does have disturbingly illiberal overtones. But one need not understand the social equality project as being quite so ambitious. A legal regime can seek to advance social equality by focusing on conduct rather than attitudes—by eliminating the practices and economic levers that empower individuals consequentially to treat others as hierarchical subordinates. As I argue in Part II, this is a conception of social equality that fits individual employment law well.

#### *B. What Does Social Equality Demand?*

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<sup>44</sup> For an attempt to justify the minimum wage not as aiming at material redistribution so much as at social equality, see Zatz, *supra* note 14.

<sup>45</sup> Cf. Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588 (1997).

<sup>46</sup> KOPPELMAN, *supra* note 36, at 2.

I should be a bit more specific about what the conception of social equality demands. Most centrally, it demands what Professor Walzer calls “complex equality.”<sup>47</sup> It demands that inequalities in economic position (which may be beneficial or inevitable) not be automatically replicated into inequalities in other areas of life that are key to participation in society. Professor David Miller puts the point this way:

[Social equality] does not require that people should be equal in power, prestige or wealth, nor, absurdly, that they should score the same on natural dimensions such as strength or intelligence. What matters is how such differences are regarded, and in particular whether they serve to construct a social hierarchy in which A can unequivocally be ranked as B’s superior. Where there is social equality, people feel that each member of the community enjoys an equal standing with all the rest that overrides their unequal ratings along particular dimensions.<sup>48</sup>

In this respect, arguments about what social equality requires overlap with arguments made by those theorists who are skeptical of certain forms of commodification. Professor Debra Satz, for example, argues that commodification of a human activity is problematic if it leads to “outcomes that undermine the conditions for citizens to interact as equals.”<sup>49</sup> Professors Elizabeth Anderson and Peggy Radin, too, have expressed concern with the way commodification of certain activities (notably sex and parenthood) can undermine social equality.<sup>50</sup>

Theorists of social equality have identified certain areas of life in which financial inequalities should not be allowed to replicate themselves (in other words, in which commodification should be limited or barred). One involves activities of democratic participation and access to the government. As Professor Anderson

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<sup>47</sup> E.g., WALZER, *supra* note 9, at 3-30.

<sup>48</sup> Miller, *supra* note 9, at 232.

<sup>49</sup> See, for example, Chapter 4 of DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* (2010).

<sup>50</sup> See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 154, 168-189 (1993); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 131-153 (1996). Note that both Professor Anderson and Professor Radin frame their arguments in terms of commodification undermining the intrinsic value of the activity. In this sense their arguments resemble those of Professor Michael Sandel. See SANDEL, *supra* note 34. But for Professors Anderson and Radin, at least, the social-equality concerns lie fairly close to the surface of their arguments.

argues, equals are “free to participate in politics and the major institutions of civil society,” so the equal ability “to participate in democratic self-government” is a key part of “liv[ing] in an egalitarian community.”<sup>51</sup> Along those lines, Professor Walzer identifies the following as among the social goods that presumptively may not be commodified: political power and influence; basic political freedoms, obligations, and offices; and basic governmental services.<sup>52</sup> Social equality is threatened when inequalities of wealth, income, or position are leveraged into inequalities of access to the political process, community self-government, the process of petitioning for redress of grievances, and the protections of the law.<sup>53</sup> In this regard, as Professor Solomon has emphasized, the opportunity to call someone to account before a neutral tribunal for violation of one’s rights is a central element of being a full and equal member of our society.<sup>54</sup>

But social equality matters outside of the context of democratic and civic participation as well. In particular, where inequalities of wealth, income, or position translate into hierarchies of status—in which “one person is treated as a superior and another as an inferior” in some general sense—social equality is threatened.<sup>55</sup> To some extent, the concern here is one of domination and subordination. As Professor Anderson argues, “[e]quals are not dominated by others; they do not live at the mercy of others’ wills.”<sup>56</sup> This anti-domination concern also finds expression in the American Republican tradition that informed the adoption of the Thirteenth Amendment.<sup>57</sup> One problem with domination is that a subordinate individual in such a relationship

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<sup>51</sup> Anderson, *supra* note 9, at 315.

<sup>52</sup> WALZER, *supra* note 9, at 100-103; *see also* Don Herzog, *How to Think About Equality*, 100 MICH. L. REV. 1621, 1633 (2002) (arguing that political power should not be commodified).

<sup>53</sup> *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 32, at 366 (arguing that “[c]itizen equality” requires “that different groups of citizens not be disadvantaged, in their effort to gain attention and respect for their views, by a circumstance so remote from the substance of opinion or argument, or from the legitimate sources of influence, as wealth is”).

<sup>54</sup> *See* Solomon, *supra* note 9, at 252-253. It is hardly surprising that in the Civil Rights Act of 1866, our Nation’s first Reconstruction-Era civil rights statute, the right “to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons or property” receives explicit protection against discrimination. 42 U.S.C. § 1981(a).

<sup>55</sup> Fourie, *supra* note 9, at 111.

<sup>56</sup> Anderson, *supra* note 9, at 315.

<sup>57</sup> *See* Balkin & Levinson, *supra* note 35.

must often submit to humiliating and degrading rituals—such as literally or figuratively engaging in the sort of “[b]owing and scraping” that Kant argued was “unworthy of a human being.”<sup>58</sup>

We might legitimately fear that such domination is afoot when one person, because of his or her wealth, can induce another person with less wealth to give up the sorts of activities or commitments that Professor Radin labels as “integral to the self” or especially bound up with “personhood.”<sup>59</sup> Even independent of domination, we might be especially concerned that social equality is threatened when one class of people—defined by wealth or income—systematically gives up the choice to engage in those activities that are especially important to defining and understanding the self.<sup>60</sup>

One particular threat to social equality is the phenomenon of asymmetric vulnerability. Where one individual is especially vulnerable to the exercise of another’s economic power, and the vulnerability is not reciprocated, it will be easier for the less vulnerable person to establish a relationship of domination over the more vulnerable one. Asymmetric vulnerability is a particular concern in employment markets—especially in times of high unemployment. For an individual worker, having and keeping a job is supremely important. For the employer, by contrast, individual employees are often replaceable or even fungible. For the worker, the loss of a job can lead to the loss of the means of making a living and of obtaining respect from self and community.<sup>61</sup> Where jobs are scarce, a worker might be willing to subordinate herself in all sorts of ways to ensure that she doesn’t

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<sup>58</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 188 (Mary Gregor, ed. 1996) (originally published 1797). For an effort to draw a connection between employment law and Kant’s argument on this point, see Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 *COMP. LAB. L. & POL’Y J.* 577, 607 (2002).

<sup>59</sup> RADIN, *supra* note 50, at 56.

<sup>60</sup> There is, of course, a real question of paternalism here, which I discuss in the next section.

<sup>61</sup> See Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 *COLUM. L. REV.* 1404, 1405-1406, 1413-1415 (1967) (discussing harm to workers of losing a job); Marion Crain, *Arm’s-Length Intimacy: Employment as Relationship*, 35 *WASH. U. J.L. & POL’Y* 163, 165-166 (2011) (same). On the importance of work to workers’ equal-citizenship status, see Forbath, *supra* note 9, at 16-17; Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *CORNELL L. REV.* 523 (1997).

lose hers.<sup>62</sup> As I show in Part II, the employment relation is therefore a central arena in the battle for social equality.

### C. *The Limitations of the Principle*

To end *all* social inequality is a goal that is beyond the reach of employment law—and likely of law itself. Even if law could achieve that goal, a thoroughgoing effort to use law to eliminate social inequality root and branch would likely require such intrusive interventions as to violate other basic principles of our liberal state.<sup>63</sup> But my argument is not that the law should eliminate all sources of social inequality. It is far more modest. I contend that employment practices are particularly likely to implicate issues of social equality and that, when they do so, the law should presumptively regulate those practices to remove the most significant threats to that goal. Social equality is not an absolute goal that the law should pursue though the heavens may fall. Legal rules must take account of the extent and incidence of costs they impose, as well as of other values that should limit their application.<sup>64</sup>

Most obviously, employment law rules should not generally prevent employers from engaging in remunerative business. The goal of employment law, as I see it, is not to prevent employers from engaging in managerial or entrepreneurial decisionmaking. Rather, it is to regulate those aspects of employer prerogative that impose significant threats to social equality without sufficient countervailing benefits to society. Managers and owners are typically in the best position to determine what workplace arrangements maximize profitability. And, in general, an increase in profits leads to an increase in the pool of material goods available to the workers in the enterprise and to growth in the economy (which itself benefits workers).<sup>65</sup> The degree to which

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<sup>62</sup> Cf. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1220-1222 (2008) (arguing that, for many Latino immigrants, the need to keep a job in the United States makes them “reluctant to turn down jobs or to complain about work conditions,” while many African-Americans working in low-wage jobs “seek to exercise some control over the terms and pace of the work in which they engage” so that they may “ensure a modicum of dignity and respect”).

<sup>63</sup> See Hills, *supra* note 45.

<sup>64</sup> See Bagenstos, *supra* note 8, at 921.

<sup>65</sup> Of course, the share that workers can obtain depends on the bargaining power of the parties—which itself depends on legal rules such as support for collective bargaining—as well as on the political feasibility of other redistributive policies

employment-law rules advance social equality must necessarily be weighed against the degree to which those rules limit profitability and economic growth.

Some employer actions may be gratuitously abusive. An example from employment discrimination law may be sexual harassment. The analog in the case of individual employment law might be a particularly intrusive invasion of a worker's privacy. Actions like these threaten social equality without enhancing the bottom line of the enterprise. We can force employers to abandon these sorts of practices without imposing any monetary cost. Indeed, if doing so makes it easier to attract and retain skilled workers, an employer might actually realize a monetary *benefit* by abandoning abusive practices.<sup>66</sup> To be sure, the supervisor will have to bear the cost of foregoing the utility that she presumably obtains from engaging in abusive conduct. But we can properly ignore that utility loss as stemming from illegitimate preferences.<sup>67</sup>

Even where it imposes some monetary cost, interference with employer prerogatives in the service of social equality is still justified. As Professor Matt Finkin notes, employment-law rules that impose costs on employers to serve societal interests are ubiquitous.<sup>68</sup> The argument supporting these rules again parallels the argument for prohibiting racial discrimination. Social inequality is an important social harm, and the employer is in the best position to avoid entrenching and reinforcing that harm. An employer that puts the interest in obtaining the absolute maximum profit ahead of its obligation to avoid contributing to that social harm is acting in a morally objectionable manner – one for which it is fair to hold the employer accountable.

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by government. There is an important role for redistributive policies, but they largely lie outside of individual employment law.

<sup>66</sup> One might question whether it is necessary for the law to step in to force employers to do something that benefits them. In a perfectly competitive market employers who engage in abusive practices that make it difficult to attract skilled workers will be driven out of business. But markets are not perfectly competitive, and they can take a long time to drive out abusive and inefficient practices. Cf. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that, even if the market would eventually drive discriminating employers out of business, Title VII accelerates our arrival at that efficient long-run equilibrium).

<sup>67</sup> This is an application of the notion of “laundering” preferences; the discussion in text glosses over the complications of this notion. See Bagenstos, *supra* note 8, at 881-883.

<sup>68</sup> See Matthew W. Finkin, *Life Away From Work*, 66 LA. L. REV. 945 (2006).

Employment discrimination law uses two principal techniques to determine when it is too costly to impose on employers an obligation to avoid contributing to inequality. The first is domain restriction. Thus, the law does not permit employers any defense for intentional race discrimination against minorities—even if the discrimination is bottom-line rational.<sup>69</sup> That rule may be explained at least in part as reflecting the conclusion that forbearing from racial discrimination is rarely likely to impose heavy costs on a particular employer—especially if all other employers are required to forbear as well. Particularly where it is the preferences of biased customers or coworkers that make discrimination rational for an employer, we are willing to impose on employers a short-term cost of increased friction in the workplace to achieve a long-term equilibrium in which those preferences go away (or at least may not be consequential in any workplace).

For sex discrimination, by contrast, rational discrimination is permissible if it is a “bona fide occupational qualification” (BFOQ) for the position in question.<sup>70</sup> This rule reflects, in part, a judgment that forgoing sex discrimination will sometimes impose intolerable costs on employers, at least in two sorts of cases: (1) cases in which an entire line of business is necessarily and not merely contingently built on sex differences (a line that cannot be drawn without making normative judgments); or (2) cases in which customer preferences to be served by a member of a particular sex rest on concerns about gender privacy that our society is still willing to endorse.<sup>71</sup>

The second technique employment discrimination law employs is straightforward balancing. Thus, in cases in which an individual’s disability is incompatible with the way a job is currently structured, courts will ask whether there is any “reasonable accommodation” that will enable the individual to perform “essential functions” of the job without imposing “undue hardship” on the employer.<sup>72</sup> In the case of employment practices

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<sup>69</sup> See, e.g., Bagenstos, *supra* note 8, at 851-852 (discussing Title VII’s prohibition of even rational intentional discrimination); Russell K. Robinson,  *Casting and Casteing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 40 (2007) (“On its face, Title VII provides no BFOQ defense for race.”).

<sup>70</sup> 42 U.S.C. § 2000e-2(e).

<sup>71</sup> For a good discussion of the cases in this area, see Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

<sup>72</sup> 42 U.S.C. §§ 12111(8), 12112(b)(5)(A) (emphasis added).

that are alleged to violate Title VII or the ADA because they have a disparate impact, the law asks whether the practice is “job-related” and “consistent with business necessity.”<sup>73</sup>

Unlike in the context of intentional race and sex discrimination, the law of reasonable accommodation and disparate impact asks courts to engage in a more overt balancing of interests. But in all of these areas, the law filters the consideration of costs through its definition of the job at issue. Crucially, the law requires courts (with more or less deference to the employer’s views) to make their own independent determinations of what the job consists of.<sup>74</sup> Because of the interest in avoiding social inequality, the law takes away a bit of the employer’s managerial prerogative to define the nature of the job. And the law takes away that prerogative even when doing so will impose costs on employers.

As I will show in Part II, these techniques have lessons for individual employment law. Employment law can sometimes limit the costs it imposes on employers through domain restriction. For example, I argue below that—except where certain categories of employees are concerned—employers should be categorically barred from regulating the off-the-job speech or conduct of their workers. Such a rule will doubtless impose costs on employers who have legitimate bottom-line-oriented reasons for concern about their employees’ off-the-job conduct. But the costs to the employers are likely to be much less—and the benefits for social equality much greater—when an employer is barred from regulating off-the-job conduct than when it is barred from regulating on-the-job conduct. Other times, individual employment law will do best by weighing employer costs directly in each case. An example here might be the law involving employee privacy within the workplace.

As in the employment discrimination context, the definition of the employee’s job will be a crucial fulcrum of evaluation. And just as in the employment discrimination context, an employer cannot be permitted absolute prerogative to define the job—even when it has financial interests in doing so. A coal company may

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<sup>73</sup> 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 12112(b)(6).

<sup>74</sup> See, e.g., 42 U.S.C. § 12111(8) (providing that “*consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job*”) (emphasis added).

have an interest in ensuring that its employees contribute to Republicans, if Republicans are likely to support a regulatory environment that aids the company's bottom line. But to allow the company to define a miner's job as extracting coal from the ground *plus* writing checks to Republican candidates would allow the company to leverage its economic power over employees into additional political power—a direct threat to social equality. Just as in the employment discrimination setting, the law should provide a check on the employer's definition of job tasks.

Individual employment law does seem—at least at first glance—to implicate at least one concern that lacks a parallel in employment discrimination law. That is a concern about paternalism. Employment law imposes terms on the employment relationship that the parties would otherwise be legally free to adopt themselves if they so chose. Orthodox economic theory would tell us that when employees do not insist on including a given term, that indicates that they value that term less than whatever they were getting in exchange for it. To require employers to provide that term in such circumstances—at least where the employer is free to take away something else in exchange for including the mandatory term—will therefore make the employee worse off—according to her own preferences—than she would be in the absence of the mandate.<sup>75</sup>

There are all sorts of reasons, even from within economic theory, to believe that this orthodox account fails in a wide range of cases to accurately describe the effects of employment law mandates.<sup>76</sup> But that account clearly offers an accurate description

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<sup>75</sup> For arguments to this effect, see Epstein, *supra* note 4; Morriss, *supra* note 4. Law-and-economics types are not the only ones concerned about this problem. This concern with the possibly perverse effects of banning problematic commodification is a central aspect of Professor Radin's writing, see RADIN, *supra* note 50, at 123-130, and the writing of other feminist scholars, see Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 362 (Martha M. Ertman & Joan C. Williams, eds., 2005).

<sup>76</sup> Professor Willborn offers a number of reasons, from within economic theory, why mandatory terms might make workers better off. See Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101 (1988). For arguments focused on employees' lack of full information, see sources cited *infra* note 90. For arguments, rooted in economic theory, that the effects of mandatory employment terms will depend on the respective value of those terms to employers and employees, and on the heterogeneity of employees' preferences, see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000); Lawrence H. Summers, *Some Simple*

at least some of the time. A social equality approach helps to show why that is nonetheless not a decisive argument against imposing mandatory terms through employment law. The imposition of mandatory employment terms may force some workers to accept deals that do not optimally satisfy their preferences, but a social equality model posits that the goal of employment law is not the satisfaction of individual employees' preferences. Rather, the goal is a systemic one—to prevent and eliminate significant threats to social equality. In this respect, again, individual employment law is analogous to employment discrimination law. Even if some employees would be better off without antidiscrimination protections, that cost is nonetheless justified because the body of law disentrenches segregation and subordination.

None of this is to say that the costs imposed on individual workers are irrelevant to an assessment of employment law rules, even under a social equality theory. If those rules significantly increase unemployment, for example, there would be a strong basis to argue against such rules—not least because increased unemployment itself undermines social equality.<sup>77</sup> And where, as Professor Julie Suk shows regarding France's highly rigid employment-law system, the disemployment effects fall especially heavily on already stigmatized and segregated social groups, social equality provides a doubly strong basis to criticize them.<sup>78</sup> Whether any of the particular rules I discuss in Part II will lead to such effects requires serious empirical analysis. But each of those rules seems quite far from imposing the sorts of dislocations that the French system has—and those rules can be designed to minimize the risk of that result.

## II. DOCTRINAL IMPLICATIONS

In this Part, I sketch some possible doctrinal applications of a social equality theory of individual employment law. As I hope to show, a social-equality focus has implications for a wide array of employment-law rules. In some doctrinal areas, such a focus suggests quite significant changes in current rules; in others, it suggests milder tweaks or extensions; and in still others it suggests that current rules have it about right. But my goal in this Part is not to make a comprehensive case for any particular reform or defense

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*Economics of Mandated Benefits*, 79 AM. ECON. REV. PAPERS & PROCEEDINGS 177 (1989).

<sup>77</sup> On the importance of work to social equality, see sources cited *supra* note 61.

<sup>78</sup> See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

of any particular rule. Any such case must engage in depth with the specific considerations at play in a particular rule choice. Although I offer some suggestions in that direction, my goal in this part is narrower: first, to show how employment law rules pervasively implicate questions of social equality; and second, to suggest that a focus on those questions can enrich our analysis—and sharpen our critiques and defenses—of those rules.

In Section A, I argue that a social equality approach supports longstanding critiques of the employment-at-will rule. That rule is the most debated principle of employment law, and I cannot hope (and do not attempt) to resolve the debate. Rather, I attempt to show that classic challenges to employment-at-will rest on an inchoate version of the social equality approach I articulate in this paper. The debate over the rule thus provides an apt first illustration of my argument. In Section B, I argue that social equality also demands legal rules that generally respect worker privacy—and I show how a social equality approach helps us elaborate those rules.

In Section C, I argue that a social equality approach suggests that the law should limit private employers' ability to regulate the political speech of their employees. I discuss this question more extensively than I do the other doctrinal areas in this part, because regulation of workers' political speech is currently an important area of discussion in employment law and because considering that area highlights the ways in which a social equality approach can accommodate employer interests. Section D extends this discussion to anti-retaliation and whistleblower protection statutes. Section E discusses the (ambiguous) implications of a social equality approach for the rise of mandatory employment arbitration. And Section F shows how social equality ideas underlie limitations on child labor as well as maximum-hours laws.

For many of the doctrines I discuss, hints of social equality arguments appear in the scholarly, judicial, and political discourse. For others, social equality may appear to be more of a novel justification. In all events, I contend that social equality is a useful concept in understanding and critiquing individual employment law.

#### *A. The Employment-at-Will Rule*

A core aspect of social equality is what de Beauvoir described as “human relations in daily life [being] on a footing of

equality.’’<sup>79</sup> Precisely because work is central to most people’s day-to-day lives, the legal rules governing the employment relationship can have a significant effect on the equality or inequality of these social relations. In particular, given the disproportionate power owners and supervisors often have over their workers, the workplace continually threatens to create and entrench hierarchies of status. Employment law can help to undermine these hierarchies. But too often it fails to meet this potential, and it bolsters those hierarchies instead. The strong default rule of employment at will is a prime example.

The most significant source of workplace hierarchy is the boss’s power to fire. Under the baseline employment-at-will rule that continues to prevail in all American jurisdictions but Montana,<sup>80</sup> an employer can terminate an employee for a good reason, a bad reason, or no reason at all—unless the employer’s reason is specifically forbidden by some external source of law such as an antidiscrimination statute. And even when the employer does act for a forbidden reason, the at-will rule will make it difficult as a practical matter for the employee to prove it, because that rule facilitates employers’ assertion of pretextual reasons for termination.<sup>81</sup> Although the rights of the employer and the employee to terminate the relationship at will are formally symmetrical, a worker often needs a particular job more than the employer needs a particular worker. This is especially true in times of high unemployment.

The at-will rule therefore gives bosses ample power to require employees to engage in the “bowing and scraping, fawning and toadying”<sup>82</sup> that is the bête noire of social equality. Professors Chris Bertram, Corey Robin, and Alex Gourevitch argue that the at-will rule makes it “difficult to conceive of a less free institution for adults than the average workplace,” where “[o]n pain of being fired,” workers “can be commanded to pee or forbidden to pee”; can be “forbidden to wear what they want, say what they want (and at what decibel), and associate with whom they want”; and

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<sup>79</sup> See Karst, *supra* note 9, at 11 (quoting DE BEAUVOIR, *supra* note 28, at 261)

<sup>80</sup> See MONT. CODE ANN. § 39-2-901 *et seq.*; Arnow-Richman, *supra* note 4, at 4 n.9 (stating that “employment at will is the established law in every state except Montana, which has modified the default rule by statute”).

<sup>81</sup> See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1995); Joseph E. Slater, *The “American Rule” That Swallows the Exceptions*, 11 EMPLOYEE RTS. & EMP. POL’Y J. 53 (2007).

<sup>82</sup> WALZER, *supra* note 9, at xiii.

“can be fired for donating a kidney to their boss (fired by the same boss, that is), refusing to have their person or effects searched, calling the boss a ‘cheapskate’ in a personal letter, and more.”<sup>83</sup> As Professor Bagchi contends, practices like these demonstrate—and enact—social status hierarchies within the workplace.<sup>84</sup>

These sorts of practices seem abusive and arbitrary in many cases. Arguments against employment at will often focus on this sort of employer abuse or arbitrariness and on the “morally reprehensible employer motives” that may underlie it.<sup>85</sup> But just as I have argued in the employment discrimination context, motive or malice ought not to be the crucial factor in determining whether the law should regulate an employer’s conduct. The problem is not simply that individual employees will have no remedy for the abusive acts of their bosses. Rather, a social equality perspective suggests that the problem rests in the entire system of social relations that the at-will rule engenders.

Some of the classic critiques of employment-at-will focus on these sorts of systemic effects. They thus rest on at least an inchoate version of a social equality approach. Dean Lawrence Blades, for example, captured the crucial point in his critique. Because employment-at-will effectively “forces the non-union employee to rely on the whim of his employer for preservation of his livelihood,” Blades argued, it “tends to make him a docile follower of his employer’s every wish.”<sup>86</sup> A worker who knows she can be terminated for virtually any reason will submit to any number of degradations, and supervisors will be tempted to force her to do so. The result is to entrench a hierarchy within the workplace, in which a boss’s dominion over the worker goes beyond what simply serves the productive mission of the workplace and potentially extends to any aspect of the worker’s life. As Professor Clyde Summers argued, the social relations engendered by the at-will rule reflect a “deeply rooted conception of the employment relation as a dominant-servient relation”—in

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<sup>83</sup> Chris Bertram, Corey Robin & Alex Gourevitch, *Let it Bleed: Libertarianism and the Workplace*, <http://crookedtimber.org/2012/07/01/let-it-bleed-libertarianism-and-the-workplace/> (July 1, 2012).

<sup>84</sup> See Bagchi, *supra* note 16, at 591.

<sup>85</sup> Arnov-Richman, *supra* note 4, at 10 (arguing that many advocates of just-cause protections have “presented at-will employment as enabling arbitrary, malicious, and even socially harmful employer behavior,” and that the opposition to employment-at-will has been based on “the condemnation of morally reprehensible employer motives”).

<sup>86</sup> Blades, *supra* note 61, at 1405.

which “[t]he employer is sovereign over his or her employee subjects” – “rather than one of mutual rights and obligations.”<sup>87</sup> A relationship in which one party is so subject to the whims of the other is not a relationship of equality and mutual respect.<sup>88</sup>

Defenders of employment-at-will make two basic arguments against abandonment of the rule. First, they argue that, because it is merely a default rule, employers and employees are free to contract around it. If employees have not sought just-cause protection in their employment contracts, these defenders contend, that indicates that employees value those protections less than they value whatever they receive from employers in exchange for giving them up.<sup>89</sup> This argument is substantially undermined by the findings that workers often assume that they cannot be discharged arbitrarily, even when the law in fact provides them no such protection.<sup>90</sup>

The second argument in defense of employment-at-will involves employer cost. A just-cause regime, defenders of the at-will relationship argue, imposes significant costs on employers by making it too difficult to discipline shirking employees—and entangling them in costly litigation when they attempt to do so.<sup>91</sup> As I argued in Part I.C., this is an entirely appropriate matter to consider in framing employment-law rules. Yet key proposals to replace employment-at-will already take account of this consideration. As I suggested in Part I.C., one way they do this is

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<sup>87</sup> Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000).

<sup>88</sup> See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 791 (1994) (suggesting that critics of the employment-at-will rule invoke “notions of equality” (or “civic equality and respect”) when they “claim that the rule reflects an inadequate kind of valuation of workers because it subjects them to the whim of employers”).

<sup>89</sup> See, e.g., Epstein, *supra* note 4, at 953-956; J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837.

<sup>90</sup> See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 118-121 (1999); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002); Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447; Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 317-338 (2002).

<sup>91</sup> See Epstein, *supra* note 4, at 964-966; Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

by giving employers significant leeway in determining what sort of performance the worker's job requires. The Model Employment Termination Act, for example, defines the "good cause" necessary for termination in a manner that is quite deferential to employers' interests in defining what is necessary job performance.<sup>92</sup> It would not even apply this good-cause requirement until an employee has worked for an employer for at least a year; during the one-year probationary period, the at-will rule would continue to prevail.<sup>93</sup> And it provides that the good-cause standard would be enforced in relatively streamlined arbitration proceedings.<sup>94</sup>

The Model Employment Termination Act has drawn criticism from both the employer and the employee perspective.<sup>95</sup> There is no need, for present purposes, to endorse or reject the precise compromise it draws. The crucial points are these: First, the longstanding challenges to employment-at-will draw support from (and at times have rested on arguments indistinguishable from) the social equality approach I defend in this paper. Second, as my argument demands, legislation overturning employment-at-will can strike at the doctrine's most significant threats to social equality without imposing undue costs on particular employers.

### B. Worker Privacy

The at-will rule does not just enable individual bosses or supervisors to engage in arbitrary or abusive conduct. It also enables employers to adopt policies that intrude on what are generally understood to be the "private" lives of workers.<sup>96</sup> The concept of privacy is notoriously broad. As Professor Pauline Kim notes, it "has been invoked to protect a variety of distinct interests in the workplace," including workers' "bodily integrity," their interest in "avoiding intrusion on physical spaces," their property interest in their "personal items," their interest in "preventing disclosure of personal information," and more general interests in

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<sup>92</sup> See Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 371-372 (1994).

<sup>93</sup> See *id.* at 372.

<sup>94</sup> See *id.* at 376-379; see also William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885, 908 (arguing that "[t]he first basic ingredient" in just-cause legislation "should be arbitration, its virtues being speed, economy, and informality").

<sup>95</sup> See, e.g., Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 426-427 (2002).

<sup>96</sup> See Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 676 (1996) (arguing that "any meaningful protection of employee privacy requires limitation of an employer's power to fire at will.").

“individual autonomy.”<sup>97</sup> Under the privacy rubric, workers have challenged employers’ regulation of out-of-work activity—like dating, smoking, and volunteering at a worker’s chosen charity—as well as employers’ at-work intrusions on their bodies, effects, or personal spaces.<sup>98</sup> Some of these challenges have been successful; many have not.

These privacy claims are often understood as invoking a purely individualistic interest in liberty, autonomy, or dignity.<sup>99</sup> But they also quite directly implicate social equality. Privacy norms do more than protect individual liberty or autonomy. They also mark a person’s status as a full member of the community. As the philosopher Jeffrey Reiman argued nearly four decades ago, “[p]rivacy is an essential part of the complex social practice by means of which the group recognizes—and communicates to the individual—that his existence is his own.”<sup>100</sup> To deny certain persons or classes of persons the privacy normally accorded to others is therefore to deny them “the respect normally accorded to full-fledged members of the community.”<sup>101</sup>

That employee privacy cases implicate social equality thus seems fairly clear. How a social equality perspective should alter the resolution of those cases is less clear. Where there is a broad social consensus supporting certain aspects of privacy, a boss who denies a worker those aspects of privacy does seem to be asserting “the employer’s higher status and the employee’s subordination.”<sup>102</sup> Searches of one’s purse or one’s body, or regulations of what workers do in their own homes or on their own

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<sup>97</sup> Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 901 (2012).

<sup>98</sup> For a general treatment of these issues, see MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (3d ed. 2009).

<sup>99</sup> For a good recent example of this attitude, see Steven L. Willborn, *Consenting Employees*, 66 LA. L. REV. 975 (2006).

<sup>100</sup> Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976).

<sup>101</sup> Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 968 (1989); see also Kim, *supra* note 96, at 692 (common-law privacy torts are concerned with those violations “which threaten an individual’s identity by withdrawing the deference normally afforded a member of the community”); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) (“To equate privacy with dignity is to ground privacy in social forms of respect we owe each other as members of a common community.”).

<sup>102</sup> Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1120 (2006).

time, seem to violate these common understandings of privacy. Accordingly, a social equality approach can applaud the common-law analysis applied in many states—an analysis that focuses on expectations of privacy and typically is skeptical of bodily intrusions and searches of personal items.<sup>103</sup> It can also applaud the statutes in many jurisdictions that prohibit employers from taking adverse action on the basis of their employees' lawful out-of-work activities.<sup>104</sup>

But the conventionalist nature of this approach seems problematic.<sup>105</sup> A conventionalist approach can rein in outlier employers—those who are acting in a manner inconsistent with what are then-widespread social norms—but it cannot protect against changes in social norms generally. As ongoing changes to the organization of work blur the boundaries between “work time” and “non-work time,” and as employers are increasingly conscious of the contribution of out-of-work activities to employees' health insurance costs, current norms may change.<sup>106</sup> Moreover, these social norms may themselves be affected by what the law permits or prohibits. Because statutory and common law permitted so many employers to test their employees for drug use, for example, that practice became sufficiently widespread in the 1980s and 1990s that there is substantially less of a social norm against submission to urinalysis than there was 30 years ago.<sup>107</sup> On the flip side, public attitudes toward cigarette smoking have rapidly evolved in such a negative direction that it is plausible that employers' prohibition of employees' out-of-work smoking could become equally normalized—but for the widespread passage of statutes protecting

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<sup>103</sup> For a good recent summary, see Kim, *supra* note 97, at 905-908.

<sup>104</sup> For a recent (critical) summary of these statutes, see M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1591-1595 (2009).

<sup>105</sup> This, of course, is a longstanding problem with privacy law. See Mark Tushnet, *Legal Conventionalism in the U.S. Constitutional Law of Privacy*, 17 SOCIAL PHIL. & POL'Y 141 (2000).

<sup>106</sup> See Kim, *supra* note 97, at 908-914; Henderson, *supra* note 104, at 1528-1530; James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 146-153 (2008). These norms were very much contested in the negotiations surrounding the wellness provisions of the Affordable Care Act, which ultimately gave employers more power than they previously held to financially incentivize healthy conduct by their employees. See JOHN E. McDONOUGH, *INSIDE NATIONAL HEALTH REFORM* 191-194 (2011).

<sup>107</sup> For a good discussion of the expansion of workplace drug testing, and the legal response to it, see Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009 (2006).

workers' lawful off-duty conduct. Because social norms about privacy are in part endogenous to law, those norms appear to provide no independent basis for determining what the law should permit or prohibit.

These points demonstrate that workplace privacy protections cannot be purely conventionalist. A social equality perspective cannot precisely answer the question of where to draw the line of privacy protection, but it does suggest three points that may help guide the search for answers. First, simply because an employer may have a financial interest in regulating an employee's conduct outside of the workplace or working hours, that does not imply that the law should permit the employer to define the job as including compliance with regulations of such conduct. As I noted above, employment *discrimination* law limits employers' ability to define their employees' jobs in ways that threaten significant equality interests—even if the employer would realize a financial benefit by defining the job in such ways.<sup>108</sup> Southwest Airlines may profit by requiring its flight attendants to be female sex objects for a predominantly male business-traveler clientele, but the law prohibits it from doing so.<sup>109</sup> The threat to gender equality of employers adopting such policies is too great, and the cost to the airline of abandoning such a policy is sufficiently small, to justify a prohibition.

An analogous point applies to off-work activities. The opportunity to choose one's own recreational and avocational activities is a key part of what it means to be a full member of our society. Those are often the activities in which individuals develop their sense of personal identity and their ties with like-minded people in the community. To allow an employer to use its economic power over an employee to regulate those activities threatens social equality. To be sure, an employer may experience some increase in health-care costs if its employees engage in risky activities. Or it may experience some reputational costs if its employees engage in controversial activities.<sup>110</sup> But the cost in the

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<sup>108</sup> See *supra* Part I.C.

<sup>109</sup> See *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting claim that "femininity, or more accurately female sex appeal," is a BFOQ for the job of flight attendant).

<sup>110</sup> Consider the recent example of Michael Brutsch, who was fired from his job at a financial services company after Gawker revealed that he was the individual, known on the Reddit website as "Violentacrez," who "posted pictures and hosted discussions about dead teenage girls, rape, and anti-Semitism." Meredith Bennett-Smith, *Reddit Troll Michael Brutsch Looks for Work in Porn, Tries to Put*

run of cases is unlikely to be so great as to justify the threat to social equality posed by allowing employers to regulate worker conduct outside of the workplace and outside of working hours.<sup>111</sup> Exceptions to this principle might exist in those categories of cases in which the cost to the employer is likely to be especially large. These categories might include very high-level employees whose controversial actions are especially likely to be reasonably attributed to the employer,<sup>112</sup> or individuals with truly unique talents who could leave the employer in the lurch if they were injured while engaging in especially risky activities.<sup>113</sup>

Second, certain privacy protections might be central to protecting other aspects of social equality—such as access to political and civic life. Professor Kim, for example, argues that workers should be protected from employer surveillance of their communications in order to ensure that they have the space to develop and transmit ideas and information that are socially valued—particularly ideas and information regarding their employers’ violations of law.<sup>114</sup> A social equality perspective suggests that employees should be entitled to some such degree of protected space regardless of whether existing social norms promote it.<sup>115</sup>

Finally, a social equality analysis can look to whether different classes of workers are treated differently. If employers subject line workers to intrusions on their persons, their effects, or

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“Jailbait” *Experience to Use*, HUFFINGTON POST, Oct. 24, 2012, [http://www.huffingtonpost.com/2012/10/24/reddit-troll-michael-brutsch-looking-for-work-in-porn\\_n\\_2009815.html](http://www.huffingtonpost.com/2012/10/24/reddit-troll-michael-brutsch-looking-for-work-in-porn_n_2009815.html).

<sup>111</sup> See Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035 (2006) (arguing that employers should be sharply limited in their ability to regulate worker conduct off the job).

<sup>112</sup> Under such a rule, for example, the Cleveland Clinic could refuse to hire a smoker as a medical director but would be barred from refusing to hire a smoker to work on a loading dock. Cf. A.G. Sulzberger, *Hospitals Shift Smoking Bans to Smoker Ban*, N.Y. TIMES, Feb. 11, 2011, at A1 (discussing Cleveland Clinic’s ban on hiring smokers).

<sup>113</sup> For example, a professional football team might prohibit its starting quarterback from riding a motorcycle without a helmet. See *Big Ben in Serious Condition After Motorcycle Accident*, ESPN.COM, June 13, 2006, <http://sports.espn.go.com/nfl/news/story?id=2480830>.

<sup>114</sup> See Kim, *supra* note 97, at 925-931.

<sup>115</sup> Of course, an employer must have a means of protecting itself against criminal liability should an employee, for example, download child pornography on the employer’s computer. But employers can serve that interest without intruding on all of an employee’s private communications.

their lives that go beyond the intrusions to which they subject supervisors and managers, that disparity suggests that the intrusions play a role in establishing or maintaining a hierarchy of status.<sup>116</sup> Absent a strong business reason for drawing the distinction—and, for the reasons I have discussed, business reasons should if anything point to *greater* intrusions on high-level employees—a social equality approach should look askance at such intrusions.

Professor Todd Henderson is highly skeptical of laws that limit employers' ability to regulate their employees' off-work activities. He asserts that employers do not engage in such regulation because of a desire to dominate their workers' lives but simply because employers bear some of the costs of out-of-work choices.<sup>117</sup> Where individuals do not bear the full costs of their conduct, Henderson contends, efforts by others to regulate that conduct will be "inevitable."<sup>118</sup> The only question, he says, is whether private employers will regulate more efficiently than will the government.<sup>119</sup> Because employers are disciplined by market constraints (in both the labor and the financial markets) in a way that the government is not, he posits that employers are often in the best position to force workers efficiently to internalize the costs of their activities.<sup>120</sup>

Professor Henderson does not persuasively undermine the case for limiting employers' ability to regulate off-work activities. For one thing, his entire argument is based on the premise, largely assumed but not proven, that market forces will ensure that such regulations serve only the interest in "economics, not domination."<sup>121</sup> But Henderson himself cites examples in which

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<sup>116</sup> Cf. Selmi, *supra* note 111, at 1051 ("Another way to obtain a reasonable balance between the interests of employers and employees with respect to medical screening would be to require employers to implement screening across-the-board, to top executives as well as those at the bottom. My sense is that many employers would shy away from genetic testing or other health screenings if they were also subject to the tests.").

<sup>117</sup> See Henderson, *supra* note 104, at 1519.

<sup>118</sup> *Id.* at 1519.

<sup>119</sup> See *id.* at 1552 ("[T]he only relevant question is: who is the most efficient nanny?").

<sup>120</sup> See *id.* at 1553-1558, 1561-1564.

<sup>121</sup> *Id.* at 1534. Professor Henderson also argues that the law will constrain the most abusive exercises of employer power to regulate employees' private lives—an argument that seems to deprive him of any ground on which to stand in opposing laws designed to limit employer regulations that the political process deems abusive. See *id.* at 1558-1559.

employers have sought to control aspects of workers' home lives that would seem to have only the most tenuous relationship to the employer's bottom line<sup>122</sup> – though he calls the employers' conduct in these cases "reasonabl[e]"<sup>123</sup> and "unobjectionable."<sup>124</sup> Even wellness programs, which Professor Henderson touts as substantially reducing health costs by regulating employee behavior,<sup>125</sup> are unlikely to have the sorts of cost-reducing effects he presumes they will.<sup>126</sup> To the extent that the bottom-line benefits of employer regulations of off-work conduct are overblown, social equality concerns should be heightened. And the residual costs of avoiding such regulations are appropriately placed on employers as the cost of ensuring that their workers can be full members of our society. This is particularly true where, as I have suggested it should, the law provides a defense to those categories of employers who will face unusually high costs if they cannot regulate their employees' off-work conduct.

Professor Henderson's argument also rests on the unproven suggestion that regulation of workers' behavior is inevitable, and that where employers cannot engage in that sort of regulation the government will.<sup>127</sup> But if off-work activity imposes costs on *employers*, there is no particular reason to believe that the *government* will necessarily step in to regulate that activity if employers cannot. Employers might well pressure the government to adopt such regulations, but workers' groups are likely to oppose them – particularly if those groups have succeeded in obtaining legislation denying employers the right to regulate that behavior

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<sup>122</sup> See *id.* at 1541 (describing how Henry Ford "deployed a team of 150 to investigate the lifestyle of each Ford employee," ensure that they were not participating in activities "such as smoking, drinking, gambling, and prostitution," and "offer employees advice on issues including childcare, money management, alcohol abuse, personal hygiene, and house maintenance"); *id.* at 1543 n.90 (discussing employers' recent efforts to incentivize employees to "tak[e] classes on managing personal finances, learn[] about art, teach[] their children not to watch television or play video games, and so on"); cf. Morriss, *supra* note 4, at 1901 (quoting one of the founders of Ben & Jerry's as saying: "If I can fire someone for making shitty ice cream, then I can fire them for being a shitty person.").

<sup>123</sup> Henderson, *supra* note 104, at 1540.

<sup>124</sup> *Id.* at 1543 n.90.

<sup>125</sup> See *id.* at 1546-1552.

<sup>126</sup> See Al Lewis & Vik Khanna, *Is it Time to Re-Examine Workplace Wellness "Get Well Quick" Schemes?*, HEALTH AFFAIRS BLOG, Jan. 16, 2013, <http://healthaffairs.org/blog/2013/01/16/is-it-time-to-re-examine-workplace-wellness-get-well-quick-schemes/>.

<sup>127</sup> See Henderson, *supra* note 104, at 1552.

themselves.<sup>128</sup> And, as Professor Henderson himself argues, an employer's regulation of an individual's private life is likely to be much more effective than a government's, because the employer does not face the administrative, constitutional, and political constraints on individual intrusions that a government does.<sup>129</sup> Professor Henderson's argument thus does not fatally undermine the case I have made in this section for limiting employers' power to regulate most workers' off-work conduct.

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<sup>128</sup> Indeed, Professor Henderson recognizes that regulation of worker behavior might be an instance of a collective action problem, in which market forces will not operate to check employers' intrusive regulations, even if those regulations are inefficient because of the high costs they impose on workers. *See id.* at 1584. If that is the case, a law denying employers the power to regulate off-work conduct will not necessarily be followed by a law giving that power to the government.

<sup>129</sup> *See id.* at 1564, 1576.

### C. Workers' Political Speech and Activities

1. *The Social Equality Case for Constraining Employers' Regulation of Employees' Political Speech*—Each election cycle, the press offers numerous accounts of employers' efforts to encourage their employees to support or oppose particular candidates or ballot propositions. Often, these efforts are backed by implicit or even explicit threats to discriminate or retaliate against employees who vote or engage in political speech on behalf of the “wrong” side. The 2012 election was no exception. If anything, as the first presidential election after the Supreme Court's *Citizens United* decision loosened restrictions on corporate political speech,<sup>130</sup> the 2012 election seemed to mark a newly aggressive approach by employers.<sup>131</sup>

Some of these employer efforts appeared simply to reflect an aggressive effort by management to let employees know which candidates' election would, in their view, best serve the interests of the company. For example, Wynn Resorts issued its employees a 67-page “Voter Guide” telling them which candidates the company supported.<sup>132</sup> But even there, some employees detected a coercive overtone. In light of the voter guide and the company CEO's “fiery diatribes against [President] Obama during TV appearances and corporate conference calls,” one Wynn employee told a reporter that “[i]f [she] had an Obama bumper sticker, [she'd] be scared for [her] job,” and that she was “worried what might happen to employees who are caught backing non-Wynn-sponsored candidates outside work, like with ‘a yard sign, a donation or a blog [post].”<sup>133</sup> Another employer, Georgia Pacific, issued a similar voter guide, while enforcing a social media policy in a way that employees perceived to target their private posting of political articles on Facebook.<sup>134</sup> And other employers combined appeals to

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<sup>130</sup> *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010).

<sup>131</sup> See Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, N.Y. TIMES, Oct. 27, 2012 at A1.

<sup>132</sup> Nate C. Hindman & Christina Wilkie, *Wynn Employee Voter Guide Pressures Workers to Vote Right*, HUFFINGTON POST, Oct. 26, 2012.

<sup>133</sup> *Id.* In 2004, a company that makes home insulation fired an employee “for driving to work with a Kerry-Edwards bumper sticker in the rear windshield of her” car. Timothy Noah, *Bumper Sticker Insubordination*, SLATE, Sept. 14, 2004.

<sup>134</sup> See Mike Elk, *Koch Sends Pro-Romney Mailing to 45,000 Employees While Stifling Workplace Political Speech*, IN THESE TIMES, Oct. 14, 2012, [http://inthesetimes.org/article/14017/koch\\_industries\\_sends\\_45000\\_employees\\_pro\\_romney\\_mailing](http://inthesetimes.org/article/14017/koch_industries_sends_45000_employees_pro_romney_mailing) (“When McKinney applied for a foreman job at the plant in May, he says, his supervisor informed him that a higher-up said he wouldn't

their employees to vote for Governor Romney with predictions (or perhaps threats) that President Obama's reelection would lead them to lay off workers.<sup>135</sup> As Professors Bruce Ackerman and Ian Ayres show, this sort of employer conduct is hardly new: "When William Jennings Bryan squared off against William McKinley for the presidency in 1896, the head of Steinway piano warned his workers, 'Men, vote as you please, but if Bryan is elected tomorrow, the whistles will not blow Wednesday morning.'"<sup>136</sup>

In other companies, CEOs sent fundraising appeals for Governor Romney's campaign to all of their employees.<sup>137</sup> According to one press report, one of these companies, Murray Energy, "ha[d] for years pressured salaried employees to give to the [company's] political action committee (PAC) and to Republican candidates chosen by the company."<sup>138</sup> According to that report, internal documents "show that company officials track who is and is not giving,"<sup>139</sup> and that the company's CEO, Robert Murray, took an intense personal interest in which employees gave money.<sup>140</sup> The report anonymously quoted two individuals who had worked as managers at the company to the following effect:

"There's a lot of coercion," says one of them. "I just wanted to work, but you feel this constant pressure that, if you don't contribute, your job's at stake. You're compelled to do this whether you want to or not." Says the second: "They will

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get the job because he was 'too political.' 'They said I should be aware of what I am posting online,' says McKinney.").

<sup>135</sup> See, e.g., Greenhouse, *supra* note 131 ("The economy doesn't currently pose a threat to your job. What does threaten your job, however, is another four years of the same presidential administration,' Mr. Siegel wrote. 'If any new taxes are levied on me, or my company, as our current president plans, I will have no choice but to reduce the size of this company.'").

<sup>136</sup> Bruce Ackerman & Ian Ayres, *Election Bosses: How to Stop Employers from Telling Workers Whom to Vote For*, SLATE, Nov. 2, 2012.

<sup>137</sup> For examples, see Andy Kroll, *CEO of International Corporation Sends Romney Fundraising Pitch to His Employees*, MOTHER JONES, Oct. 25, 2012, <http://www.motherjones.com/mojo/2012/10/romney-fundraising-email-ceo-incomm-brooks-smith>; Arthur Allen, *CEO Of ASG, Sent Email Pressuring Employees To Donate To Mitt Romney*, HUFFINGTON POST, Oct. 20, 2012, [http://www.huffingtonpost.com/2012/10/20/arthur-allen\\_n\\_1992370.html](http://www.huffingtonpost.com/2012/10/20/arthur-allen_n_1992370.html).

<sup>138</sup> Alec MacGillis, *Coal Miner's Donor*, NEW REPUBLIC, Oct. 25, 2012.

<sup>139</sup> *Id.*

<sup>140</sup> See *id.*

give you a call if you're not giving. . . . It's expected you give Mr. Murray what he asks for."<sup>141</sup>

And when Governor Romney visited a coal mine operated by a Murray-owned company for a rally, a company official acknowledged that workers were told that attendance at the event "would be both mandatory and unpaid."<sup>142</sup>

Even outside of the realm of electoral politics, employers might perceive an interest in regulating the off-the-worksites political speech of their employees. In the well-known *Novosel* case, for example, an insurance company fired a claims manager for "refus[ing] to participate in [a company-supported] lobbying effort" and privately stating "opposition to the company's political stand."<sup>143</sup> Employers often discipline or fire employees who publicly oppose their company's position on political issues.<sup>144</sup> And a company might deem it best to fire, or not to hire, an employee whose political speech is repugnant to the company's owner or "alienates coworkers, customers, or political figures" who regulate the company.<sup>145</sup> Such an employee may, but need not, express especially extreme political views.<sup>146</sup>

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<sup>141</sup> *Id.*; see also Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 342 (1994) (In 1992, a "CEO sent faxes to regional managers strongly recommending that they purchase seats at a candidate's fundraiser if they intended to have a future with the corporation; one who failed to do so lost his job."); Lewis Maltby, *Office Politics: Civic Speech Shouldn't Get Employees Fired*, LEGAL TIMES, Aug. 29, 2005 ("William Niess, a Democrat in Wisconsin, refused to make a political contribution to the party favored by his boss. As a result, he was fired in 1996.").

<sup>142</sup> Sabrina Eaton, *Coal Miners Lost Pay when Mitt Romney Visited their Mine to Promote Coal Jobs*, PLAIN DEALER, Aug. 28, 2012; see also Bingham, *supra* note 141, at 341 ("During the 1992 presidential campaign, employers required that employees sit through a presidential candidate's stump speech as part of a company-wide captive audience.").

<sup>143</sup> *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983).

<sup>144</sup> See, e.g., *Edmondson v. Shearer Lumber Products*, 75 P.3d 733 (Idaho 2003) (employee fired for publicly opposing land development project that his employer supported).

<sup>145</sup> Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POLITICS 295, 301 (2012).

<sup>146</sup> See Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 389 (2003) ("Maybe the employee's political activities and public statements have been considered extremely offensive (such as being a grand dragon of the KKK, or speaking out in support of pornography or pedophilia), and the employer may say it is responding to pressures from other employees and customers. Other times, the worker's politics may simply

These practices raise significant concerns from a social equality standpoint. In each case, an employer is using its economic power over its employees as leverage to obtain greater power in the political sphere. Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree.<sup>147</sup> The result will be a skewed political discourse, in which employers' voices are amplified and workers' are squelched.<sup>148</sup> Where an employee suppresses political speech that relates to the actions of her employer or industry—such as speech about health or safety hazards, sharp financial practices, or the employer's compliance with regulations addressing harms like those—the political discourse may lose out on a particularly distinctive and important perspective.<sup>149</sup> I address “whistleblowing” speech of this nature in Part II.D. below. But even where the suppressed speech relates to matters entirely separate from the workplace, the employer's ability to translate its economic power into enhanced political power poses a threat to social equality.<sup>150</sup>

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be in conflict with those of a boss who prefers to have like-minded people working for the enterprise.”) (footnote omitted). For a relatively recent example of an individual being fired for extreme views that seem to have no bearing on the ability to do the job, see Timothy Noah, *Can Your Boss Fire You for Your Political Beliefs?*, SLATE, July 1, 2002 (describing the case of a sewing-machine operator who was fired by Goodwill Industries in 2002 for supporting the Socialist Workers Party).

<sup>147</sup> See David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 9-13 (1998) (discussing the pressures toward worker self-censorship); Maltby, *supra* note 141 (“People need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families.”).

<sup>148</sup> See Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 692 (arguing that “[i]t makes little difference” whether “a person who speaks out is discharged by a public or private employer,” because “[p]olitical discussion is equally impoverished, the marketplace of ideas similarly distorted, and respect for the person no less denied.”).

<sup>149</sup> See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 111 (1995). For a general argument that the law should protect “citizen employees” who, among other things, bring employer wrongdoing to the attention of the public, see Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237 (2009).

<sup>150</sup> Cf. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710 (1991) (arguing, from a civic republican perspective, that “citizens should be protected from employers' compulsion or penalization of political activity” and that the law should provide “speedy and effective legal

2. *The Doctrinal Response* – Employment law should address this threat. And it already does to some extent. The courts in most states recognize a cause of action for wrongful termination against public policy.<sup>151</sup> But courts have generally not used the public policy tort to protect workers’ political speech. The one notable exception is the decision in *Novosel*, in which the Third Circuit, sitting in diversity, predicted that Pennsylvania law would protect an employee against discharge for refusing to engage in a lobbying campaign sponsored by his employer.<sup>152</sup> Subsequent Pennsylvania cases discredited that prediction, and courts elsewhere have not taken up the *Novosel* doctrine.<sup>153</sup> Many state statutes, however, protect workers’ political speech against retaliation by their employers. As Professor Eugene Volokh recently showed, “[a]bout half of Americans live in jurisdictions that protect *some* private employee speech or political activity from employer retaliation.”<sup>154</sup> But these statutes have widely disparate coverage.<sup>155</sup> Connecticut’s statute is the only one broad enough to apply “the same rules to private employers as are applied to public employers under the First Amendment.”<sup>156</sup>

A social equality perspective suggests that these aspects of employment law are moving in the right direction, but they do not go far enough. A focus on social equality suggests the need for a general prohibition of adverse employment actions for engaging or refusing to engage in off-the-job political speech—including political contributions or volunteering. To be sure, an employer has a number of legitimate and wholly business-related interests in its employees’ out-of-work speech. As with worker privacy, the law governing worker speech should take account of those interests without permitting them simply to trump the interest in social equality.

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remedies from discharge, reduction in job benefits, and other employer-controlled penalties for political activity”).

<sup>151</sup> See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.01, comment a (Tentative Draft No. 2 Revised, 2009).

<sup>152</sup> *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

<sup>153</sup> See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 618-620 (3d Cir. 1992); see also *Edmondson v. Shearer Lumber Co.*, 75 P.3d 733, 738-739 (Idaho 2003) (“[T]he public policy adopted in *Novosel* has not been endorsed by any other court, not even the Pennsylvania state courts within the federal district of the Circuit that issued *Novosel*.”); *Tiernan v. Charleston Area Medical Center, Inc.*, 506 S.E.2d 578, 589 (W.Va. 1998) (stating that “*Novosel* is dubious authority today”).

<sup>154</sup> Volokh, *supra* note 145, at 297 (emphasis added).

<sup>155</sup> See *id.* at 309-334.

<sup>156</sup> *Id.* at 311; see CONN. GEN. STAT. § 31-51q.

What are an employer's financial interests in regulating an employee's political speech outside of the workplace and working hours? I can imagine several. For one thing, customers may attribute that speech to the employer. If they object to a worker's out-of-work speech, they may punish the employer for retaining the employee who engaged in it.<sup>157</sup> Coworkers or managers may have a difficult time working with an individual who engages in out-of-work speech that they find offensive or with which they fundamentally disagree. This may be a particular problem in small or closely-held companies. Finally, an employer may engage in political speech of its own solely to enhance its bottom line (which seems to be what was going on in *Novosel* itself). As Professor Matt Bodie explains, "[c]ompanies make political contributions and spend on political advertising because it's good for business—their business."<sup>158</sup> An employer's speech in this regard can be blunted or undermined by employees' out-of-work speech—particularly if the employees are hired specifically to express the corporation's political message or are so high-ranking that their speech (even out of the office) will likely be attributed by observers to the corporation.<sup>159</sup>

Of course, an employer may have more ideological and less bottom-line-oriented reasons for regulating or compelling its workers' speech on political issues. A company may be owned by staunch opponents or proponents of the war in Afghanistan. If the owners want to exercise their right, protected by the Supreme Court in *Citizens United* and earlier cases,<sup>160</sup> to spend their company's treasury to support their preferred cause, they will have

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<sup>157</sup> In 1982, for example, the Boston Symphony Orchestra canceled a contract with Vanessa Redgrave to narrate a performance of "Oedipus Rex" after subscribers and community members protested Ms. Redgrave's support for the Palestine Liberation Organization. See *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988) (rejecting Redgrave's civil rights claim but affirming a judgment in her favor for breach of contract).

<sup>158</sup> Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: A Reponse to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206, 206 (2012).

<sup>159</sup> In 1986, for example, the large defense contractor Raytheon fired its chief lobbyist after he spoke at a press conference and advocated a reduction in defense spending. See *Korb v. Raytheon Corp.*, 574 N.E.2d 370 (Mass. 1991) (rejecting the lobbyist's wrongful termination claim); see generally Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 41-43 (2009) (describing evidence that onlookers often attribute the views of one's associates to oneself).

<sup>160</sup> See *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

to do so by hiring someone to speak on their behalf. Just as in the cases of bottom-line-oriented speech, an employer will have an interest in ensuring that those it hires to engage in ideological speech do not undermine that message.

Any protection of private employee speech must take account of legitimate employer interests like these. For example, such a protection could exempt particularly small employers or perhaps closely-held or nonprofit corporations. It could exempt the highest-ranking executive employees whose speech will be “readily identified with the employer.”<sup>161</sup> It could also exempt cases in which speaking or refusing to speak on a particular topic can be regarded as a bona fide occupational qualification. Such a rule would enable an employer to control the out-of-work speech of a lobbyist or other individual hired specifically to engage in political speech without permitting the employer to control every worker’s speech outside of the workplace. As in the employment discrimination context, a BFOQ doctrine would eliminate some of the employer’s traditional prerogative to define employees’ jobs. To take a recent example, Starbucks might define the job of a barista as someone who brews espresso drinks while writing messages on cups urging a solution to the fiscal cliff,<sup>162</sup> just as airlines in the 1970s defined the job of a flight attendant as helping customers get from place to place while appealing sexually to male business travelers. A BFOQ rule resists an employer’s casual and opportunistic leveraging of its economic power over the speech of employees whom it can control simply because of their economic dependence on the enterprise. But it leaves employers free to hire individuals specifically for the purpose of speaking on behalf of the enterprise and to ensure the effectiveness of their speech.

3. *Constitutional Questions*—There remains the question whether a law prohibiting private employers from controlling their workers’ political speech—even with the exceptions I have suggested—would be consistent with current First Amendment doctrine.<sup>163</sup> After all, the employer’s interests in this context—in

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<sup>161</sup> Selmi, *supra* note 111, at 1054.

<sup>162</sup> See Kevin Drum, *Starbucks CEO Should Leave His Baristas Alone*, MOTHER JONES, Dec. 28, 2012, <http://www.motherjones.com/kevin-drum/2012/12/starbucks-ceo-should-leave-his-baristas-alone>.

<sup>163</sup> Cf. Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998) (arguing that imposing First Amendment norms on private entities may actually threaten First Amendment values).

avoiding having speech with which it disagrees attributed to it, and in engaging in political speech of its own—are interests that the Supreme Court has found to be constitutionally based. These are complex issues that deserve an article of their own. For now, let me sketch (far too simplistically) the reasons why I believe a law like the one I have defended is consistent with current First Amendment doctrine.

The Supreme Court has held that a state may require a “business establishment” to associate itself in some ways with a third party’s speech, at least so long as the views of the speaker “will not likely be identified with those of the owner”; “no specific message is dictated by the State”; and the business “can expressly disavow any connection with the message.”<sup>164</sup> A law prohibiting employers from disciplining workers for off-work speech would not discriminate on the basis of viewpoint, as it would apply no matter what message the employer or employee wished to express or suppress.<sup>165</sup> And when an employee speaks about political issues on her own time, her speech is not likely to be understood as expressing her employer’s views (at least where she neither was hired specifically as a spokesperson or lobbyist nor occupies such a senior position in the company as to be understood as speaking for it at all times). Indeed, the very existence of a law protecting the off-work political speech of employees should undercut any suggestion that that speech could be attributed to the employer. The Court has explained that “high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.”<sup>166</sup> The same point applies here. In any event,

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<sup>164</sup> *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *see also* *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (reaffirming this aspect of *PruneYard*); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 576-577, 580 (1995) (reaffirming this aspect of *PruneYard*, but holding that the First Amendment prohibited the state from requiring operators of “an expressive parade” to include participants expressing a message with which they disagreed, where inclusion of those participants would dilute “the parade’s overall message” and disavowal by the parade operators would be impractical).

<sup>165</sup> *Cf. Pacific Gas & Elec. Co. v. Public Utilities Com’n*, 475 U.S. 1, 12-15 (1986) (plurality opinion) (requiring utility company to include in its billing mailer statements from third parties chosen specifically because they disagree with the company’s views is viewpoint-discriminatory and impermissibly burdens the company’s right to express its views).

<sup>166</sup> *Rumsfeld*, 547 U.S. at 65. One cannot, of course, press this point too far without eliminating any constitutional protection against forced association with

the employer can always disavow an employee's off-work speech—whether through a general disclaimer of responsibility for anything an employee says outside of the workplace or in response to a specific act of speech that the employer, customers, or coworkers find particularly offensive.

In *Boy Scouts v. Dale*, the Court held that requiring an “expressive association” to admit to membership an individual who (in his outside life) vocally disagreed with the association's message violated the First Amendment.<sup>167</sup> The Court concluded that such forced membership significantly burdened the association's message without serving a sufficiently strong interest.<sup>168</sup> But a commercial enterprise's hiring and retention of an employee—at least where the employee is not hired specifically to express a message—seems a far cry from an expressive association's decision to admit an individual to membership.<sup>169</sup>

To be sure, the Court held in *Citizens United v. FEC* that the government may not prohibit a corporation from engaging in political speech.<sup>170</sup> A corporation can act only through its employees. To engage in its constitutionally protected political

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another's speech. But in the context of out-of-work speech by ordinary employees, one need not push the point to the logical limit. Unless such an individual expressly refers to her status as an employee of a particular employer, it is fair to insist that the employer not act on the premise that the individual's speech will be attributed to it. Cf. *Selmi*, *supra* note 111, at 1054 (arguing that, when the worker *does* expressly refer to her status as its employee, an employer may require her to make clear that she speaks only for herself).

<sup>167</sup> *Boy Scouts v. Dale*, 530 U.S. 640, 653-654 (2000).

<sup>168</sup> *See Dale*, 530 U.S. at 659; *see also* *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 712 (2012) (citing *Dale* to support its holding that the First Amendment protects a church's choice of whom to admit to the ministry).

<sup>169</sup> Cf. *Rumsfeld*, 547 U.S. at 69 (concluding that permitting military personnel to recruit at law schools did not violate *Dale*, because recruiters are “outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association”). The analysis in text tracks, at a reasonably high level of abstraction, one of the leading defenses of *Dale*. Professor Dale Carpenter argues that *Dale* protects the right against compelled association in expressive, but not in commercial, activity. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001). There is a substantial argument that Professor Carpenter's reading of *Dale* is too broad and unduly limits state power over even noncommercial associations. *See* Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27 (2004). If that is so, my proposal should stand on even firmer constitutional ground.

<sup>170</sup> *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010).

speech, then, a corporation must be free to hire individuals to speak on its behalf. And it must be free to require those individuals not to undercut the message it has hired them to express. But that does not mean that employers have a constitutional right to transform the speech of *all* of their employees—even those who are hired to engage in productive activity quite distinct from expressing a message—into the speech of the corporation. In the context of government speech, the Court has held that the government may hire contractors to express a message and may take measures to ensure that those contractors do not undercut that message.<sup>171</sup> But it has suggested that the government may not regulate those contractors—nor, notably, their employees—in their speech outside of the contract.<sup>172</sup> Similarly, the Court has said that public employers can regulate out-of-work speech when employees deliberately seek to link that speech to their employers.<sup>173</sup> But it has not held that public employers can regulate their employees' off-duty speech when the worker does not seek to draw such a link.<sup>174</sup> Consistent with current First Amendment doctrine, courts could draw a similar distinction here: between a corporation's own political speech, which the government generally may not prohibit, and the political speech of its employees on their own time, which the government may regulate the corporation to protect.<sup>175</sup>

This discussion no doubt glosses over some important points. But I hope I have shown that a focus on social equality supports a call for greater protection of private employees' out-of-

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<sup>171</sup> See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

<sup>172</sup> See *id.* at 197-199.

<sup>173</sup> See *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

<sup>174</sup> *But cf.* Norton, *supra* note 159, at 18-19 (discussing lower-court cases allowing cities to sanction police officers for their off-duty speech, though those cases might be explained as applications of the principle that police officers are the sort of employees whose speech will always be reasonably attributed by observers to their government employers).

<sup>175</sup> It is true that the speech of many employees will be facilitated by the wages or salaries they earn, but that does not make their speech constitutionally attributable to their employers. "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." *Citizens United*, 558 U.S. at 905. There is an interesting parallel here with the current debate over whether employers can be required to offer their workers insurance policies that cover contraception, though the religious liberty issues in that debate are sufficiently distinct from the matters I discuss in this article that I leave them for another day. See generally Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151 (2012) (addressing those issues).

work political speech, and that such protection is at least plausibly consistent with current First Amendment doctrine.

#### D. Prohibitions on Retaliation

Employment law contains important, but incomplete, protections for workers who speak out on their employers' violations of law. These laws advance social equality in two respects. First, as I suggested above, they protect the ability of workers to participate in public discourse in those areas in which they have the most distinctive contributions to make as employees. Many courts have therefore applied the public policy tort to prohibit terminating an employee because she truthfully testified or participated in an investigation regarding her employer's compliance with the law.<sup>176</sup> Any number of federal and state whistleblowing statutes—most notably the whistleblowing provisions of the Sarbanes-Oxley Act<sup>177</sup>—also protect employees against adverse treatment taken because they reported their employers for statutory or regulatory violations or financial improprieties.<sup>178</sup> The antiretaliation provisions of various workplace statutes also protect employees who oppose or file complaints against employers' violations of those statutes.<sup>179</sup>

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<sup>176</sup> See, e.g., Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 445-446 (2009) ("All jurisdictions that recognize the public policy exception apply it where the employee informs a government agency about her suspicions."); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third Party Effects*, 74 TEX. L. REV. 1943, 1966-1967 (1996) (collecting cases).

<sup>177</sup> 18 U.S.C. § 1514A; see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) (describing Sarbanes-Oxley as the "gold standard in protection of employee whistleblowers"). The Dodd-Frank Act expanded on Sarbanes-Oxley's whistleblower protections. See Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. REV. 73, 85-95.

<sup>178</sup> For a comprehensive survey of state statutory and common-law whistleblower protections, and of federal whistleblower statutes enacted as of 2004, see Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1087-1123 (2004).

<sup>179</sup> See, e.g., 42 U.S.C. § 2000e-3(a) (prohibiting employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by" Title VII); 29 U.S.C. § 660(c)(1) (prohibiting employers from "discharg[ing] or in any manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such

But these laws have significant limitations. Both the public policy tort and whistleblower statutes are inconsistent in their coverage.<sup>180</sup> Moreover, they typically do not protect employees' speech to the general public.<sup>181</sup> Rather, they are generally limited to protecting whistleblowing speech made in one of two circumstances: (1) in conjunction with an investigation or judicial, administrative, or legislative proceeding<sup>182</sup>; or in some cases, (2) in an employee's communications with her supervisor<sup>183</sup> — though many do not even reach the latter circumstance.<sup>184</sup> The antiretaliation provisions of the federal employment discrimination laws, at least, are broader in their protection of employee speech that opposes violations of those laws.<sup>185</sup>

The public policy tort and the whistleblower and anti-retaliation laws also serve social equality in a second respect: they protect workers' access to the processes for petitioning the state for redress of grievances and for obtaining the protection of the laws. Thus, courts in a number of states have held that an employer engages in wrongful discharge by firing an employee for claiming worker's compensation or (during layoff periods) unemployment benefits.<sup>186</sup> The proposed Restatement of Employment Law would generalize this principle and provide a tort cause of action for employees who are disciplined for "fil[ing] a charge or claim[ing] a benefit in good faith under an employment statute or law (irrespective of whether the charge or claim is meritorious)."<sup>187</sup> And numerous state and federal laws that extend rights to

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employee on behalf of himself or others of any right afforded by" the Occupational Safety and Health Act).

<sup>180</sup> See, e.g., Cherry, *supra* note 178, at 1049 (concluding that "state whistleblower law is murky, piecemeal, disorganized, and varies from jurisdiction to jurisdiction" and that "the federal statutory scheme results in a haphazard enforcement structure").

<sup>181</sup> Connecticut is the only state that gives employees general free-speech protection against private employers. See CONN. GEN. STAT. § 31-51q.

<sup>182</sup> See, e.g., 18 U.S.C. § 1514A(a)(1)(A) & (B), (a)(2) (antiretaliation provision of Sarbanes-Oxley Act).

<sup>183</sup> See, e.g., 18 U.S.C. § 1514A(a)(3) (antiretaliation provision of Sarbanes-Oxley Act).

<sup>184</sup> See Lobel, *supra* note 176, at 445-447.

<sup>185</sup> See Crawford v. Metropolitan Government of Nashville and Davidson County, 555 U.S. 271 (2009) (reading Title VII's opposition clause broadly in accordance with the ordinary meaning of the word "oppose").

<sup>186</sup> See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 Reporters Notes comment d (Tentative Draft Revised, 2009) (collecting cases).

<sup>187</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02(c) (Tentative Draft Revised, 2009).

employees contain their own antiretaliation provisions protecting workers who pursue charges or claims under them.<sup>188</sup>

An employer that uses its economic power to prevent a worker from reporting its violations of law threatens social equality in at least two dimensions: one that relates to dynamics outside of the workplace, and the other that relates to dynamics within the workplace. The ability to petition the government for redress of grievances, seek the protection of the laws, and call another person to account for violating one's rights is a core aspect of citizenship in our democratic polity.<sup>189</sup> When employer retaliation forecloses that ability for a worker, it denies the worker full membership in the broader community. But even those dynamics that are purely internal to the workplace matter for social equality. As Professor Cynthia Estlund has shown, the workplace is a central location in our society for the development and exercise of citizenship.<sup>190</sup> When an employer can effectively foreclose a worker from seeking redress for a violation of the worker's own rights guaranteed by law, the employer communicates the worker's subordinate status clearly and effectively. Retaliation exacerbates and entrenches hierarchies of status within workplaces, by "prey[ing] on the most vulnerable" employees, while "simultaneously magnif[ying] the power of high-status persons" such as owners and supervisors.<sup>191</sup>

By helping to ensure that workers can report employers' violations of their legal rights, the legal suite of antiretaliation protections advances and protects social equality. As the Supreme Court explained when it interpreted Title IX of the Education Amendments as including a prohibition against retaliation, the objective of ensuring individuals effective protection against discrimination "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation."<sup>192</sup> That is because antidiscrimination laws, like other workplace laws, cannot be effectively enforced without individual employees' reports of

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<sup>188</sup> See, e.g., 29 U.S.C. § 215(a)(3) (Fair Labor Standard Act); *id.* § 660(c)(1) (Occupational Safety and Health Act); *id.* § 2615(b)(1) (Family and Medical Leave Act); 42 U.S.C. § 2000e-3(a) (Title VII of Civil Rights Act); *id.* § 12203(a) (Americans with Disabilities Act).

<sup>189</sup> See *supra* text accompanying notes 53-54. (explaining why access to such legal and governmental processes is essential to social equality).

<sup>190</sup> See CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

<sup>191</sup> Deborah Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005).

<sup>192</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

violations. As Professor Estlund persuasively shows, enforcement of workplace rights depends on “vigorous encouragement and protection of individual employees who speak up about rights and regulatory infractions.”<sup>193</sup>

But the suite of antiretaliation protections does not yet provide protection for all employees who claim violations of their workplace rights. In particular, workers who assert rights under state law will be denied protection if they live in one of the many states that does not provide a wrongful discharge cause of action for retaliation for the exercise of employment rights. A social equality perspective suggests that the suite of antiretaliation protections should be expanded to fill that gap. In particular, the wrongful discharge tort should generally protect employees’ complaints about violations of their legal rights.

As with the other doctrinal areas I have discussed, employers have legitimate interests here, and the law should take account of them. For one thing, whistleblowers’ complaints can be frivolous, asserted in bad faith, or raised in a needlessly adversarial or disruptive manner.<sup>194</sup> Social equality requires that employees be able to speak out about violations of their workplace rights or their employers’ other violations of law; it does not require that they be permitted to use whistleblower laws to harass their employers. Accordingly, it would be fully consistent with a social equality approach to accommodate the employer interests here. The law might do this by explicitly adopting a balancing test. The Connecticut statute, for example, does not protect conduct that “substantially or materially interfere[s] with the employee’s bona fide job performance or the working relationship between the employee and the employer.”<sup>195</sup> The Connecticut courts have interpreted that language as incorporating the *Connick/Pickering* doctrine from the Supreme Court’s First Amendment case law, which balances the public interest in the speech against the employer’s interest in efficient management of the workplace.<sup>196</sup>

But, as Professor George Rutherglen has persuasively argued, such a balancing test has serious flaws. “The hard cases typically reduce to a direct conflict between incommensurable

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<sup>193</sup> Estlund, *supra* note 177, at 376.

<sup>194</sup> See Lobel, *supra* note 176, at 464-465 (describing how courts have denied protection to bad faith, frivolous, or needlessly disruptive whistleblowing speech).

<sup>195</sup> CONN. GEN. STAT. § 31-51q.

<sup>196</sup> See *Schumann v. Dianon Systems, Inc.*, 43 A.3d 111, 121-123 (Conn. 2012).

rights: on the part of the employee to talk about what goes on at work and on the part of the employer to control it.”<sup>197</sup> The balancing test in employee speech cases thus “turns out, upon examination, to be an illusory balance between poorly defined interests.”<sup>198</sup> Professor Rutherglen shows that the result is systematically to underprotect the employee’s speech interest—the interest, in my terms, in social equality—while denying certainty and predictability to both employees and employers.<sup>199</sup>

A more promising approach would adopt specific subrules to identify those categories of whistleblowing speech that threaten legitimate employer interest and can be exempted from protection without significant harm to social equality. The proposed Restatement, for example, would protect whistleblowing employees only when they have a good-faith belief that the employer has violated the law.<sup>200</sup> Further limiting employees’ whistleblowing rights, the lower federal courts have accorded protection under antiretaliation statutes only to those workers who act on the basis of a *reasonable* belief that the employer violated the law.<sup>201</sup> These rules recognize that, given the uncertainties of an employer’s underlying legal obligations, workers need breathing space to complain without fear that a court will later conclude that their employers did not violate those obligations. But they also prevent frivolous and harassing complaints that the law need not protect to serve social equality.

Professor Orly Lobel contends that antiretaliation law should take account of employers’ interests in a distinct respect. She argues that the law should incentivize workers to present whistleblower complaints to their employers first, and should privilege them to complain outside of the company only if the employer fails to provide satisfaction (or to create a process that can be expected to be responsive to meritorious claims).<sup>202</sup> One model for her approach is the Supreme Court’s harassment

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<sup>197</sup> George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J. L. & POL. 129, 144 (2008).

<sup>198</sup> *Id.* at 143.

<sup>199</sup> *See id.* at 143-144.

<sup>200</sup> *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02(c) (Tentative Draft Revised, 2009).

<sup>201</sup> *See* Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 446-451 (2010).

<sup>202</sup> *See* Lobel, *supra* note 176, at 461-467.

jurisprudence.<sup>203</sup> That body of law was designed to incentivize employers to create internal processes that effectively prevent and respond to harassment and, at the same time, to incentivize employees to take advantage of those processes.<sup>204</sup> But that jurisprudence has not lived up to its promise to protect employees.<sup>205</sup> More generally, Professor Lobel's argument is driven by a belief in "new governance" approaches that place a heavy premium on employer self-regulation.<sup>206</sup> But I am skeptical that such self-regulation can adequately preserve employees' ability to speak out about violations of law in the workplace.<sup>207</sup> To the extent that Professor Lobel argues that workers should be protected against employer retaliation when they make internal whistleblowing complaints, I agree; such retaliation is a major threat to social equality. But to the extent that she argues that employers should be empowered to discipline or fire workers who make reasonable, good-faith complaints to external authorities about violations of law at the workplace, her proposal would undermine social equality and should be rejected.

#### E. Arbitration

The growth of employment arbitration, aided and abetted by a number of Supreme Court decisions,<sup>208</sup> also raises significant concerns from a social equality perspective.<sup>209</sup> The doctrinal implications of those concerns are less clear, however. Critics of arbitration argue that it operates in a manner that undermines the rights granted by employment statutes and the common law.<sup>210</sup>

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<sup>203</sup> See *id.* at 473-475 (citing, *inter alia*, Faragher v. City of Boca Raton, 524 U.S. 775, 805-808 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)).

<sup>204</sup> See Michael C. Harper, *Employer Liability for Harassment under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41 (1999).

<sup>205</sup> See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 24-25 (2006).

<sup>206</sup> See Lobel, *supra* note 176, at 470-473.

<sup>207</sup> I discuss the reasons for my skepticism in Bagenstos, *supra* note 205, at 20-40.

<sup>208</sup> The most notable of these have been *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that a claim under the Age Discrimination in Employment Act could be subject to contractually binding arbitration); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that the Federal Arbitration Act applies to employment contracts); and *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (holding that a collective bargaining agreement could require arbitration of individual employees' claims under the federal employment discrimination laws).

<sup>209</sup> See Bagchi, *supra* note 16, at 612-614.

<sup>210</sup> See Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Private Arbitration*, 74 WASH. U. L.Q. 637, 695 (1996).

They contend that arbitration favors employers—who, as repeat players, have an outsized influence on the selection of arbitrators.<sup>211</sup> They contend that virtually all of the process that arbitration removes is process that benefits workers.<sup>212</sup> And they note that a large number of arbitration decisions remain confidential or are released in only a redacted form, which undermines the public-education benefits of litigation.<sup>213</sup> Taken together, one critic has charged, employment arbitration provisions facilitate “a new feudal order,” in which contract is “used to create status, or at least reinforce the lack thereof.”<sup>214</sup>

These arguments do suggest that arbitration of employment claims undermines workers’ ability to petition their government for redress of grievances, obtain the protection of the laws, and call employers to account. They thus provide reasons to be skeptical, from a social equality perspective, of the spread of mandatory employment arbitration. But there is another side to the story. Many defenders of the practice contend, with some support, that arbitration is more accessible than are judicial proceedings, so that in many cases arbitration will provide a *more* effective means for individual workers to obtain the protection of the laws than will the filing of a lawsuit.<sup>215</sup> In part for this reason, advocates of just-

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<sup>211</sup> See Lisa B. Bingham, *Employment Arbitration: The Repeat-Player Effect*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189 (1997); cf. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 430 (2006) (noting various reasons to think employers have a repeat-player advantage but finding the empirical evidence “equivocal at best”); but see Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 400-401 (1999) (“As a matter of general practice, the use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage.”) (footnotes omitted).

<sup>212</sup> See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 829-833 (2009).

<sup>213</sup> See Estlund, *supra* note 211, at 433; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1672 (2005).

<sup>214</sup> Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1063 (1998); see also Bagchi, *supra* note 16, at 614 (“If employers are permitted to use biased arbitration procedures to evade even those basic background checks on employer power imposed by law, the resulting situation of unchecked authority magnifies the disempowerment associated with low status.”).

<sup>215</sup> See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559; Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783 (2008); David Sherwyn, J. Bruce Tracey, & Zev J. Eigen, *In*

cause termination regimes typically argue that those regimes should be enforced through a system of arbitration.<sup>216</sup> But the argument that arbitration is a more effective forum for workers to vindicate their employment rights remains highly controversial.<sup>217</sup>

For present purposes, there is no need to assess these competing claims, which rest largely on empirical disagreements. Rather, two points are crucial. First, from a social equality perspective, employment arbitration should be encouraged only if and to the extent that it advances the ability of workers to obtain redress for their employers' violations of their legal rights. That arbitration may be cheaper or more efficient than a lawsuit cannot save mandatory arbitration under a social equality analysis unless the cost savings and efficiencies reduce the barriers to workers' access to the process.<sup>218</sup>

Second, given the quite significant threat that arbitration poses to social equality, courts should be vigilant in ensuring that arbitration occurs in a procedural context that mitigates that threat. In particular, courts should not hesitate to invalidate arbitration provisions that have the effect of keeping meritorious claims from being decided. The social equality analysis thus provides a basis for challenging application of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*<sup>219</sup> to employment arbitration. In holding that a state-law prohibition on class-action bans was preempted by the Federal Arbitration Act,<sup>220</sup> the Court there gave short shrift to the concern that class adjudication (whether in court or in arbitration) is essential to ensuring that some meritorious

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*Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999); see also Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813 (2008) (finding the empirical evidence inconclusive overall, but finding reason to think that arbitration is more accessible than litigation for many low-wage employees, though less accessible than litigation for other employees); cf. Estlund, *supra* note 211, at 436-437 (arguing that a fair arbitration agreement should benefit many employees).

<sup>216</sup> See *supra* text accompanying note 94.

<sup>217</sup> For a particularly powerful rebuttal, see David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

<sup>218</sup> This seems to be largely Professor Estlund's argument. See Estlund, *supra* note 211, at 426-438.

<sup>219</sup> 131 S. Ct. 1740 (2011).

<sup>220</sup> See *id.* at 1753.

claims will be brought at all.<sup>221</sup> Whatever one may think about that concern in the consumer-contract setting of *Concepcion* itself,<sup>222</sup> an extension of the Court's analysis to the employment setting would raise serious social equality concerns.<sup>223</sup>

Consistent with my analysis, the National Labor Relations Board's recent *D.R. Horton* decision held that employment arbitration agreements that include class action waivers are invalid.<sup>224</sup> The Board concluded that such agreements interfere with employees' rights under the National Labor Relations Act to engage in concerted action (including concerted legal action) for their mutual aid and protection.<sup>225</sup> The Fifth Circuit has stayed the Board's decision, however, and lower federal courts have so far refused to endorse it.<sup>226</sup> Nonetheless, a social equality perspective suggests that the Board was right to hesitate before extending *Concepcion's* holding to the employment context.

#### F. Child Labor and Maximum-Hours Laws

A number of employment law doctrines can be profitably understood as advancing a distinct aspect of social equality. These doctrines ensure that individuals have the time, space, and ability to participate in democratic citizenship. The significant restriction of child labor is a prime example.<sup>227</sup> Although opponents of child labor have often made arguments that rest on a notion of compulsion—that children cannot, as a practical matter, make a

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<sup>221</sup> See Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-Concepcion Era*, 56 ST. LOUIS U. L.J. 1203, 1225 (2012); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

<sup>222</sup> See Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 175-182 (2006) (arguing, before *Concepcion*, that mandatory arbitration clauses with class-action bans make certain consumer claims impossible to vindicate); but cf. Omri Ben-Shahar, *Arbitration and Access to Justice: Economic Analysis*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2197013](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197013) (Jan. 2013) (expressing skepticism about this conclusion).

<sup>223</sup> See Estlund, *supra* note 211, at 427-429 (arguing, before *Concepcion*, that “[b]oth the effect of negating some nonwaivable employee rights and the apparent purpose of foreclosing some meritorious claims altogether condemn class action waiver clauses” in the employment setting).

<sup>224</sup> *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012),

<sup>225</sup> See *id.* at 5.

<sup>226</sup> See *Andrus v. D.R. Horton, Inc.*, 2012 WL 5989646 at \*4 n.1 (D. Nev., Nov. 12, 2012) (noting that the Fifth Circuit had stayed the Board's decision).

<sup>227</sup> See, e.g., 29 U.S.C. §§ 203(l), 212 (child labor provisions of the Fair Labor Standards Act).

free choice whether to work<sup>228</sup>—another significant strand of the case against child labor rests on a notion of democratic citizenship. To the extent that children who work too young or for too many hours lose out on time for education,<sup>229</sup> child labor deprives individuals of the opportunity to develop the skills and capacity necessary for full citizenship.<sup>230</sup>

Our legal and constitutional tradition has long endorsed the role of education in developing the means to exercise equal citizenship. James Madison’s famous letter to W.T. Barry, “applaud[ing]” what Madison called Kentucky’s “liberal appropriations” to support “a general system of Education,” provides an early example:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>231</sup>

In recent decades, the Supreme Court has similarly endorsed the importance of education to full social and democratic citizenship.<sup>232</sup>

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<sup>228</sup> John Stuart Mill described this notion pithily: “Freedom of contract, in the case of children, is but another word for freedom of coercion.” V JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, Ch. XI § 30 (1848). For authors collecting examples of these sorts of arguments, see Kaushik Basu, *Child Labor: Cause, Consequence, and Cure, with Remarks on International Labor Standards*, 37 J. ECON. LIT. 1083, 1093-1095 (1999); and Mark Blaug, *The Classical Economists and the Factory Acts – A Re-Examination*, 72 Q. J. ECON. 211 (1958).

<sup>229</sup> The degree to which child labor displaces education will no doubt depend on the age of the child, the number of hours worked, the educational opportunities that would otherwise be available, and other local social and economic factors. See, e.g., Basu, *supra* note 228, at 1093 (discussing studies showing a variety of effects of child labor on education).

<sup>230</sup> Mill again puts the point well. He argues that “[t]here are certain primary elements and means of knowledge, which it is in the highest degree desirable that all human beings born into the community should acquire during childhood,” and that the failure to provide education in those elements breaches a duty “towards the members of the community generally, who are all liable to suffer seriously from the consequences of ignorance and want of education in their fellow-citizens.” V MILL, *supra* note , Ch. XI § 24.

<sup>231</sup> Letter from James Madison to W.T. Barry, Aug. 4, 1822, <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

<sup>232</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence” and that “education prepares individuals to be self-reliant and

When children are forced, by their families' economic circumstances, to work at a young age and forgo basic educational opportunities, they are likely to become locked into an "underclass" defined by a self-perpetuating cycle of poverty and inequality.<sup>233</sup> Laws restricting child labor are best understood as preserving the opportunities for all children to become full and equal citizens.

Child labor may seem a bit remote from the problems of American employment law today.<sup>234</sup> But the scope and application of maximum-hours laws<sup>235</sup> to the general workforce remains a vital topic in the field. And those laws, too, can be profitably understood as preserving the space for workers to develop capacities for participating in social citizenship. Indeed, notions of social citizenship played a significant part in workers' agitation for maximum-hours laws in the decades surrounding the turn of the Twentieth Century. As one study of workers' advocacy during the period shows, "a persistent theme among nineteenth and early twentieth century shorter hours advocates was that shorter hours yield enhanced leisure time with which working people could improve their minds and become better citizens."<sup>236</sup> When workers repeated the slogan "Eight hours for work, eight hours for rest, and

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self-sufficient participants in society"); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (describing education as "the very foundation of good citizenship").

<sup>233</sup> It was precisely this concern about creating a self-perpetuating underclass that led the Court to strike down a law barring free public education of the children of undocumented immigrants. See *Plyler v. Doe*, 457 U.S. 202, 221-223 (1982); see also *id.* at 234 (Blackmun, J., concurring) ("Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass."); *id.* at 239 (Powell, J., concurring) (describing the law at issue as "threaten[ing] the creation of an underclass of future citizens and residents").

<sup>234</sup> *But see* Marjorie Elizabeth Wood, *Pitting Child Safety Against the Family Farm*, N.Y. TIMES, May 7, 2012 (noting controversy over Obama Administration's quickly-abandoned efforts to impose new child labor restrictions on hazardous agricultural employment).

<sup>235</sup> See, e.g., 29 U.S.C. § 207 (maximum-hours provision of the Fair Labor Standards Act).

<sup>236</sup> Matthew S. Bewig, *Lochner v. The Journeyman Bakers of New York: The Journeyman Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 443 (1994).

eight hours for what we will”<sup>237</sup> – the “what we will” often referred to educational and civic activities.<sup>238</sup>

And the point remains a vital one today.<sup>239</sup> A large proportion of workers are spending increasing amounts of time at work, which crowds out their ability to engage in personal development or participate in the civic life of their community.<sup>240</sup> As Professor Todd Rakoff points out, “[t]ime spent not-working” includes “time spent going to religious services and participating in civic groups,” as well as “time spent forming political opinions and working as a citizen.”<sup>241</sup> In light of the increasing time spent at work, Professor Estlund argues that we should treat the workplace as a central arena for civic and democratic participation.<sup>242</sup> But one can endorse Professor Estlund’s argument as one proposal for responding to work’s crowding out of civic engagement without endorsing the underlying trend. Maximum-hours laws provide a lever to fight that underlying trend.

The problem of overwork appears to be concentrated among “white collar” workers<sup>243</sup> – many of whom are not especially wealthy or powerful within or outside of their workplaces.<sup>244</sup> A social equality perspective might therefore make one receptive to proposals to narrow the FLSA’s white-collar exemptions.<sup>245</sup>

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<sup>237</sup> E.g., Tabatha Abu El-Haj, *Changing the People, Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1, 42 (2011).

<sup>238</sup> See Bewig, *supra* note 236, at 443-447.

<sup>239</sup> See TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 68 (2002) (“In the present day, the fundamental reason to set a legal limit to work time is to make time available for other important social activities.”).

<sup>240</sup> See, e.g., RAKOFF, *supra* note 239, at 169.

<sup>241</sup> RAKOFF, *supra* note 239, at 68.

<sup>242</sup> See ESTLUND, *supra* note 190. Along similar lines, Professor Laura Rosenbury argues that we should treat the workplace as an important locus of friendships and intimate ties. See Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL’Y 117 (2011).

<sup>243</sup> See RAKOFF, *supra* note 239, at 77-80.

<sup>244</sup> See Adam T. Klein, Mark R. Humowiecki, Tarik F. Ajami & Cara E. Greene, *The DOL’s New FLSA White Collar Exemption Regulations and Working with the DOL on FLSA Actions*, 10 EMPLOYEE RTS. & EMP. POL’Y J. 459 (2006) (noting that under the new Department of Labor regulations the white-collar exemptions can apply to an employee with a salary as low as \$23,660 per year). For a good discussion of the application of these exemptions to retail store managers – many of whom make little more than minimum wage – see Drew Frederick, Comment, *Exempt Executives? Dollar General Store Managers’ Embattled Quest for Overtime Pay Under the Fair Labor Standards Act*, 160 U. PA. L. REV. 277 (2011).

<sup>245</sup> To be sure, the problem of crowding out civic life exists for workers who are covered by the FLSA as well. See Shirley Lung, *Overwork and Overtime*, 39 IND. L.

Commentators have suggested a number of possibilities in this regard. Union lawyer Scott Miller proposes replacing the white-collar exemptions with one, modeled on the “key employee” exemption under the Family and Medical Leave Act, that would exclude the top 10 percent of an employer’s workforce (defined by salary) from maximum-hours coverage.<sup>246</sup> Sociologist Juliet Schor similarly proposes allowing employers to “exempt the top 20% of their workforce from the 40-hour week standard, but that they be required to designate an alternate standard of weekly and annual hours for this 20%.”<sup>247</sup> Professor Rakoff proposes eliminating the white-collar exemptions for those currently exempt workers who “either have regular hours or already keep track of their hours for business purposes.”<sup>248</sup> He would continue to exempt only those “high-level employees who work disparate and irregular hours without any ordinary reason to keep track of them.”<sup>249</sup>

These various proposals have their strengths and weaknesses from a policy perspective. But the problem is even more complex than that. As Professor Deborah Malamud’s research has shown, the boundaries of the white-collar exemptions have both material and symbolic effects, and these may point in different directions.<sup>250</sup> Although limiting the application of the white-collar exemptions will tend to advance social equality by freeing up more time for newly-covered workers to spend “as they will,” it may at the same time undermine that effect by sending the message that those workers should be treated as having a lower status more generally. A social equality perspective cannot answer the question of how these considerations ultimately balance against each other.<sup>251</sup> But I hope I have shown that it helpfully highlights a key factor that policymakers must take into account in elaborating, applying, and considering reforms to the Fair Labor Standards Act.

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REV. 51 (2005) (responding to the problem by arguing for a statutory right to refuse overtime).

<sup>246</sup> See Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 5 (2003).

<sup>247</sup> Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157 (1994).

<sup>248</sup> RAKOFF, *supra* note 239, at 81.

<sup>249</sup> RAKOFF, *supra* note 239, at 82.

<sup>250</sup> See Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212 (1998).

<sup>251</sup> It does suggest, however, that Professor Malamud is probably correct in urging that it is “time to genuinely rethink the FLSA and its upper-level exemptions, not merely to ‘simplify’ them or remake them to maximize employer ‘flexibility.’” *Id.* at 2319-2320.

## CONCLUSION

In this paper, I have offered an egalitarian theory of individual employment law. I have argued that employment law can be profitably understood as serving the interest in promoting social equality—and that its rules can be analyzed, defended, and critiqued based on the degree to which they advance that interest. Like the rules of employment discrimination law, which also promote social equality, I have argued that rules of individual employment law are justified even if they impose costs on employers. Each employer, I have argued, has an obligation to spend reasonable sums to avoid contributing to social inequality. And I have argued that employment law can draw on the techniques employment discrimination law uses to ensure that particular employers are not called upon to bear too heavy a burden.

I have showed how the social equality theory illuminates a number of key issues in employment law—from the field's most enduring questions (Is employment-at-will the correct baseline rule for job termination?) to those that are especially prominent today (Should we protect employees' off-work speech and actions?). The social equality theory thus provides a fitting alternative to existing theories of employment law, which focus either on promoting economic efficiency or on avoiding a hazily defined notion of exploitation. Social equality offers an attractive overarching theory of individual employment law, one that offers traction in addressing important doctrinal issues.