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Does Work Law Have a Future if the Labor Market Does Not?

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DOES WORK LAW HAVE A FUTURE IF THE LABOR MARKET
DOES NOT?

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I. INTRODUCTION

For this Piper Lecture, I was asked to address the “Future of Work.” No small topic, and one much-discussed these days.¹ An especially earnest

* This Essay is a revised version of the 37th Annual Kenneth M. Piper Lecture delivered at IIT Chicago-Kent College of Law on April 14, 2015. I am grateful for the honor of delivering the Lecture, for the stimulating comments from Niklas Bruun, Akiko Taguchi, and other participants, and for the generous hospitality of Marty Malin, Kelly Power, and everyone at Chicago-Kent and its Institute for Law and the Workplace. I also received helpful feedback from Sanjukta Paul and Katherine Stone. Brian Li-A-Ping and Kathleen Semanski provided excellent research assistance.

1. See, e.g., *The Future of Work and Workers*, PACIFIC STANDARD, <http://www.psmag.com/series/the-future-of-work-and-workers> (last visited Jan. 23, 2016); *The Future of Work: Map of Related Inquiries*, OPEN SOCIETY FOUNDS., FUTURE OF WORK IN AM. (last updated Apr. 1, 2015), <http://www.futureofworkinamerica.org/>; Tom Perez, *The Future of Work*, U.S. DEP'T OF LABOR BLOG (Dec. 3, 2015), <https://blog.dol.gov/2015/12/03/the-future-of-work/>.

strand of this conversation circles around Uber,² which stands in for the entire phenomenon of the “gig,” “on-demand,” or “sharing” economy, ill-defined as those categories are.³ The “future of work” topic seems to call for an oracle who provides inscrutable clues to an uncertain future. So to motivate this Essay, and to signal how I hope to broaden the conversation, I pose a riddle: “What do Uber, *Hobby Lobby*, and Ferguson have in common?” Aside, of course, from their sheer prominence in U.S. law, politics, and culture over the past year or two. By the end, I shall link them to another high-profile development that arose after the Lecture, fizzled before publication, and will no doubt return, namely the Supreme Court’s consideration of *Friedrichs v. California Teachers Association*.⁴

The felt need to question the future of work reflects a sense of tumult in the present. Major U.S. labor market institutions are changing.⁵ Much-discussed examples include the decline of manufacturing jobs and, more recently, the extension of outsourcing and offshoring deep into the service sector, too. The organization of production and the structure of firms are changing, in some cases facilitated by new technologies and as evidenced by practices ranging from telecommuting to, of course, Uber and its app-based cousins. The long-running decline of organized labor appears to have entered a new phase with serious blows struck against public sector unions from state legislatures to the Supreme Court,⁶ and right-to-work laws taking root in the heartland of industrial unionism.⁷

2. See, e.g., Steven Greenhouse, *Uber: On the Road to Nowhere*, AM. PROSPECT, <http://prospect.org/article/road-nowhere-3> (last visited Jan. 23, 2016); Benjamin Sachs, *Uber, the Gig Economy, and Labor*, ONLABOR (Apr. 16, 2015), <http://onlabor.org/2015/04/16/uber-the-gig-economy-and-labor/>; Cf. Lawrence Mishel, *Uber Is Not the Future of Work*, ATLANTIC (Nov. 16, 2015), <http://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/>.

3. See, e.g., Matt Bencke, *The On-Demand, Sharing and Gig Economies Never Existed, So Stop Pretending They Did*, TECH CRUNCH (Dec. 3, 2015), <http://techcrunch.com/2015/12/03/the-sharing-and-gig-economies-never-existed-so-stop-pretending-they-did/>; Denise Cheng, *Is Sharing Really Caring? A Nuanced Introduction to the Peer Economy*, OPEN SOC’Y FOUND. (Oct. 2014), <http://static.opensocietyfoundations.org/misc/future-of-work/the-sharing-economy.pdf>.

4. *Friedrichs v. Cal. Teachers Ass’n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), cert. granted, 135 S. Ct. 2933 (June 30, 2015) (No. 14-91), *aff’d by an equally divided Court*, 135 S.Ct. 1083 (2016) (Mem.) (per curiam).

5. See generally, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

6. Eileen Boris et al., *After ‘Harris v. Quinn’: The State of Our Unions*, NATION (July 2, 2014), <http://www.thenation.com/article/after-harris-v-quinn-state-our-unions/>; Richard Michael Fischl, “Running the Government Like a Business”: Wisconsin and the Assault on Workplace Democracy, 121 YALE L.J. ONLINE 39 (2011), http://www.yalelawjournal.org/pdf/996_zvnjg6xa.pdf.

7. Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), <http://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html>.

In the course of all this, workers are taking it on the chin. The Great Recession created huge dislocations of long-term unemployment, downward mobility, and the exacerbation of racial disparities among workers.⁸ Real wages are stagnant or declining, and middle-class jobs seem more elusive than ever. Indeed, the very idea of a stable life anchored by regular employment has been undercut by the rise of fluctuating and on-call schedules,⁹ and yes, again, Uber.

But all that is not my main concern today, important as it is. Instead, I want to explore something that is more speculative, less apparent, and potentially deeper.

All the phenomena just invoked are conventionally understood under the rubric of “changes in the labor market.” My question is whether this sense of instability extends beyond specific labor market institutions and instead also calls into question the very existence of “the labor market” as a distinct social field. In other words, I am interested in whether we are witnessing not merely a time of disruptive change *within the labor market*, but the early signs of the labor market’s obsolescence as an institutionalized category. Such a development would portend the demise of any common regulatory project organized around “workers” or “employees” as we currently understand them.

II. TWO TENSIONS IN EMPLOYMENT AS MARKET WORK

Currently, in everywhere from academic research to government statistics to common parlance, we treat “the labor market” as a discrete and coherent thing. On the one hand, it is separated off from other domains of social activity (“the family,” “civil society,” and so on), and even from other components of “the economy” (capital markets, product markets, etc.). On the other, it is an object held together by distinctive internal dynamics. We do this all the time when characterizing “the labor market” as

8. MIKE EVANGELIST & ANASTASIA CHRISTMAN, NAT’L EMP’T LAW PROJECT, SCARRING EFFECTS: DEMOGRAPHICS OF THE LONG-TERM UNEMPLOYED AND THE DANGER OF IGNORING THE JOBS DEFICIT (2013); *Chart Book: The Legacy of Great Recession*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/research/economy/chart-book-the-legacy-of-the-great-recession> (last updated Mar. 25, 2016); Valerie Wilson, *The Crisis of Black Unemployment: Still Higher Than Pre-Recession Levels*, AM. PROSPECT (Apr. 2, 2015), <http://prospect.org/article/crisis-black-unemployment-still-higher-pre-recession-levels>.

9. HARRIET PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES (2005); Susan J. Lambert et al., *Precarious Work Schedules Among Early-Career Employees in the US: A National Snapshot*, U. CHI. EINET (Aug. 27, 2014), https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert.fugiel.henly_.precarious_work_schedules.august2014_0.pdf.

healthy or hurting, growing or shrinking, as characterized by certain levels of unemployment or patterns of wage growth, decline, or dispersion.

This discreteness and coherence is an institutional achievement, not a foreordained result. The labor market's boundaries come under pressure in two seemingly different ways: the distinctiveness of "labor" relative to other market activity, and the distinctiveness of "markets" relative to other means of structuring labor. This Part reviews this achievement, these tensions, and suggests how they interact.

A. Workers Versus Firms: The Distinctiveness of Embodied Labor

For labor and employment lawyers, the crucial example of the labor market's coherence and discreteness is the institution of "employment." Our labor and employment laws are built on the idea of an all-purpose category of employer-employee relations.¹⁰ This category is quite general. It puts manual laborers, child care providers, clerical workers, computer technicians, university professors, and professional athletes all in the same box. We are all employees, notwithstanding the particular differences in our employment. Similarly, mega-corporations like Wal-Mart, small neighborhood businesses, not-for-profit organizations, and government agencies are "employers" and, as a result, face basically the same regulatory regime.

This abstraction and homogenization applies across workers not just with regard to their occupation or type of employer but also with regard to what Mark Freedland calls the "personal work nexus."¹¹ Labor and employment law rarely distinguishes between a 19-year-old high school graduate living at home with her parents, a senior citizen living alone with a pension and no mortgage, or a 35-year-old supporting several family members in her household. Officially, employment concerns a worker's relationship to the production process without regard to the rest of the worker's life.

Of course there are various exceptions one could tick off. But it suffices for my point that these are structured *as exceptions*, notwithstanding the basal fact of an employee-employer relationship. They generally are understood this way, too.

10. See generally Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 31 (Annette Bernhardt et al. eds., 2008).

11. Mark Freedland, *From the Contract of Employment to the Personal Work Nexus*, 35 *INDUS. L. J.* 1 (2006).

As exceptions, various carve-outs from employment law coverage or specialized rules within it seem to be suspect, or at least in need of special justification. The question goes, why shouldn't domestic workers or agricultural workers be treated just like other employees? They are all workers, and that is what matters.¹² The same problem applies to more delightfully obscure exceptions like "employee[s] employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto."¹³ The explanation for such exclusions often seems nefarious—because of racism, sexism, and/or some backroom special interest deal—and frequently for good reason.¹⁴

These claims to horizontal equity rest on an assertion of underlying similarity in the relevant respect. What is this relevant respect? The traditional legal answer sounds in questions of the employer's control over the employee.¹⁵ That control can be understood formally through the common-law focus on an employer's right to direct the manner of work, or it can be understood more substantively through the Fair Labor Standards Act's emphasis on the "economic realities" of functional control rooted in economic dependence.

These questions of control dominate analysis of whether workers are employees and, if so, of what employer(s). They arise in the familiar contexts of independent contracting, sub-contracting, franchising, and staffing agency arrangements, including in the current ferment around the employee status of "gig economy" workers like Uber drivers.¹⁶

These standard issues around control, all of which implicate the disintegration or reconfiguration of traditional Fordist firms, generally are assumed to arise *within* the labor market. The fundamental worry about labor and employment law is that current structures are simply inadequate for the

12. See generally Noah D Zatz & Eileen Boris, *Seeing Work, Envisioning Citizenship*, 18 EMP. RTS. & EMP. POL'Y J. 95 (2014).

13. 29 U.S.C. § 213(a)(8) (2012) (specifying "exemptions" from the Fair Labor Standards Act).

14. See, e.g., SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL SOCIAL POLICY* (1998); Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the FLSA*, 7 J. POL'Y HIST. 416 (1995); Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L. REV. 851 (1999).

15. Zatz, *supra* note 10.

16. See generally CATHERINE RUCKELSHAUS ET AL., NAT'L EMP'T LAW PROJECT, *WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK* (2014), <http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>; REBECCA SMITH & SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, *ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY* (2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>.

project of regulating work in today's labor markets even if one could address simple cheating or misclassification. Like exclusions of agricultural or domestic workers, or employees of small newspapers, the problem of exclusion arises precisely because these are *workers*. Even if not employees, they share something fundamentally important with traditional employees, something *not* captured by established analyses of control.¹⁷

This notion—that labor market participation is more fundamental than employee status—lies behind the movement to rename the field “work law.” Let's not fetishize employment but rather focus on the full range of ways that work is organized in today's labor markets. This might include developing additional legal statuses that embrace workers who are not employees.¹⁸

B. *Work as Commerce: The Distinctiveness of Market Forms*

This conversation about “work law” focuses almost entirely on *exclusion* from employee status, on how independent contractors and other non-standard workers are excluded from employment protections despite the relative unimportance of what distinguishes them from employees. Such discussions, however, almost entirely neglect to articulate crisply what *unites* employees and excluded workers distinctively, what merits their regulation under a single, broader “work law” rubric. That is, there is little effort to distinguish workers from non-workers. Instead, the focus is on the *irrelevance* of various purported distinctions *among* workers.

Implicitly, this commonality is an economic bargain in which productive labor is exchanged for compensation under terms set in a (more or less) competitive market. This commonality comes into focus when one considers the limitations of an exclusive focus on matters of control. A teacher's control over a student does not typically yield an employment relationship. The student may work hard under her teacher's direction, but that does not make her even a “worker,” let alone an “employee.”

Complementing the dominant focus on control is another dimension of the employment relationship, one concerned with whether control is being exercised within a fundamentally “economic” relationship.¹⁹ When courts are forced to face such questions, they generally treat the relationship's economic character as equivalent to its location within the labor market, as

17. See Guy Davidov, *Who is a Worker?*, 34 *INDUS. L. J.* 57 (2005).

18. See *id.*

19. See generally Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 *VAND. L. REV.* 857 (2008).

opposed to some other institutional location structured by a different set of norms and practices. Thus, although one might readily treat the student's efforts as nonproductive (or at least not delivering a product to the teacher), the more telling example is a parent's control over a minor child. Even when that control is exercised to direct productive work in household chores or a family business, there is, again, plenty of control but not employment.

In this vein, before employment law decides how to regulate labor markets, it must decide whether and when to understand claims attendant to productive labor as problems of market organization in the first place. In this regard, employment law incorporates rather than simply resists the contradictions of markets in human labor. It simultaneously treats labor as a market form, and indeed helps to construct it as such,²⁰ and then mandates deviations from that (idealized) form.

Rather than partially *decommodify* relationships that have purely marketized pre-legal form,²¹ employment law operates both to *marketize*²² work (relative to nonmarket arrangements) and to do so *incompletely*²³ (relative to *laissez faire*). Wage and hour law is commonly understood to *restrict* market freedom. Yet it also constructs employment as an arms-length bargain by requiring regular payments in cash, thereby separating workers' labor market participation from their consumer market participation, in contrast to more feudal relationships in which employers pay in-kind with housing, food, and the like.²⁴ Similarly, some aspects of employment discrimination law promote consideration of workers as fungible economic inputs without regard to their social identities,²⁵ and labor law entrenches the idea of contractual (albeit collective) bargaining as the fundamental basis for workplace conduct.

In research on prison labor, I observed that courts routinely exclude inmate labor from employment law coverage for reasons completely unrelated to the control axis running from employment to independent contract-

20. See *id.*; Noah D. Zatz, *Prison Labor and the Paradox of Paid Nonmarket Work*, in *ECONOMIC SOCIOLOGY OF WORK* 19 (Nina Bandelj ed., 2009).

21. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

22. 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* (Martha M. Ertman & Joan C. Williams eds., 2005) (discussing terminology of "commodification" and "marketization").

23. Cf. RADIN, *supra* note 21.

24. Zatz, *supra* note 19, at 930–32, 943–45.

25. Mark Kelman, *Market Discrimination and Groups*, 53 *STAN. L. REV.* 833, 835 (2001) (conceptualizing employment discrimination protections as requiring employers to treat workers "no worse than they treat others who are equivalent sources of money").

ing.²⁶ Conceding that the control test would be met, courts instead rely on the notion that “[p]risoners are essentially taken out of the national economy” and relocated to the “separate world of the prison.”²⁷ This spherical distinction relies on a contrast between “the essentially penological nature of labor performed by prisoners for a prison” in contrast to the “bargained-for exchange of labor for consideration” required for “a true *economic* employer-employee relationship.”²⁸ Similar reasoning has been used to deny employment protections to graduate teaching assistants who dwell in the realm of education, patients who dwell in a world of medicine, welfare recipients who dwell in a world of social services, spouses and children who dwell in a world of family, and so on.²⁹ Insofar as employment regulation is understood to address problems specific to the market, placing non-market work outside its protection makes sense. Work situated in nonmarket relationships do not raise those market problems.³⁰

This separate spheres analysis is deeply problematic because economic activity constantly crosses these supposed boundaries between spheres.³¹ A family or a prison or a school might obtain the fruits of someone’s labor by mobilizing these nonmarket relationships. Doing so, moreover, reduces their own need to buy labor on the market, thereby affecting aggregate demand.³² Furthermore, having obtained these fruits, they might sell them in competition with other suppliers reliant on market labor, thereby putting downward competitive pressure on these competitors’ wages. This point is pretty intuitive if one considers a family business staffed by family members, including children.³³

The temptation always is to dissolve the problem by treating these nonmarket relations as a sham, “nothing but”³⁴ a cynical attempt to obtain cheap labor for competitive advantage. But while that no doubt occurs, it does not follow automatically from the economic significance of the relationship. To think otherwise is to ignore the insights of generations of

26. See generally Zatz, *supra* note 19.

27. *Vanskike v. Peters*, 974 F.2d 806, 810, 810 n.5 (7th Cir. 1992); see also *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (quoting *Vanskike*); *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) (en banc) (same).

28. *Vanskike*, 974 F.2d at 812.

29. See Zatz, *supra* note 19; Julia Tomassetti, *Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment*, 37 LAW & SOC. INQUIRY 815 (2012).

30. See Noah D. Zatz, *The Impossibility of Work Law*, in THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2011).

31. Zatz, *supra* note 20.

32. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

33. See Lisa Philipps, *Silent Partners: The Role of Unpaid Market Labor in Families*, 14 FEMINIST ECON. (2008).

34. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY (2005).

scholarship in economic sociology and allied fields,³⁵ scholarship showing that (1) markets are one but not the only way to organize economic activity,³⁶ (2) even in a so-called “market society,” the production, distribution, and consumption of scarce resources pervades relationships conventionally deemed “noneconomic” because of their nonmarket character,³⁷ and (3) relationships *inside* “the market” pervasively are structured by “noneconomic” considerations.³⁸ Against this backdrop, the separate spheres account of employment law’s market-regulating function also fails to account for the law’s role in drawing, institutionalizing, and defending these infirm boundaries.³⁹

Without repeating that analysis here, I simply note that my past work in this vein remained within the tradition of writing about excluded workers. The emphasis was on how these workers operating in nonstandard institutional settings were hard to distinguish from “core” cases of employment.

Here, my attention turns toward the opposite phenomenon. Work seemingly at the “core” of labor market activity may be vulnerable to being cast out into a separate sphere. Market boundaries are porous in both directions. At the limit, this phenomenon could threaten the idea that there is any “core” to the labor market at all. This suggests a lurking potential for fundamental restructuring in how law regulates work.

In particular, such incursions into the heartland of employment raise the prospect that different forms of “work” might not be bundled together in one legal field known as “work law.”⁴⁰ Instead, they might be parceled out among a variety of regulatory fields organized along different lines. Of course, from my perspective that already is true—prison law, not employment law, regulates prison labor; family law regulates unpaid caretaking among immediate family members; and so on. But could we imagine a world in which that was *always* true, in which there was no large, stable

35. See generally CHRIS TILLY & CHARLES TILLY, *WORK UNDER CAPITALISM* (1998).

36. See, e.g., Karl Polanyi, *The Economy as Instituted Process*, in *THE SOCIOLOGY OF ECONOMIC LIFE* 29 (Mark Granovetter & Richard Swedberg eds., 2001).

37. See, e.g., ZELIZER, *supra* note 34; Andrew Abbott, *Sociology of Work and Occupations*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 307 (Neil J. Smelser & Richard Swedberg eds., 2005).

38. See, e.g., Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, in *THE SOCIOLOGY OF ECONOMIC LIFE* (Mark Granovetter & Richard Swedberg eds., 2001); Viviana Zelizer, *Caring Everywhere*, in *INTIMATE LABORS: CULTURES, TECHNOLOGIES AND THE POLITICS OF CARE* 267 (Eileen Boris & Rhacel Salazar Parreñas eds., 2010); Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 *WASH. U.J.L. & POL'Y* 163 (2011).

39. See Zatz, *supra* note 20.

40. See Zatz, *supra* note 30.

core of “regular” employment governed principally by employment law unmodified by spherically-specific considerations?

This possibility—and it is not a prediction—lies far from the imperial future imagined by “work law.” In that future, labor and employment law reaches out to incorporate previously or newly excluded forms of work. In my alternative, work outside of markets reaches in to devour work law by leaving it no object to regulate, no work or employment that, legally, is just “work” or just “employment.” Instead, human labor always is situated within some other field that supplies distinctive regulatory concerns or styles.

C. The Tension Between the Distinctiveness of Work and of Markets

The market conception of the worker is closely related to a deep instability in the independent contractor/employee distinction. On a market conception, employers treat employees as economically fungible. To the extent they supply labor of equal value at equal costs to the production process, workers are interchangeable. If independent contractors are just a different way to obtain labor, then it seems arbitrary to treat them differently than employees for legal purposes. This is especially true when employment law imposes certain costs on employers vis-à-vis employees. The result is that shifting between functionally equivalent independent contracting and employment relationship forms creates opportunities for regulatory arbitrage. By manipulating form,⁴¹ employers can shift costs onto workers, the state, or the other third parties.⁴²

Likewise, from the perspective of workers, these different organizational and legal forms are just different ways of obtaining income. Unsurprisingly, then, when the policy focus is more on workers’ earnings capacity and income security, and less on employers’ responsibility, the resulting legal regime tends to place less weight on the independent contractor/employee distinction and more on broad labor market concepts like “earnings.”⁴³ This pattern appears, for instance, in the incorporation of so-called “self-employment” into Social Security, the Earned Income Tax Credit, and California’s paid family leave law.

41. See Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279 (2011).

42. See ROBERT HABANS, UCLA INST. FOR RESEARCH ON LABOR AND EMP’T, EXPLORING THE COSTS OF CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS: FOUR ILLUSTRATIVE SECTORS (Dec. 2015), http://www.irle.ucla.edu/publications/documents/IndependentContractorCost_20151209.pdf.

43. Zatz, *supra* note 10.

On this economically reductionist view, employers are trying to extract economic value from workers, and vice versa, and that mutual instrumentalism is structured through arms-length bargaining in markets that set price and other terms. This market conception distinguishes the object of work law from other modes of human activity—education, family life, punishment, charity, etc.—structured by different relational logics and institutions, even if those activities have economic significance.

This marketized conception that *distinguishes* conventional employment from “nonmarket” activity immediately threatens to *merge* it into market economic activity more generally. On such a thoroughly marketized account of work, what remains to distinguish it from other market transactions?

This difficulty, which arises from understanding the independent contractor/employee distinction as one arising *inside* a more encompassing labor market, illuminates the broader politics of employment regulation. Two opposing approaches draw strength from the fact that blurring the independent contractor/employee distinction also tends to blur the distinction between labor markets and other markets.⁴⁴

First, for conservative critics of employment law, the problem is that employees should be treated more like independent contractors currently are. That is, they object to the existence of work law as such, arguing that markets in labor should be treated like other markets and simply incorporated into general purpose contract law.⁴⁵ On this view, employment law interferes with the free choice and efficiency characteristic of markets, and so it should be disfavored for the reasons that support *laissez faire* generally.

Second, for supporters of employment regulation, independent contractors ought to be treated more like employees. Typically, such arguments are consistent with a more general approach to regulated markets. They have relatively little to say about why human labor specifically triggers regulatory concern. Instead, the case for regulating independent contracting is continuous with regulating consumer lending, health care delivery, housing, and so on. All trigger somewhat generic concerns about markets: asymmetries of power or information, moral objections to arms-length agonistic relationships, the inability to account for externalities,

44. See generally Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. (forthcoming 2016).

45. See generally Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

collective action problems, and so forth.⁴⁶ Some, but not all, of these concerns can be articulated within a market-based framework as responses to various sorts of “market failures” in which independent bilateral deals fail to maximize social welfare.

In these ways, the politics of employment law offer a specific version of the politics of markets generally. Of course, there are more radical traditions, not entirely snuffed out, for which labor is special.⁴⁷ These sound in a variety of registers from labor theories of value to ideas of workplace democracy. But, these are in retreat in contemporary American law and politics.

What is intriguing, and confounding, about the examples to follow, is that they shift contests over work regulation onto a different plane. Partially echoing the traditional left discomfort with marketized, alienated conceptions and institutions of human labor, they insist on *not* reducing the work relationship to a stylized market form and premise their regulatory consequences on precisely that deviation.

III. FOUR EXAMPLES

To provide examples, I return to my opening riddle. “What do Uber, *Hobby Lobby*, Ferguson, and *Friedrichs* have in common?” All of them, I suggest, contain the seeds of a possible disintegration of labor markets as a distinctive object of regulation.

A. *Uber and the Sharing Economy*

I begin with Uber, which already is familiar in debates over employment status. Uber, of course, is the so-called ride-sharing service that has rapidly emerged as a serious threat to traditional taxi and limousine services. Debate about Uber, Lyft, and other so-called “sharing economy” services typically retreads the longstanding independent contrac-

46. See, e.g., Alan Hyde, *What Is Labor Law?*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAWS: GOALS AND MEANS IN THE REGULATION OF WORK* (Guy Davidov & Brian Langille eds., 2006).

47. For a survey of some of these, see *THE IDEA OF LABOUR LAW* (Guy Davidov & Brian Langille eds., 2011); Mark Barenberg, *Workers: The Past and Future of Labor Law Scholarship*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 563 (Peter Cane & Mark Tushnet eds., 2003). The specialness of labor—in particular the inability to separate work from the worker—arguably lies at the heart of both attempts to define employment in terms of control—thereby recognizing that employment intrinsically involves personal authority and not just a sale—and of the difficulties incorporating it into the contractual forms associated with market transactions. See generally Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315 (2014).

tor/employee controversy.⁴⁸ With regard to issues of control, it largely updates older battles over FedEx⁴⁹ and taxi drivers.⁵⁰

In this context, Uber stands for deregulation, labor flexibility, and customer service, while its critics stand against exploitation and for placing a floor under labor standards. In keeping with my observations above, the debate over subjecting Uber to employment regulation closely tracks a parallel debate about subjecting it to various forms of consumer regulations.⁵¹ Insofar as regulation imposes some costs on operators in order to promote a higher good, Uber appears to be engaging in regulatory arbitrage, manipulating matters of form in order to avoid those costs. This allows it to seize a competitive advantage over traditional taxis, which are heavily regulated for consumer protection. For those customers, or drivers, for whom the traditional protections are less valuable—or who do not realize their value *ex ante*—they may be very happy to benefit from the lowered costs and increased convenience of the service.⁵² It's really no big surprise that people who do not need accessible transportation services might be delighted to offload the costs of accessibility onto others,⁵³ and to celebrate that as innovation.

In this vein, Uber is not a step away from the market at all. To the contrary, as one critic put it, “Uber is just capitalism, in its most naked form.”⁵⁴ Before moving on to my primary concerns, it is worth pausing to note that this “naked capitalism” account of Uber also illustrates my subsidiary point about the contradictions of “labor market” distinctiveness. That is, it illustrates how embracing *nonmarket* aspects of human labor may be necessary to avoid the incorporation of labor regulation into market regulation generally.

The most difficult cases for applying employment law to Uber are those in which drivers are not, in practice, especially dependent on Uber for

48. See Benjamin Sachs, *Do We Need an “Independent Worker” Category?*, ONLABOR (Dec. 8, 2015), <http://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/> - more-6978.

49. See, e.g., Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. (forthcoming 2016).

50. Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities* (2015) (unpublished dissertation, University of California, Berkeley) (on file with author).

51. See Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015).

52. Cf. Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000) (analyzing the distributive effects of mandatory contract terms).

53. Jim Dwyer, *Accessibility as Challenge in Age of Uber*, N.Y. TIMES (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/nyregion/accessibility-as-challenge-in-age-of-uber.html>.

54. Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sept. 19, 2014), <https://www.jacobinmag.com/2014/09/against-sharing/>.

their livelihood.⁵⁵ This occurs when Uber gigs account for a relatively small fraction of drivers' time relative to conventional work schedules—a few hours a week, or a few days in a month, etc. Such scenarios are threatening because they undermine rationales for employment law that are built upon a specific conception of workers' *lives*. Wage and hour regulations are built on a normative ideal of a worker who “makes a living” by achieving a certain balance between work time and personal time—“eight hours for work, eight hours for sleep, eight hours for what we will”—such that the hourly wage from that amount of work time provides enough total income to live a decent life.⁵⁶ That is why arguments for “living wages” in hourly terms always relate that hourly wage to an income standard (usually relative to “poverty”) by assuming full-time, full-year work.

These rationales for employment law lose some force when a “gig” is “secondary,” relative either to other work or to other sources of household income.⁵⁷ That is why Uber and its allies trumpet the percentage of its drivers for whom this “secondary” status appears to apply.⁵⁸ Of course, this can be misleading because a small percentage of drivers can perform the bulk of the driving. If one driver works fifty hours and ten drivers work half an hour each, the law might reasonably prioritize the circumstances of the one driver who does 90% of the work over the ten who do, in aggregate, only 10%.⁵⁹ In this regard, merely counting heads is too simplistic.⁶⁰

55. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 13 (The Hamilton Project, Discussion Paper No. 2015-10, 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf; Sachs, *supra* note 48; Benjamin Sachs, *Uber’s Take-Rate Structure and Employee Status*, ONLABOR (May 23, 2015), <http://onlabor.org/2015/05/23/ubers-take-rate-structure-and-employee-status/>.

56. See, e.g., ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUALITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001); T.H. Marshall, *Citizenship and Social Class*, in *CITIZENSHIP AND SOCIAL CLASS, AND OTHER ESSAYS* 1, 11 (Pluto Press 1992) (1949) (characterizing employment laws as part of a welfare state designed to enable citizens to “live the life of a civilised being according to the standards prevailing in the society”).

57. This point is reflected, at a more technical level, in the degree of the worker’s economic dependence on a particular employer, a factor that bears on but does not determine employee status. See Sachs, *supra* note 48.

58. See, e.g., Kia Kokalitcheva, *Uber CEO: Most Drivers Work Too Little to Be Considered Full Time Employees*, FORTUNE (Oct. 21, 2015, 1:49 AM), <http://fortune.com/2015/10/21/travis-kalanick-part-time-drivers/>. An Uber survey of its drivers reports that 69% had other full-time or part-time work and 50% averaged fewer than 10 hours of Uber driving per week. Jessica, *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, UBER NEWSROOM (Dec. 7, 2015), <https://newsroom.uber.com/driver-partner-survey/>; see also Lauren Weber, *Who Is Your Uber Driver (and What Does He Want?)*, WALL ST. J. (May 20, 2015, 12:01 AM), <http://www.wsj.com/articles/who-is-your-uber-driver-and-what-does-he-want-1432094463>.

59. Unsurprisingly, Uber-sponsored research does not report data in this form. See Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United*

An analysis of this sort will ultimately prove sensitive to the particular proportions of drivers and hours driven and to one's willingness to prioritize certain life/work configurations over others. It may be perfectly appropriate to burden the moonlighters somewhat in order to protect those working full-time or more, just as it may be appropriate for all riders to share the costs of ensuring accessibility to wheelchair users. And of course the matter gets even more complicated once one considers the competitive effects on other firms whose workers have different work/life configurations, and so on. A useful historical analogue is the decision to apply wage and hour law to industrial homework. That decision prioritized and legally normalized the livelihoods of (predominantly male) factory-based "breadwinners" over those of (predominantly female) home-based workers for whom the home location facilitated different work/family configurations implicating child care and child labor.⁶¹

For present purposes, though, resolving these difficulties is unimportant. Instead, my point is that this kind of employment law controversy cannot adequately be understood by looking at the firm-worker relationship in isolation. Rather, it is precisely by situating the worker both inside *and* outside the labor market—as a worker who has a particular kind of life that may or may not be sustained by a particular pattern of work—that the controversy will be resolved. The difference, conventionally, between a "firm" and a "worker" is that the worker has a life beyond its market existence.⁶² That is why dissolving labor relations into generic market relations requires a choice to more radically sequester work from "nonmarket" considerations, even though the separation of labor regulation from noneconomic regulation already relies on a partial such sequestration.

At least in its early days, though, Uber and its fellow travelers also seemed to present a different kind of challenge to employment law. They were positioned as leading examples of a growing "sharing economy"⁶³

States 18 (Princeton Univ., Indus. Relations Section, Working Paper No. 587, 2015), <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf>.

60. See Noah Zatz, *Is Uber Wagging the Dog With Its Moonlighting Drivers?*, ON LABOR (Feb. 1, 2016), <https://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/> (estimating from existing Uber survey data that the majority of its drivers, who work under 15 hours per week, perform under one-fifth of Uber's total driving, while its drivers who work 35+ hours per week, while under one-fifth its drivers, perform about half of Uber's total driving).

61. EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES (1994).

62. See generally KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2001).

63. Rachel Botsman et al., *41 Lessons from Uber's Success*, WIRED UK (May 18, 2015), <http://www.wired.co.uk/magazine/archive/2015/06/features/uber-lessons>.

organized around new methods of “collaborative consumption.”⁶⁴ This strand was particularly prominent in how Lyft, another ride-hailing app, described and implemented its service.

Lyft analogized its drivers less to scrappy entrepreneurs and more to friendly neighbors. Rather than a broker in a hyper-efficient market, Lyft “provides a means to enable persons who seek transportation to certain destinations (“Riders”) to be matched with persons driving to or through those destinations (“Drivers”).”⁶⁵ The drivers are presented as if they already were going to the rider’s destination, as opposed to doing so as a service to the rider. With the route already fixed, all that was at issue was “sharing” the lift. That was the (unsuccessful) argument Lyft presented in pending California wage & hour litigation as the basis for denying an employment relationship with its drivers.

In other words, Lyft presented itself as a teched-up version of the ride boards that some of us used in college to identify people willing to share rides en route to a common destination, or of the familiar practice of giving a friend a lift to the airport: “your friend with a car” has been Lyft’s motto.⁶⁶ Of course, good manners typically require some reciprocity in such situations, whether paying for gas or returning the favor, but these transactions are quite distant from a profit-maximizing commercial enterprise.⁶⁷ In some markets Lyft attempted to institutionalize this analogy by having riders pay an amount at their discretion, styled as a “donation” rather than as a fee-for-service set by Lyft.⁶⁸ And, more generally, it cultivated the formation of a “social” relationship between customers (no, “riders”) and drivers by promoting fist-bump greetings and riding in the front passenger seat.⁶⁹

64. RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* (2010).

65. Defendant’s Motion for Summary Judgment at 3, *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (No. 3:13-cv-04065-VC); see also *Lyft Terms of Service*, LYFT (Feb. 8, 2016), <https://www.lyft.com/terms>.

66. Aarti Shahani, *In the Battle Between Lyft and Uber, the Focus Is on Drivers*, KQED NEWS (Jan. 19, 2016), <http://ww2.kqed.org/news/2016/01/19/in-the-battle-between-lyft-and-uber-the-focus-is-on-drivers>.

67. See Catherine Lee Rassman, *Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance “Gap,” and Why Pennsylvania Should Get on Board*, 15 U. PITT. J. TECH. L. & POL’Y 81, 90 (2014) (discussing personal car insurance policies that exclude coverage for commercial use, where commercial use is defined in terms of payments exceeding reimbursement for expenses).

68. See *Cotter*, 60 F. Supp. 3d at 1070 (N.D. Cal. 2015).

69. Ryan Lawler, *Lyft Sheds Some Of Its Quirks As It Seeks New Users*, TECH CRUNCH (Nov. 30, 2014), <http://techcrunch.com/2014/11/30/lyft-quirks/>.

These examples point to an ambiguity in the “sharing” moniker, one made clearer by considering its relationship to the term “collaborative consumption.” The latter positions all participants in the arrangement as “consumers.” No one is working. Instead, the crux of the relationship is that some underutilized capital good—a power tool,⁷⁰ a car or, for Airbnb, a house—is being “shared” in the sense of having multiple users. Such sharing makes better use of the scarce resource and avoids wasteful overproduction; hence the connection to environmental considerations.

But “sharing” also connotes a relationship in which activity is coordinated in a non-adversarial fashion, in a spirit of cooperation and joint effort rather than hard bargaining. Thus, one description of “cohousing” developments positions car sharing as among the benefits arising from “the conscious commitment by its residents to live as a community,”⁷¹ one that nurtures a “sense of togetherness, trust, support.”⁷² This sense of “sharing” has no necessary relationship to the first. An underutilized resource can just be rented out, and a friendly volunteer can give you a ride to the airport in your own car.

In any event, this “sharing” characterization seems to be shrinking in importance as the underlying practices become routinized and intensified.⁷³ Not much of that “sharing” ethos remains when participants consistently take up one side of the relationship—repeatedly driving or repeatedly being driven—and rely on it for a substantial fraction of their income or transportation needs. Services that initially focused on underutilized capital increasingly rely on cars and housing primarily devoted to “sharing” and often purchased for that purpose,⁷⁴ and the “sharing” model has proliferated into pure service-brokering such as TaskRabbit. Under these circumstances, the short-term service work (driving, preparing and cleaning a room, household

70. Rachel Botsman, *The Case for Collaborative Consumption*, TED TALKS (Dec. 2010), https://www.ted.com/talks/rachel_botsman_the_case_for_collaborative_consumption/transcript?language=en.

71. Jerome L. Garciano, *Affordable Cohousing: Challenges and Opportunities for Supportive Relational Networks in Mixed-Income Housing*, 20 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 169, 171 (Winter 2011).

72. *Id.* at 174.

73. Sarah Kessler, *The “Sharing Economy” Is Dead, and We Killed It*, FAST COMPANY (Sept. 14, 2015, 6:06 AM), <http://www.fastcompany.com/3050775/the-sharing-economy-is-dead-and-we-killed-it>; Lawler, *supra* note 69.

74. See, e.g., Patrick Clark, *Study: Professional Landlords Generate \$500 Million Per Year on Airbnb*, BLOOMBERG (Jan. 21, 2016, 2:06 PM), <http://www.bloomberg.com/news/articles/2016-01-20/study-professional-landlords-generate-500-million-per-year-on-airbnb>; Leena Rao, *Uber Now Offers its Own Car Leases to UberX Drivers*, FORTUNE (July 29, 2015), <http://fortune.com/2015/07/29/uber-car-leases/>; Benjamin Snyder, *Airbnb Wants to Help you Buy a Home*, FORTUNE (June 25, 2015, 11:50 PM), <http://fortune.com/2015/06/25/airbnb-home-buying/>.

maintenance or errand-running, etc.) purchased through these platforms is increasingly divorced from any capital stake on the workers' part.

For these reasons, analysts increasingly highlight the convenience that consumers gain precisely from *not* having to establish and negotiate particular thick social relationships—the “on-demand” economy—and from the social *disembeddedness* of workers' fragmented tasks—the “gig” economy. Lyft abandoned its “donation” pricing model, and the entire “sharing” framework seems to be dissipating.

Nonetheless, the boundary problem invoked by the “sharing economy” is not a trivial one. It is easy to be cynical about Uber and Airbnb, but consider more consistently reciprocal institutions like vacation or sabbatical home swaps or child-care co-operatives, both of which can be scaled up thanks to low-cost communications technologies. With much of the managerial overhead shifted to software and reduced by GPS and related technologies, there is considerable interest in cooperative ownership of “gig economy” platforms,⁷⁵ which might revive some of the “sharing” ethos.

Indeed, there is unrealized potential here for convergence with another recent fit of overwrought techno-utopianism and exceptionalism, so-called “peer production” like Wikipedia.⁷⁶ In both cases, technology enhances the potential for high-volume, small-scale transactions among people who may not know one another but nonetheless feel some sense of connection and trust. In part by drawing on reputational mechanisms, the newer platforms may facilitate much greater levels of personal interaction—letting someone into your car, or vice versa—than contributing text to a webpage.⁷⁷ All of these show some potential for redrawing distinctions between work and home, between the working day and leisure time, and between professional and personal relationships, all distinctions that are central to the discreteness and homogeneity of “the labor market.”

B. Hobby Lobby and Religious Employers

My next example is both stronger and narrower. In its titanicly controversial *Hobby Lobby* decision,⁷⁸ the Supreme Court sided with a corpo-

75. Trebor Scholz, *Platform Cooperativism vs. the Sharing Economy*, MEDIUM.COM BLOG (Dec. 5, 2014), <https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad-.n7s3akt3s>.

76. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 70 (2006); Cheng, *supra* note 3; *see also* Zatz, *supra* note 19, at 916 n. 275 (noting the absence of longstanding forms of nonmarket production from Benkler's analysis).

77. Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014, 6:30 AM), <http://www.wired.com/2014/04/trust-in-the-share-economy/>.

78. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

ration that resisted a requirement that its employee health insurance plan cover certain forms of contraception, the so-called “contraception mandate.” Without getting into the technical details, the root issue in *Hobby Lobby* was whether a firm’s relationship with its workers could, for legal purposes, be simultaneously economic and religious in character.

The general strategy of the Obama administration, and those who sided with it, was to invoke separate spheres reasoning that emphasized the discrete and homogenous nature of employment within labor markets. Thus, the dissent reasoned that religious accommodations were inapplicable to “any entity operating in ‘the commercial, profit-making world.’”⁷⁹ By virtue of its location in the marketplace, “for-profit corporations . . . use labor to make a profit,” unlike “religious nonprofits [that] use labor . . . to perpetuate the religious values shared by a community of believers.”⁸⁰

By making the profit-making effort essential to the firm’s legal identity, this line of argument enables employment protections that are invariant across employers. This is the “workers are workers” argument referenced above. “Working for Hobby Lobby . . . in other words, should not deprive employees of the preventive care available to workers at the shop next door.”⁸¹ The force of the argument relies on a baseline assumption of legal homogeneity, which in turn relies on an assumption of relational homogeneity: “us[ing] labor to make a profit” is the constant essence of employment relationships in for-profit firms, something that excludes other relational projects like “perpetuat[ing] religious values.”

The majority rejected this separation between economic and religious spheres. Justice Alito’s opinion objected, among other things, to the prospect of forcing religious people to a hard choice between adherence to religious conviction and full participation in market institutions through the for-profit corporate form. Notice that this is not a claim grounded in *laissez faire*, not an attempt to purify the market in the name of competition, efficiency, and economic liberty. Instead, it represents a refusal to allow seemingly conventional market transactions to be characterized in purely market terms.

In contrast to the mutuality connoted by “sharing,” *Hobby Lobby* represents a particularly deep incursion into market logic because the relevant “nonmarket” aspect is unilateral. It was sufficient that Hobby Lobby understood its employment relationships in this religious way, regardless of how its employees experienced their work. Thus, it was Hobby Lobby who got

79. *Id.* at 2795 (Ginsburg, J., dissenting).

80. *Id.* at 2796–97 (citation omitted) (emphasis deleted).

81. *Id.* at 2804.

to define the relationship in religious terms, even if for the workers this was “just a job.”

Of course, Hobby Lobby might defend that seemingly unilateral power as instead a matter of mutual consent, assuming that workers knew what they were signing up for. But that argument has a strong whiff of double-speak, because it relies upon the authority of a quintessentially market technique—a bargained-for contract—to legitimize the *nonmarket* character of the relationship. The question, in other words, is whether Hobby Lobby should be able to leverage its market power to exempt itself from the market’s rules by bargaining for a declaration of nonmarket status.⁸² That, however, would seem to run afoul of the strong principle against waivers of employment protections,⁸³ including through stipulations of non-employee status.⁸⁴

This asymmetric feature of *Hobby Lobby* is particularly notable because, thirty years earlier, the Court had rejected a conceptually similar argument under circumstances seemingly much more favorable to the employer. In *Tony & Susan Alamo Foundation v. Secretary of Labor*,⁸⁵ the Court insisted on applying the Fair Labor Standards Act to commercial enterprises run by a firm specifically incorporated as a *nonprofit religious* organization, unlike the for-profit business corporation framework utilized by Hobby Lobby. The employer characterized these enterprises as a reciprocal exercise in religious ministry by the Foundation and religious devotion by the workers.

The most striking feature of *Tony & Susan Alamo Foundation* is that the workers themselves rejected the government’s characterization of the work relationship as a wage bargain. To the contrary, a representative worker averred that a market conception of this relationship fundamentally distorted it, that treating it as deal for mutual economic gain was “vexing to my soul.”⁸⁶ Despite this, the Court found the worker’s own religious understanding of his work to be irrelevant. Instead, what mattered was the rela-

82. A similar irony lurks in the Court’s use of a market baseline to reason that the way to ensure adequate protection for workers is for the government to pay for the added costs of contraceptive coverage. On this view, the lack of contraceptive coverage is, in one instance, treated as the outcome of economic bargaining in which the government intervenes, and, in another, a religious outcome protected against interventions that would be routine in ordinary economic bargains.

83. See sources cited *infra* note 146.

84. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985); ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 5 (2001); but see Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 364–66 (2014) (discussing judicial deference to contractual designations of independent contractor status).

85. *Tony & Susan Alamo Found.*, 471 U.S.

86. *Id.* at 301.

tionship's functional equivalence to ordinary employment, especially insofar as the Foundation's enterprises competed with other firms that lacked a religiously infused production process. Unsurprisingly, the *Hobby Lobby* dissents made similar arguments, though *Tony & Susan Alamo Foundation* was cited only in passing.⁸⁷

It remains to be seen how far *Hobby Lobby* will be extended. But for now, it stands for the proposition that, at least sometimes, employers—even for-profit employers—are not fungible as economically equivalent labor market actors when they bring their own religious motivations and interpretations to the workplace.

Most importantly, nothing about *Hobby Lobby* makes it an intrinsically marginal case. *Hobby Lobby* itself is a large, for-profit firm employing 13,000 workers.⁸⁸ *Tony & Susan Alamo Foundation* involved an atypical set of hiring and management practices in which the employer recruited people who were “drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation” and embraced them in a comprehensive relationship in which “workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.”⁸⁹ *Hobby Lobby*, by contrast, involves hiring out of the general labor market for ordinary positions stocking shelves, working a cash register, and so on, with generally ordinary terms and conditions of employment.⁹⁰ Nobody would suggest that *Hobby Lobby* and its workers lack an employment relationship, and yet that provided little barrier to carving one aspect of the relationship out of employment law because that aspect implicated religious considerations.

C. *Ferguson and the Public Duty to Work Off Court-Ordered Debt*

I now turn to a third example, where the lack of fungibility among market actors focuses on the worker side, not the employer side. This is the connection to *Ferguson*. I refer to the admixture of criminal justice institutions, racism, and class bias for which *Ferguson* has come to stand, not narrowly to police officer Darren Wilson's killing of Michael Brown. After the killing, it became well known, especially through a high-profile U.S.

87. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting).

88. *Id.* at 2765 (majority opinion).

89. *Tony & Susan Alamo Found.*, 471 U.S. at 292.

90. *Hobby Lobby's* career page offers an illustrative list of the hourly positions available as well as the benefits received by a typical full-time employee. *Retail Hourly*, HOBBY LOBBY CAREER CTR., <http://careers.hobbylobby.com/current-openings/retail-hourly/> (last visited Jan. 28, 2016).

Department of Justice report,⁹¹ that Ferguson operated what many have characterized as modern day debtors' prisons. These arose when pervasive racial profiling conjoined with aggressive attempts by municipal courts to extract fines and fees from those subjected to police action. Those who did not pay would be jailed without the constitutionally required inquiry into their ability to pay, and that threat enabled Ferguson to extract scarce funds from the poorest citizens and their families.

My brief analysis here is part of a broader project connecting debtors' prisons to debt peonage as part of a system of forced labor backed up by threats of incarceration.⁹² These connections have deep historical resonance because anti-Black racism in the U.S. has long relied on complementary racial politics of work and crime. The racist trope of African Americans lacking in work ethic and discipline has been deployed to justify using physical and legal coercion to elicit work effort where economic incentives are deemed insufficient.⁹³ The Southern convict lease system implemented that principle on a massive scale,⁹⁴ notwithstanding the nation's nominal commitment to a system of "free labor," meaning "market labor,"⁹⁵ ushered in by the Thirteenth Amendment. This history reverberated in the slogans of some Ferguson counter-protestors. They rebutted the protests' signature chant of "Hands Up, Don't Shoot" with their demand: "Hands Down, Go to Work."⁹⁶

91. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015). The DOJ report documented and publicized phenomena that had long been challenged by local activists. See, e.g., John Eligon & Michael S. Schmidt, *In Ferguson Scrutiny on Police Is Growing*, N.Y. TIMES (Aug. 20, 2014), <http://www.nytimes.com/2014/08/21/us/in-ferguson-scrutiny-on-police-is-growing.html>; Carimah Townes, *As Verdict Looms in Ferguson, Activists Play The Long Game*, THINKPROGRESS (Nov. 24, 2014, 12:31 PM), <http://thinkprogress.org/justice/2014/11/24/3593378/ferguson-next-steps/>.

92. See, e.g., NOAH ZATZ ET AL., UCLA INST. FOR RESEARCH ON LABOR AND EMP'T, UCLA LABOR CTR., & A NEW WAY OF LIFE REENTRY PROJECT, GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT (2016), <http://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail/> [hereinafter, ZATZ ET AL., GET TO WORK]; Noah D. Zatz, *A New Peonage?: Pay, Work, or Go To Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. (forthcoming 2016) [hereinafter Zatz, *A New Peonage?*].

93. EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 92 (2002); ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 37 (2015 [1990]). See also Zatz, *A New Peonage?*, *supra* note 92.

94. See generally SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 61-102 (2015); ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996).

95. See, e.g., Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

96. Wayne Dupree, *Driver Refuses to Remove "Ferguson! Put Your Hands Down & Go to Work" from Rear Window*, WAYNEDUPREE.COM (Dec. 1, 2014), <http://newsninja2012.com/driver-refuses-to-remove-ferguson-put-your-hands-down-go-to-work-from-rear-window/>; Josh Gardner for Mailonline &

The path from criminal justice debt to forced labor arises from the need to work in order to pay off debt, at least among those without wealth. Because these are not ordinary civil debts, they can be enforced with incarceration and often fall outside the set of nineteenth-century legal protections designed to abolish debtors' prisons.⁹⁷ Of course, "inability to pay" remains a defense on paper.⁹⁸ But even if courts took this defense seriously in practice,⁹⁹ it immediately invites inquiries into ability to work.¹⁰⁰

As demonstrated by public benefits contexts like unemployment insurance and disability benefits, the idea of "involuntary unemployment" necessarily involves normative judgments about what work can be refused and what work should be accepted.¹⁰¹ For unemployment insurance purposes, for instance, someone who refuses a *bona fide* job offer is still considered "involuntarily unemployed"—and therefore eligible for benefits—if that job offers wages and other working conditions below the locally prevailing standards for the occupation.¹⁰² This connection between ability to pay, ability to work, and working conditions blazes a path from criminal justice debt to standard setting about what kinds of jobs debtors must take, on pain of incarceration if they refuse.

A regime like this already is taking root in the context of child-support enforcement.¹⁰³ And its continuity with the criminal justice debt issues associated with Ferguson is tragically illustrated by its connection with another high-profile police killing of a Black man this past year. When

Reuters, *Ferguson 'March for Justice' Met with Display of a Melon, Fried Chicken, a 40oz Beer and 200 Racist Protesters in Rural Missouri*, DAILYMAIL.COM (Dec. 5, 2014, 6:39 AM), <http://www.dailymail.co.uk/news/article-2861693/120-mile-Ferguson-march-met-display-melon-fried-chicken-40oz-beer-racist-counter-protesters-rural-Missouri.html>.

97. See Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016).

98. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011); *Bearden v. Georgia*, 461 U.S. 660, 674 (1983); *Tate v. Short*, 401 U.S. 395, 397–98 (1971); Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015).

99. For evidence that they routinely do not, see, e.g., AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS* 17 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf.

100. Cf. Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 50 UCLA L. REV. 550 (2012) (analyzing how, in the context of means-tested benefits, assessing income availability leads to assessment work behavior).

101. Lucy A. Williams, *Unemployment Insurance and Low Wage Work*, in *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* 158, 160 (Joel F. Handler & Lucie White eds., 1999); Matthew Diller, *Entitlement And Exclusion: The Role Of Disability In The Social Welfare System*, 44 UCLA L. REV. 361 (1996); Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373 (2006).

102. See U.S. DEP'T OF LABOR, *APPLICATION OF THE PREVAILING CONDITIONS OF WORK REQUIREMENT, UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 41-98* (Aug. 17, 1998); 26 U.S.C. § 3304(a)(5)(B) (2012).

103. See generally Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012).

Walter Scott was shot in the back and killed by police officer Michael Slager in North Charleston, South Carolina, Scott most likely was fleeing because of an outstanding warrant for his arrest based on nonpayment of child support.¹⁰⁴ South Carolina has provided a leading example of incarcerating child-support obligors who do not pay,¹⁰⁵ and indeed this practice led to a recent Supreme Court decision addressing the right-to-counsel implications of that practice.¹⁰⁶

As with debtors' prisons arising from criminal justice debt, the burdens of child-support enforcement fall most heavily on low-income communities of color. A California study found that a majority of those in arrears had annual incomes under \$10,000.¹⁰⁷ In larger U.S. cities for which data is available, 15% of African American fathers are at some point incarcerated for nonpayment of child support, and the vast, disproportionate majority of those incarcerated for nonpayment are Black and poor.¹⁰⁸

The principles underlying these enforcement practices, and their deep connection to labor regulation, are illustrated by a 1998 decision of the California Supreme Court. *Moss v. Superior Court* held that a child-support obligor could be imprisoned for contempt if he "fails or refuses to seek and accept available employment for which the parent is suited by virtue of education, experience, and physical ability."¹⁰⁹ The logic is that if someone is willfully not working, he is willfully not paying. Therefore, there is no inability-to-pay defense to incarceration, whether imposed through a contempt sanction, a parole revocation, or a criminal sentence. In the California case in question, the trial judge had ordered imprisonment based on the reasoning that the defendant surely "could get a job flipping hamburgers at McDonald's."¹¹⁰

Of particular significance to my argument here is how *Moss* treated the noncustodial father's involuntary servitude defense under the Thir-

104. Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES, Apr. 20, 2015, at A1.

105. See, e.g., Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J. L. & PUB. POL'Y 95 (2008).

106. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

107. ELAINE SORENSEN ET AL., URBAN INST., EXAMINING CHILD SUPPORT ARREARS IN CALIFORNIA: THE COLLECTIBILITY STUDY 7 (2003), http://www.urban.org/research/publication/examining-child-support-arrears-california-collectibility-study/view/full_report. See also ELAINE SORENSEN ET AL., URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION (2007); Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. (2001).

108. See ZATZ ET AL., GET TO WORK, *supra* note 92.

109. *Moss v. Superior Court*, 950 P.2d 59, 76 (Cal. 1998).

110. *Id.* at 80 n.16.

teenth Amendment.¹¹¹ On the face of it, this was a classic case of a valid obligation to work enforced with the invalid means of compulsion by threat of incarceration—the same basic principle that undergirds the rule against ordering specific performance as a remedy for a contract for personal services¹¹² and the Supreme Court’s peonage jurisprudence.¹¹³

Moss, however, concluded that, among other things, this was essentially a family law case, not a labor case.¹¹⁴ A similar case in the Ninth Circuit drew out this analysis. *United States v. Ballek* reasoned that applying the Thirteenth Amendment would “drastically interfere with one of the most important and sensitive exercises of the police power—ensuring that persons too young to take care of themselves can count on both their parents for material support.”¹¹⁵ Consequently, the court added child-support enforcement to a laundry list of ad hoc exceptions from the general proposition that the Constitution forbids imprisoning people for refusing to work.

Ballek’s analysis presents a deep challenge to a separate spheres account of the labor market. Just as *Hobby Lobby* undermines the fungibility of otherwise identical employers based on their religious reasons for imposing particular terms or conditions of employment, *Ballek* and *Moss* undermine fungibility among employees. As between two workers doing the same job, one can be jailed for quitting while the other cannot. That difference originates in “nonmarket” considerations stemming from family obligations. Based on family status, some workers engage their employers on terms far removed from standard accounts of choice in a “free market.”

More generally, for workers facing imprisonment for failure to work, family law or criminal law may become far more important than employment law in regulating their terms or conditions of employment. Those bodies of law, and the specific conceptions of criminal and familial responsibility they implement, will be drawing lines between acceptable and unacceptable working conditions, lines that will apply differently to workers laboring side-by-side.

As with employers like *Hobby Lobby*, this is not a sideshow. In the child support context, many states, with concerted federal legal and finan-

111. See generally Zatz, *A New Peonage?*, *supra* note 92.

112. Lea S. Vandervelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775 (1992).

113. See generally James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 YALE L.J. 1474 (2010).

114. *Moss*, 950 P.2d at 66–68.

115. *United States v. Ballek*, 170 F.3d 871, 875 (9th Cir. 1999).

cial support and exhortation,¹¹⁶ have been developing and promoting work programs¹¹⁷ for some of the 13 million adults in the federal-state child support system.¹¹⁸ Similarly, at least 10 million adults are estimated to owe criminal justice debt.¹¹⁹

In the criminal justice context more generally, Lawrence Mead, an intellectual architect of welfare reform,¹²⁰ has been adapting his arguments for welfare work requirements into arguments for enforcing work obligations through expanding systems of criminal justice supervision.¹²¹ These include probation and parole, which cover about 5 million people at any one time.¹²² Mead's analysis also readily extends to increasingly popular "diversion" programs that offer to avoid criminal prosecution, conviction, or sentencing on condition of obeying various behavioral conditions, including obligations to work.¹²³

In one vivid example, a "drug court" judge tells a private employer, "I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time, if he comes to work under the influence of any kind of drugs, I'll put him in jail, on your say so."¹²⁴ In this configuration, the employer's supervision and discipline has become an extension of the criminal justice system,¹²⁵ and, vice versa, the proce-

116. See Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68548, 68557 (Nov. 17, 2014) (to be codified at 45 C.F.R. pt. 303); Information Memorandum from Vicki Turetsky, Comm'r, Office of Child Support Enf't on Alternatives to Incarceration to State Agencies Administering Child Support Enforcement Plans under Title IV-D of the Social Security Act and Other Interested Parties (June 18, 2012), <http://www.acf.hhs.gov/programs/css/resource/alternatives-to-incarceration>.

117. Dear Colleague Letter from Vicki Turetsky, Comm'r, Office of Child Support Enf't on Work-Oriented Programs for Noncustodial Parents, to All State IV-D Directors (May 27, 2014), <http://www.acf.hhs.gov/programs/css/resource/work-oriented-programs-for-noncustodial-parents>.

118. OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVICES, PRELIMINARY REPORT, FY 2014 106 (2014), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2014_preliminary.pdf.

119. Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1786 (2010).

120. LAWRENCE M. MEAD, *BEYOND ENTITLEMENT* (1986); LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992).

121. LAWRENCE M. MEAD, *EXPANDING WORK PROGRAMS FOR POOR MEN* (2011).

122. U.S. DEP'T JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES*, 2013 (2014) (revised Jan. 21, 2015), <http://www.bjs.gov/content/pub/pdf/ppus13.pdf>.

123. See generally Allegra M Mcleod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012). For an example of a court excluding work from employment because of its functions as a diversion from incarceration and a means of bearing criminal responsibility, see *Doyle v. City of New York*, 91 F. Supp. 3d 480 (S.D.N.Y. 2015) (rejecting Fair Labor Standards Act coverage of work performed as part of a conditional dismissal program).

124. James L. Nolan, *Therapeutic Adjudication*, 39 SOCIETY 29, 32 (2002).

125. Cf. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009) (analyzing employers as delegated immigration enforcers).

dures and powers of punishment have become a tool in the hands of the employer. The notion, so essential to the prison labor cases, that penal and labor market institutions exist in “separate worlds,”¹²⁶ is unrecognizable here.

D. Friedrichs and the Political/Economic Distinction

My final example comes from the most watched labor case of the Supreme Court’s October 2015 Term. In *Friedrichs v. California Teachers Association*,¹²⁷ the Supreme Court was to decide whether to deploy the First Amendment to undermine the financial foundations of public sector unions, a critical though embattled bulwark against labor’s precipitous decline in the private sector.¹²⁸ The issue is whether public employees can be required to pay “fair share fees” in unionized workplaces, fees that fund the union’s collective bargaining operations. Critical to the attack on public-sector fair-share fees is the invocation of a stark divide between private and public sector employment. Such a divide runs directly contrary to the idea that public and private employers operate within a single labor market, an idea reflected in the general, though not uniform, pattern of applying labor and employment laws to both sectors, notwithstanding some limitations largely sounding in federalism concerns.

Of course, public/private distinctions are no stranger to the Court’s labor jurisprudence, but traditionally they have operated in a very different way. Rather than carving out entire employers, the Court has attempted to disentangle the economic from the political aspects of relationships between employees and employers. The former are deemed intrinsic to the employment relationship while the latter are deemed extrinsic and thus subject to a different set of rules.

Consider the private sector analogue to the question in *Friedrichs*. Labor law allows collective bargaining agreements to mandate that all covered workers pay for their fair share of union operations, but only to the extent that they fund the union’s “economic” activities in bargaining. In

126. *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992).

127. *Friedrichs v. Cal. Teachers Ass’n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (June 30, 2015) (No. 14-91), *aff’d by an equally divided Court*, 136 S.Ct. 1083 (2016) (Mem.) (per curiam).

128. For an overview, see Lyle Denniston, *New Challenge to Public Employee Unions, Made Simple*, SCOTUSBLOG (Aug. 24, 2015, 12:08 AM), <http://www.scotusblog.com/2015/08/new-challenge-to-public-employee-unions-made-simple/>.

contrast, different rules apply to funds devoted to “political” activities in government elections and so forth.¹²⁹

A similar patterns holds in the law of concerted activity. There, the courts and the NLRB have strained to distinguish between actions directed at workers’ economic interests in the employment relationship—including questions of government policy affecting those interests—and “conduct or speech that are so purely political or so remotely connected to the concerns of employees.”¹³⁰

Returning to the public sector, the economic/political distinction has been used to limit workers’ First Amendment claims when their (governmental) employer takes adverse action against them based on their speech. First Amendment protections do not apply when worker speech concerns the “economic” sphere of workplace operations.¹³¹ In such circumstances, public employer-employee relations are to be harmonized with private employer-employee relations—all are just firms acquiring labor in markets, and the governmental character of the public employer is incidental.¹³² In contrast, when a government employer retaliates for worker speech on “political” matters of general public concern, and not simply as a matter of enforcing discipline within the production process, First Amendment protections apply.¹³³ In other words, the basic questions are whether the government is acting economically, qua employer, or politically, qua government, and whether the worker is acting economically, qua employee, or politically, qua citizen.

In contrast to all this, *Friedrichs* raised the prospect of drawing the economic/political distinction in a very different way. The Court now seems poised to treat a public sector union’s core bargaining function as *political* in nature. And therefore to treat mandatory fees, even when devoted exclusively to those functions directly addressing the economic terms and conditions of employment, as a form of compelled political participation offensive to the First Amendment. At oral argument, Justice Scalia reasoned that “[t]he problem is that everything that is collectively bar-

129. See *Comms. Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991) (union could charge objecting members for expenses incident to strike but not for lobbying expenses).

130. *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 570 n.20 (1978). See generally Paul E. Bateman, *Concerted Activity—The Intersection Between Political Activity and Section 7 Rights*, 23 LAB. L. 41 (2007).

131. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

132. *Id.* (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services”).

133. *Connick v. Myers*, 461 U.S. 139, 146 (1983).

gained with the government is within the political sphere, almost by definition.”¹³⁴ Counsel defending the fees responded with classic separate spheres reasoning: “as a government, we have two things that we’re doing; one is trying to run a workplace, another is trying to run a government.”¹³⁵

After Justice Scalia’s sudden death, the Court divided evenly and issued no opinion on the merits in *Friedrichs*.¹³⁶ Had the Court struck down public-sector fair-share fees, we no doubt will see a flurry of declarations from pro-labor commentators explaining that, whatever you may think about public sector unionism, surely adversarial bargaining in the oh-so-private sector is as purely economic as you can get. Thus, the political/economic boundary would migrate from a distinction between aspects of government action to a distinction between government and private employers. This might still come to pass once Justice Scalia’s replacement is confirmed. This would be a most peculiar place for labor to be. After all, prominent rationales for our regime of collective bargaining rely precisely on the notion that *private sector wages* and *private sector workplace authority* are matters of public concern.

Notice, moreover, how *Hobby Lobby* provides a playbook for defeating attempts to limit *Friedrichs* to the public sector. The *Hobby Lobby* Court rejected the notion that private employers’ conduct should be treated legally as purely an economic function structured by a profit-maximizing market logic. Indeed, *Hobby Lobby* relied heavily on continuity across the for-profit/not-for-profit divide. Accommodations offered to non-profits were leveraged into an obligation to offer similar accommodations to for-profits.

Hobby Lobby’s point about the religious meaning of private employment practices is readily extended to political meanings. Any employer practice that is the subject of a political dispute about the scope of labor and employment law—wage inequality, work/family conflict, protected classes for antidiscrimination law, affirmative action, unionization itself—can itself be seen as having broader political significance.

More generally, disputes over these employment practices are, routinely, disputes over broad questions of power and belonging in a democratic society. That, of course, is precisely the argument ordinarily offered from the left. For instance, a political commitment to the full equality of lesbian, gay, bisexual, and transgendered people is part of the rationale for barring employment discrimination based on sexual orientation or gender

134. Transcript of Oral Argument, *supra* note 4, at 45.

135. *Id.*

136. *Friedrichs v. Cal. Teachers Ass’n*, 136 S.Ct. 1083 (2016) (mem.) (per curiam).

identity. But by the same token, whether or not a union seeks such an anti-discrimination provision in a collective bargaining agreement would seem to be a political decision. Of course, these *also* are economic decisions. The whole problem in this arena is the facile notion that to be economic is to be apolitical and that to be political is to be noneconomic.

IV. CONCLUSION

I make no claim to predict the future of work, just to observe some potential futures that may be opening up. Uber, *Hobby Lobby*, Ferguson, and *Friedrichs* could portend a twenty-first century that witnesses transformations on par with what we saw in the late nineteenth and early twentieth centuries, transformations in how work is organized, how it is understood socially, and how it is regulated.¹³⁷

Labor and employment law, the law of the labor market, emerged from what was once called “master & servant” law, itself a species of “domestic relations” law.¹³⁸ My examples all raise questions about whether some new configuration could emerge. That configuration could splinter “the labor market” and contextualize work to an extent that defeats any common regulatory project organized around “workers” or “the workplace.”

An obvious question is whether to welcome or abhor such a development. Answering that lies beyond the scope of this Essay. It is worth drawing out what I have already suggested, namely that my examples all reflect some deep ironies and intriguing reversals.

The traditional politics of labor regulation follow the well-worn battle lines over *laissez faire*. Those who would roll back regulation of employer conduct and weaken the relative power of workers typically do so in the name of purifying the market, permitting it to operate according to its own innate logic and allowing the invisible hand to guide us toward just and efficient outcomes.

137. SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGER, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY* (Lawrence Erlbaum Assocs., Inc., 2004) (1985); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2d ed. 2001) (1944).

138. See, e.g., KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 *INT'L LABOR & WORKING CLASS HIST.* 56 (1995); William E. Forbath, *Caste, Class, And Equal Citizenship*, 98 *MICH. L. REV.* 91 (1999); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U. PA. L. REV.* 437 (1989).

Here, in contrast, we have seen the opposite. The political conservatives are not invoking neoliberal notions of a thoroughly marketized society. To the contrary, they invoke nonmarket considerations—of community, of religion, of family, of politics—to free employers from regulation and impose new burdens on workers.

Similar surprises emerge from the political left, such as it is. Traditionally, among the most basic left commitments are the notions that the economy is political and that “the labor of a human being is not a commodity.”¹³⁹ Rather than a self-contained, self-regulating sphere apart from state action, modern market economies represent a political choice about how to distribute resources and authority.¹⁴⁰ Such economies cannot exist in recognizable form without the exercise of government power to establish and enforce property and contract relations, among many other things, and to collect the taxes required to exercise those powers.¹⁴¹

Having placed labor markets within the domain of politics, progressives then reject both *laissez faire* and efficient markets¹⁴² as normatively appealing baselines, certainly so far as labor is concerned. Labor law demands that principles of democratic decision-making play a significant role at work,¹⁴³ rather than being walled off into a separate “political” sphere. Antidiscrimination law demands that employers *not* simply treat workers as factors of production¹⁴⁴ but instead as free and equal citizens whose fate cannot justly be determined by morally arbitrary features of race or sex, even if a profit-making calculus would rely upon them. Wage and hour law routinely does something like what we saw with child-support enforcement: it invokes the notion that workers *have families to support*, and their wages should be high enough to allow them to do so—*living wages*.¹⁴⁵

139. 15 U.S.C. § 17 (2012).

140. Fred Block & Peter Evans, *The State and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 37; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCIENCE Q. 470 (1923); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

141. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

142. “Market-perfecting” regulation deviates from the former in order to achieve the latter.

143. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

144. Compare Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003), with Kelman, *supra* note 25.

145. For some progressive skepticism about this approach to wage and hour regulation, see Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1 (2009).

Furthermore, all these and other protections are unwaivable,¹⁴⁶ lying beyond the domain of market bargaining.

Thus, it is quite a spectacle to behold when workers' advocates invoke the purity of the market form in order to hold nonmarket values at bay. That, however, is the tenor of many objections to the phenomena surveyed here: Hobby Lobby's religious values should have no purchase in the labor market; "sharing" is bunk once money changes hands; child-support obligations should not disrupt the ordinary terms of labor competition; unions are engaged in economic bargaining disconnected from politics.

The irony, then, is that the left's deepest critical insights about market mythology currently are being turned against the signature regulatory achievements built on those insights. At stake here is not merely discrete rules like the contraceptive mandate or even broad structures like public sector unionism. What is at stake is the very idea of a labor market. This presents a mortal threat to labor and employment law. But this is a body of law thoroughly dependent on precisely the evil it strains to resist. Surely somewhere, somehow, there is an opportunity for human freedom in this death embrace.

One such opportunity may be found in the current revival of sectoral strategies in the labor movement. Some of the most innovative recent campaigns have broken away from a "workers are workers" approach. Instead, they have grounded organizing and advocacy in specific forms of work. Examples include the Los Angeles Clean & Safe Trucks campaign,¹⁴⁷ the Food Chain Workers Alliance,¹⁴⁸ and Caring Across Generations.¹⁴⁹ In each case, claims about working conditions are not framed universally but in context-specific ways—as part of environmentally friendly transportation, a "sustainable food system,"¹⁵⁰ or "policy solutions that enable all of us to live and age with dignity and independence."¹⁵¹ This contextualization

146. See generally Keith N. Hylton, *Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741 (1995); Cass R. Sunstein, *Human Behavior And The Law Of Work*, 87 VA. L. REV. 205 (2001); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1995).

147. See *What We Do*, LAANE, <http://www.laane.org/what-we-do/projects/clean-and-safe-ports/-more-2615> (last visited Jan. 29, 2016); Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 UC IRVINE L. REV. 939 (2014).

148. See FOOD CHAIN WORKERS ALLIANCE, <http://foodchainworkers.org/> (last visited Jan. 29, 2016); SARUMATHI JAYARAMAN, BEHIND THE KITCHEN DOOR (2013).

149. See AI-JEN POO, THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA (2015); *Who is Caring Across Generations?*, CARING ACROSS GENERATIONS, <http://www.caringacross.org/about-us/> (last visited Jan. 29, 2016).

150. *About—Vision for a Sustainable Food System*, FOOD CHAIN WORKERS ALLIANCE, http://foodchainworkers.org/?page_id=3421 (last visited Jan. 29, 2016).

151. *Who is Caring Across Generations?*, *supra* note 149.

does not simply identify problematic working conditions among a subset of workers. Instead, it articulates those workers' claims in conjunction with those of neighbors, consumers, and employers and with regard to substantive ends (food, air, care) that are not already framed in market terms.¹⁵²

Although these campaigns do not offer a frontal assault on understanding work in market terms,¹⁵³ they do represent a concerted shift away from solidarity among workers as a class to solidarity among sectoral participants. "The food system," not "the labor market" or even "work," becomes the unit of analysis. A full treatment lies beyond this already amply speculative Essay. These hopeful examples, however, suggest reasons to think carefully about how to formulate criticisms of Uber, *Hobby Lobby*, Ferguson, and *Friedrichs*, as well as reasons to explore the prospects for turning these developments toward more progressive ends.

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152. See also BEN BEACH & KATHLEEN MULLIGAN-HANSEL, ROOSEVELT INST., METROPOLITAN COALITIONS: CREATING OPPORTUNITIES FOR WORKER ORGANIZING (2015), <http://rooseveltinstitute.org/metropolitan-coalitions/>.

153. Caring Across Generations is particularly noteworthy for explicitly linking paid and unpaid caregivers. See Karen Yang, *Caregivers Need to Be Seen & Valued for Their Work*, CARING ACROSS GENERATIONS, <http://www.caringacross.org/stories/caregivers-need-be-seen-valued-their-work/> (last visited Jan. 29, 2016), drawing on longstanding feminists' concerns with the devaluation of care in both domains. See, e.g., NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004); Smith, *supra* note 14; Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45 (2011).