2 The Legal Construction of Workplace Neoliberalism

Introduction

The transformations in our political economy over the last several decades have left their mark on the law.[1] Or more precisely, our labor laws and our political economy *coevolved* during that time, as the postwar political settlement gave way to a new regime that many have characterized as neoliberal. Since the passage of the National Labor Relations Act (NLRA or "the Act"), our labor law has embraced *both* democratic commitments to worker self-organization *and* employers' traditional common-law prerogatives to organize production as they wish. But the relative import of those values has shifted over time. In the postwar era, democratic commitments were somewhat more prominent, and labor law theory even imagined employment—at least for relatively privileged industrial workers—as a social relationship jointly constituted by the working class and employers. Through the period of neoliberalism, the democratic strands of our labor law receded, and the common-law strands rose to dominance. Various forces discussed in chapter 1 helped to drive that evolution, including deindustrialization and the service transition, the rise of advanced information technologies, the globalization of much economic activity, and a concerted effort by capital to reassert control over the spheres of production and distribution.

Legally, that effort played out in litigation and lawmaking processes as companies sought greater freedom of action vis-à-vis workers and the state: greater freedom to hire and fire workers at will, to avoid unionization and to erode unions' power, to reshape production as they wish, and to gather and utilize data in their operations with few restrictions. Those freedoms enabled greater profitability and a greater return on invested capital, especially in service sectors with low productivity growth. Those changes also

cohered over time into a new legal conception of employment as an individual contract between putative equals rather than a social relationship. Today our labor law no longer understands workers as a group with obvious shared interests best advanced through collective action, nor does it assume that workers deserve protection simply because of their subordinate position in the division of labor. In that sense, our labor law helped to create the new working class, even as it denies that a working *class* still exists. The book calls this new labor law regime "workplace neoliberalism," and links it to broader trends in governance over the same period.

In this chapter, section 2.1 outlines the shift from postwar industrial pluralism to contemporary workplace neoliberalism and places that story in the context of broader legal transformations over the same period. Sections 2.2 and 2.3 then discuss the doctrinal shifts in detail. Section 2.2 explains how workplace governance was reshaped around the logic of individual contract. Section 2.3 traces the relationship of labor law to workplace technology over the same period and discusses companies' more recent efforts to gather and enclose workplace and worker data. These legal developments helped constitute the contemporary accumulation regime discussed in chapter 1, and which is explored in detail in chapters 3–5.

A note before proceeding: the law is immensely complex, and its content can be difficult to determine even for experienced attorneys. Cases and bodies of doctrine are often in tension with one another, or may even contradict one another. Because this book is intended to be accessible to laypeople as well as legal scholars, the discussion of law in this chapter and subsequent chapters remains at a fairly high level. The main text aims to trace general trends in the law, and to demonstrate their relationship to technological and political-economic factors. To make that possible, various nuances of legal doctrine will appear in the endnotes. I hope the breadth of coverage enabled by that strategy will compensate for any loss of precision.

2.1 From Industrial Pluralism to Workplace Neoliberalism

Prior to the New Deal, our labor law was essentially a branch of the common law, or the judge-made law—including the fields of contract, tort, property, and domestic relations—that the US inherited from England. During that era, companies enjoyed near-plenary rights to hire and fire at will, state courts often enjoined worker protest under civil conspiracy

laws,[2] and the Supreme Court struck down various legislative regulations of employment on the grounds that they unconstitutionally infringed freedom of contract.[3] It took a crisis of capitalism and state legitimacy during the Great Depression to displace that system. As noted in chapter 1, the centerpiece of the new order was the NLRA, which altered employers' common law contract and property rights by prohibiting retaliation against workers for union organizing and related activities. In litigation over the constitutionality of the NLRA and other worker statutes, the Supreme Court shifted its approach to questions of constitutional political economy and ratified broad federal regulatory authority.[4] Those cases helped set the stage for the postwar labor relations regime.

Yet in *National Labor Relations Board v. Jones & Laughlin Steel*, the very case in which the Supreme Court upheld the NLRA, the Court also signaled that the Act did not fully displace the earlier common law's emphasis on freedom of contract and employer property rights. As the Court explained, the Act forbade employers from retaliating against workers for unionizing and required them to bargain in good faith with their employees' unions, but it did not "compel agreements between employers and employees." Nor did it "interfere with the normal exercise of the right of the employer to select its employees or to discharge them," so long as the employer did not do so in retaliation for protected activity.[5] The emerging regime therefore envisioned a system of collective private ordering, in which the state would not generally scrutinize managerial decisions, and in which employers retained many unilateral powers. Indeed, *Jones & Laughlin*'s reasoning reflected a fundamental tension of our collective bargaining law: that it protects both workers' rights to pursue industrial democracy *and* continued employer prerogatives in the workplace, as reflected in the earlier common law whose legitimacy was based on tradition rather than democratic ideals.[6]

After the war, our collective bargaining law consolidated around the ideology of "industrial pluralism," which sought to resolve this tension between the state's promotion of collective bargaining and the older common law.[7] As the legal scholar Katherine Stone put it in a canonical article, "Industrial pluralism is the view that collective bargaining is self-government by management and labor." Through collective bargaining, the parties "engage in debate and compromise, and together legislate the rules under which the workplace will be governed."[8] Importantly, the organs of state—especially courts and administrative agencies—were

expected to refrain from interfering in that process to the greatest extent possible.[9] Somewhat paradoxically, while the New Deal led to a much larger administrative state and to the progressive extension of federal regulations into more and more spheres of the economy and private life, industrial pluralism entailed a *retreat* from intimate state involvement in labor relations. The role of the state—here, the NLRB and the courts—was not to govern employment directly, but rather to establish the legal entitlements necessary for autonomous private lawmaking.[10]

Under industrial pluralism, then, workers' organizations obtained some lawmaking power, or at least their values and practices became legitimate sources of workplace authority.[11] Collective bargaining agreements accordingly had a status more fundamental than individual contracting, being instead akin to legislation, or even a constitution for workplace governance.[12] Similar notions of collective bargaining as a form of autonomous collective ordering informed European labor law systems at the time.[13] US courts then embraced collective bargaining and governance not just because they would make workplaces more fair, but also because they would induce employee loyalty. In the latter respect, industrial pluralism was heavily indebted to the "human relations" school of industrial sociology, which held that workers who could share their concerns and feelings about work were more likely to be productive and reliable.[14] Labor law theorists at the time argued that grievance arbitration could serve that function in unionized workplaces,[15] and the Supreme Court suggested in a leading case that "the processing of even frivolous claims" through arbitration "may have therapeutic values" in the workplace.[16]

Yet due to the persistence of employers' common law entitlements, industrial pluralism delivered a rather thin form of workplace and economic democracy.[17] Through the postwar era, employers often sought to erode unions' power through strategies such as outsourcing, staffing cuts, and crude threats against union supporters.[18] Indeed, various labor law scholars have argued that the industrial pluralist vision of labor and management standing on equal footing was far more ideological than real—reflecting the political valence of human resources theory—and served mainly to legitimate workplace domination and broader political-economic inequalities.[19]

Over time, and especially after the 1970s crisis of the postwar order, the common law side of this equation grew steadily in importance, and today it outweighs (or even dominates) the democratic side. Today's labor law

thus enacts a different model of the relationship among workers, companies, and the state, one that gives workers still fewer protections and reflects broader trends in governance over the same period that others have termed "neoliberal."[20] "Neoliberalism" itself is a controversial notion, but at root it describes a set of theories that came to prominence in the 1980s holding that the state should be reorganized to reflect putative market imperatives.[21] As various scholars have argued, while neoliberalism has strong laissez-faire overtones, it is distinct from classical liberalism. The major difference is that classical liberalism viewed "market ordering under the common law" as "part of nature rather than a legal construct,"[22] while neoliberalism supports the affirmative use of law and political power to "restructure areas of law and social life along market lines."[23] The market is at once the outcome of conscious legal and social projects and an ideal-typical model for social and political relations.

In operation, neoliberalism entailed a simultaneous rollback of legal regimes that empower labor and citizens and a rollout of legal regimes that empower companies and capital more generally.[24] Under the influence of neoliberalism, many fields of law that concern the market were "re-oriented around versions of economic 'efficiency,'" crowding out concerns of distributive fairness and democratic legitimacy.[25] These legal changes therefore helped to "encase" the powers and privileges of dominant economic actors against challenge by workers, citizens, and even state actors.[26] For example, within antitrust, corporate litigants and allied scholars reframed merger analysis and related questions around a consumer welfare standard, displacing an older view that antitrust should also limit market power per se. That shift encouraged greater market concentration and corporate power in recent decades, as discussed in chapter 5.[27] Within corporate law, financial interests and various scholars pressed for shareholder wealth maximization as a predominant goal, arguing that investors needed legal tools to limit managers' propensity to enrich themselves.[28] That approach often disregarded the needs of workers, communities, and other corporate stakeholders. Scholars and litigants also consolidated the field of intellectual property (IP) out of disparate doctrines in patent, trademark, and copyright law and reoriented it toward the normative goal of creating incentives for innovation and production.[29] In a related shift, debates regarding the social good were often reframed around idealized notions of consumer freedom, to the point that entire swaths of social life—including educational policies, rights

of association, and even voting—were often discussed in terms of individual consumption preferences.[30]

In public law fields, meanwhile, courts insulated various structural inequalities from legal challenge under the Fourteenth Amendment, limiting the extent to which constitutional law could even take account of economic matters.[31] For example, the Supreme Court refused to recognize impoverished individuals as a suspect class in the context of education funding or housing policy.[32] The division of tax revenue between cities and suburbs, zoning decisions that lead to racial segregation, and many other sets of social policies were therefore left to the will of local majorities and placed beyond constitutional scrutiny. In a later set of developments, welfare benefits were ratcheted back and linked to work eligibility, so workers had to get a greater share of essential resources from labor markets.[33] Restricting nonworkers' access to social insurance and welfare effectively imposed greater market discipline on workers, especially female workers and Black workers and other workers of color.

Labor law sits at the intersection of public and private law, and accordingly it has been influenced by both sets of developments. Law and economics scholars argued from the beginning that fundamental worker protections, including collective bargaining and wage/hour laws, in fact interfere with market ordering, competition, and/or individual choices, and therefore reduce aggregate welfare.[34] For a time, this approach to the design of labor market institutions influenced self-identified liberal legal academics, who often suggested that labor markets should be organized to optimize employment levels and looked skeptically at minimum wage and related regulations.[35] Within collective bargaining doctrine, the influence of neoliberalism was most apparent in shifts toward viewing union membership as a matter of individual choice and union organizing as a collective purchase of services.[36] However, neoliberalism was never as powerful among labor law *scholars*, due in part to their tradition of drawing from old institutional economics and political economics.

Meanwhile, employment discrimination doctrine evolved in ways that reflect the general trends in public law noted just above.[37] Starting in the 1970s, and continuing to today, courts increasingly viewed discrimination as a matter of individual animus rather than a structural feature of the labor market.[38] Doctrine now largely endeavors to provide a sort of pure procedural justice: employers must treat workers equally based on their aptitudes,

remaining blind to protected traits. But in the absence of policies that correct for background inequalities that correlate with those traits—including poverty and housing and educational inequality for racial minorities, and disproportionate care burdens for women—employment discrimination doctrine has only a limited capacity to ensure real equal opportunity. Moreover, as the legal scholar Ahmed White has argued, our lack of industrial policy made it nearly impossible to ensure racial equity in industrial employment after Title VII. Nascent deindustrialization occurred at the same time as efforts to desegregate industrial workplaces, but Title VII protected incumbent workers' seniority, which meant that Black workers never had equal access to manufacturing jobs.[39] Later, as the state retreated from addressing structural injustices, the racial wage gap expanded and progress in remedying patterns of workplace discrimination stalled.[40] Neoliberalism and the service transition therefore left us with more pronounced and mutually reinforcing race and class divisions, and with fewer public tools to address those inequalities.

2.2 Foundational Shifts in Labor Law

As discussed in section 2.1, workplace neoliberalism realigned authority among workers, companies, and the state. Rather than basic terms of employment being set by collective bargaining, they were set by individual negotiations against a backdrop of statutory protections. Past labor law scholars have explored the differences between this "individual rights" regime and the industrial pluralist regime of the postwar era.[41] The discussions in this section and section 2.3 draw on that work, while situating this transition in the broader shift to neoliberalism.[42] This section shows how companies subjected workers to greater market discipline by eroding unions' strength and coverage and, where possible, eliminating employment relationships entirely. Section 2.3 shows how companies expanded and encased their property rights, including their rights in workplace technology and data. These two legal shifts were closely linked, both conceptually and operationally. Where an employer enjoys broad powers to set employment terms by fiat, and to hire and fire workers at will, that employer is also well positioned to reshape production as it likes, including through technological means (since workers who object can be fired).

Deunionization and the individualization of employment relationships The first foundational legal shift under workplace neoliberalism involved the

long-running decline of private-sector unionization and collective bargaining.[43] As noted in sections 1.5 and 2.1, companies never stopped resisting union power, even in the postwar heyday of collective bargaining. In their ongoing legal battles with unions and workers, companies pressed their own interpretations of the NLRA and its limits, frequently emphasizing their residual common law rights. Over decades, those efforts led to broad shifts in labor law. But the seeds of the transformation lay in core aspects of labor law as it emerged in the New Deal.

For example, as noted in chapter 1, the New Deal labor regime instantiated the racial and gendered political economy of the 1930s, and therefore excluded many workers from protection. That labor law regime also sharply limited workers' rights to strike, which made it harder for workers to sustain their associational power in the postwar era and to rebuild it after the crisis of the 1970s. To paraphrase a common-sense understanding shared by US labor lawyers, strikes are legal in this country unless and until they are effective. Early in the NLRA's history, companies argued—and the Board, the courts, or both agreed—that various strikes were "unprotected" in labor law parlance, meaning that employers could lawfully discipline or even fire employees for engaging in them. Those include slow-down strikes, sit-down strikes, and intermittent strikes, all of which were quite effective weapons in labor's arsenal.[44] Companies may also "permanently replace" workers who are striking to achieve an economic goal, which in many cases is tantamount to being fired.[45] While employers have had that right since 1939, they exercised it more often and more aggressively beginning in the 1980s.[46] The 1947 Taft-Hartley Act also prohibited unions from engaging in most "secondary boycotts," or strikes and pickets through which workers put pressure on a company other than their immediate employer.[47] Exploiting that restriction, firms such as McDonald's have sought to immunize themselves against labor unrest by organizing their operations through a franchising model, since our labor law often treats franchisors and franchisees as independent enterprises.[48] Line-level McDonald's workers then have few if any rights vis-a-vis McDonald's corporate, which substantially limits their power. This issue is discussed in more detail in chapter 5. Finally, companies established broad rights to campaign against unionization soon after the war, as discussed in more detail in chapter 4.[49]

Another longstanding problem that has become especially acute lately is that our labor law favors localized or enterprise-level bargaining. This is

reflected in several foundational rules. The NLRA itself provides that the "unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," which has discouraged multiemployer bargaining structures.[50] That emphasis is consistent with our labor law's rules of majority rule and exclusive representation. Workers usually have no rights to bargain collectively under our law unless and until they unionize with a majority vote in an NLRB-supervised election, or until an employer voluntarily recognizes a union that has majority support.[51] A resulting collective bargaining agreement will then apply to all workers in the bargaining unit but only to them, not to other workers in the industry. Similarly, even if workers have organized at a majority (or all) of a company's existing locations, the company retains the background right to operate new locations or new lines of business on a nonunion basis.[52]

These doctrines, together with employers' rights to resist organizing, have made it nearly impossible for workers to build unions at many major employers today, as discussed in more detail in chapter 4. Each of these doctrines also contrasts with rules and practices in European systems where postwar class settlements were more stable. In many such systems, collective bargaining is centralized rather than fragmented,[53] and workers enjoy some collective representation as a matter of right though institutions other than unions.[54] Cross-national evidence shows a strong correlation among bargaining centralization, wage equality, and the generosity of welfare states.[55] Chapter 6 discusses the possibility of building more centralized bargaining structures in the US today.

For now, the key point is that companies have exercised their various rights and powers to reorder work relations around individual rather than collective agreements. The change can be visualized by placing employment contracting practices on a continuum running from highly centralized on the left to highly individualized on the right. The left pole of that continuum would be occupied by some European peak bargaining systems, in which unions and companies set standards at the national level. Moving to the right, the next grouping would involve coordinated bargaining between unions and multiple companies in the same sector. In our own history, the "pattern bargaining" strategy of the United Auto Workers (UAW) is perhaps the canonical example. For decades, the union has negotiated an agreement with one of the Big Three automakers—General Motors (GM), Ford, and Chrysler—and then pushed the other two to match terms.[56] The

UAW and other unions built such arrangements in the postwar period, despite the legal impediments to doing so, by building substantial political-economic power at key moments. But due both to institutional drift and companies' ongoing resistance, collective bargaining in the US over time has become increasingly localized, as well as increasingly rare. The current unionized sector, therefore, sits a step or two to the right of pattern bargaining. Workers there have union protections but often bargain only at the workplace or enterprise level.

The right side of this continuum reflects reality for most workers today. Nonunionized workers in the US have no rights of collective representation at all; instead, they bargain individually with their employers. The vast majority of private-sector workers today are not unionized, including low-wage workers in manufacturing, retail, health care, logistics, and food services. Finally, the right pole of the continuum is occupied by individual workers who do not even have a legal employment relationship with the company or companies for whom they work. As discussed later in this section, that group includes many gig economy workers, workers for franchised fast-food companies and hotels, janitors, and temporary workers. The overall trend in the US over the last few decades has therefore been progressive individualization of employment: decentralization of bargaining, deunionization, and then elimination of the employment relation itself. As we move from left to right on this continuum, workers have less and less power to take wages out of competition, or even to restrict the labor supply, and are therefore subject to greater and greater market discipline.

To be clear, this individualization of employment has coincided with a substantial expansion of statutory workplace protections. In the 1960s and 1970s, for example, Congress passed several pieces of landmark legislation to protect individual workers' rights, including Title VII of the Civil Rights Act of 1964, the Occupational Safety and Health Act of 1970 (OSHA), and the Employee Retirement Income Security Act of 1974.[57] Later on, Congress and state legislatures passed numerous privacy protections starting in the 1980s,[58] and Congress extended employment discrimination protections to individuals with disabilities in 1990.[59] Many states and localities have also raised their minimum wages recently.[60] Those statutes and others provide essential protections against many forms of workplace mistreatment and subordination. However, effectuating such rights is a perpetual challenge for less privileged workers. Unions had once ensured that employers complied

with such laws through collective action as well as litigation. In unions' absence, such protections can be chronically underenforced.[61] Moreover, the workers at the right pole of the continuum are frequently ineligible even for those meager protections, since they are not legally classified as employees. In that sense, the collapse of unions and the individualization of employment contracting have stripped workers of many basic legal entitlements.

The contractualization of employment A second major development of the last few decades has been the reshaping of employment contracts around notions of liberty and consent reminiscent of the pre–New Deal era. This trend carries forward industrial pluralism's focus on private ordering. However, under workplace neoliberalism, the contracting parties on the employee side are individual workers rather than workers' organizations. Workers' consent to particular terms and conditions of employment then renders those terms and conditions legally binding, even if workers had little real bargaining power. Workplace neoliberalism therefore discards the idea that workers need associational power to actually advance their interests, as well as the notion that employers' workplace authority is most legitimate when based on collective bargaining processes.

The influence of this view of contract on employment law is most apparent in the resurgent importance of the employment-at-will doctrine. Under that rule, an employer "may dismiss their employees . . . for good cause, for no cause, or even for cause morally wrong . . ." as long as doing so is not otherwise unlawful.[62] In practice, unless there is evidence of other wrongdoing, such as fraud or a statutory violation, the employment-at-will rule deters courts from second-guessing companies' decisions to terminate workers.[63] Under the rule an employee may also quit employment at any time and for any reason, with or without giving notice. There is nothing new about the at-will rule, which became dominant in the late nineteenth century[64] and was foundational to labor law prior to the New Deal. As the Supreme Court wrote in a canonical 1908 case, *Adair v. United States*, "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars, the employer and the employee have equality of right."[65] Practically, however, employment at will was less important under industrial pluralism since collective bargaining agreements typically provided that employees could be terminated only for "good cause," such as poor performance, violation

of work rules, or absenteeism. Nonunion employers often adopted similar policies during the same period to avoid unionization.

In the 1980s, various state courts chipped away at the at-will rule. The cases arose in the broader political-economic context of deindustrialization and union decline, which left workers increasingly vulnerable. Terminated workers then claimed that their employers' promises of job security were contractually binding, and won a number of landmark cases.[66] Around the same time, state courts carved out another exception to employment at will that forbade employers from terminating workers for activities that implicate major public policies, such as a worker's performance of jury duty.[67] Yet except for Montana, no state reversed the at-will default.[68] What's more, the logic of contract and consent in such cases was easily deployed to *limit* workers' rights over time. Early cases reasoned in part that promises of employment security were binding because employees had the right to quit, and therefore their continued work bound the employer to its promise.[69] In some subsequent cases, companies argued—and courts agreed—that employees' continued work could constitute acceptance of revised employer policies that *eliminated* job security provisions.[70]

The logic of *Adair* itself has even made a comeback. In *Epic Systems Corporation v. Lewis*, a 2018 case considering the enforceability of agreements to arbitrate employment-related disputes, Supreme Court Justice Neil Gorsuch stated the question presented as follows: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[71] The issue, in this framing, is not whether an employer may require the employee, as a condition of employment, to sign such an agreement, taking into account the clear imbalance of bargaining power, nor the fact that arbitration may undermine enforcement of statutory employment rights. Rather, it is whether the employee should have the power to contract for such a term—as if the *employee* had demanded it.[72] Illustrating the importance of and malleability of such notions of consent, some other courts have held that employers can bind their employees to a duty to arbitrate workplace disputes by presenting an agreement one day and telling workers that they are bound by it unless they quit.[73]

The contractualization of employment is also apparent elsewhere in our collective bargaining laws. For example, in this era jurisprudence around collective bargaining and worker organizing efforts came to emphasize workers' preferences, often viewing their decision on whether to join a union

or to organize as being similar to their decisions to purchase a good or service.[74] In his opinion in the 1992 *Lechmere, Inc., v. NLRB* case, holding that a company may exclude non-employee union organizers from a mall parking lot that is open to the public in almost all circumstances, Justice Clarence Thomas reasoned that the union had alternative means of getting in touch with workers, including advertising in local newspapers or putting up signs on public property abutting the lot. In that view, the organizing effort was like a marketing operation rather than an agonistic social process that has real value in a democracy.[75]

A similar emphasis on employee choice has informed the Supreme Court's recent jurisprudence around union dues and agency fees. In 2018's *Janus v. AFSCME*, the Court held that public employee unions cannot require represented workers to defray costs of representation. As in *Epic Systems*, the Court in *Janus* framed the issue around employee choice, stating that "[u]nder Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."[76] The logic is flawed because a majority of workers had *chosen* to negotiate an agency fee, and workers who objected had the right to seek another job. Indeed, the concept of employee choice in *Janus* is in serious tension with the concept in *Epic Systems*: in *Janus*, the Court disregarded the workers' past choices and present capacity to leave their jobs, while in *Epic Systems*, the Court viewed the fact that workers did not quit as indicating their assent.[77] Operationally, the cases nevertheless push in the same direction: they reorient employment around a vision of individualized contract and away from enabling "collective action as a means of checking employer power."[78]

The decline of employment The third foundational aspect of workplace neoliberalism is that in recent decades companies have increasingly been able to avoid labor law obligations entirely.[79] They have done so by exploiting the fact that our labor laws only grant protections to individuals who are legally classified as employees, and only give those employees rights against entities that are legally classified as their employers. Workers who are classified as independent contractors are not covered by those laws, and those who work for temporary labor agencies, subcontractors, or franchisees usually have rights only against their immediate employers—not against user firms or franchisors that contract with their employers, even if those other firms have more power to set their wages and working conditions. Chapter

5 discusses these issues in detail, but a brief summary here will be helpful in understanding what follows.

Independent contracting and subcontracting are not new. In fact, they were well established liability-blocking strategies in the early twentieth century.[80] As a result, the issue concerning which workers were covered by the key New Deal statutes—the NLRA, Fair Labor Standards Act (FLSA), and Social Security Act (SSA)—was litigated soon after those statutes' passage. In each case, the Supreme Court held that workers who provided some of their own tools and/or worked without much direct supervision—newspaper vendors in the case of the NLRA, a gang of specialized slaughterhouse workers under the FLSA, and coal loaders under the SSA—were employees rather than independent contractors. In so doing, the Court interpreted the statutory language purposively and broadly to protect vulnerable workers, and to encourage companies to directly employ workers who were essential to their enterprises.[81] In other words, by defining employment broadly, Congress and the Court at the time sought to encourage companies to internalize the costs of their operations and to deter subcontracting and other strategies that undermined the overall statutory schemes.

That expansive definition of employment was short-lived. Following employer pressure, Congress responded in Taft-Hartley by specifying that independent contractors were *not* covered under collective bargaining laws.[82] As a result, the NLRA and most other worker protective statutes today use the legal definition of "employment" from the common law of agency, which asks whether the putative employer controls the worker's performance.[83] That test was developed to determine whether a worker or the company he or she works for is responsible when a tort by the worker injures a third party, and it may have worked reasonably well for that purpose. But that test does not reflect the statutory purpose of employment regulations, which is to protect workers against social harms such as low wages, unsafe working conditions, and discrimination.[84] Thus, it is arguably too narrow per se. Moreover, that statutory definition is often too narrow in operation. This is in part because many work relationships do not fall neatly into classic categories of employment or independent contracting, and in part because the doctrine is confusing and highly malleable. Many courts and agencies use a multifactor test with ten or more factors to determine employment status, but the precise factors emphasized can vary from case to case and court to court.[85] This both leads to uncertainty and raises

the costs of proving a violation, since workers seeking to prove that they are employees must develop an extensive factual record. The legal analysis of user firms' duties toward employees of subcontractors and franchisees is similar and is discussed in chapter 5.

Over the period of neoliberalism, companies have increasingly pressed on those ambiguities, avoiding labor law duties by classifying workers as independent contractors or by using subcontracting and franchising arrangements. These strategies have collectively come to be known as the "fissuring" of employment since they each place a legal gap between workers and the companies that utilize their work, much like the fissures that break through boulders over time.[86] Fissuring is devastating to workers' associational power. It places workers outside of a company's legal boundaries, making it difficult for them to make moral or legal claims on the company. Indeed, the Taft-Hartley ban on secondary boycotts made it *illegal* in most cases for unions to picket or strike companies other than the immediate employer.[87] Fissuring is also a *consequence* of unions' declining power, in the sense that well-organized workers could at times block fissuring efforts, even if they had few or no *legal* rights to do so.[88] As a result, for decades companies have had incentives to organize work relationships or new lines of business in ways that avoid employment duties entirely.[89] New surveillance technologies have also made fissuring more attractive to companies by enabling them to closely monitor far-flung networks of workers and suppliers. As chapter 5 shows, these various factors have led many of today's leading companies to employ far fewer workers than their postwar predecessors.

2.3 Encasement of Workplace Information

Over this same period, companies claimed broader and deeper property and property-like rights in workplace technology, in workplace data, and even in their employees' knowledge and know-how. These developments paralleled shifts in other areas of doctrine—including IP and trade secrets—that helped facilitate the tech giants' explosive growth and the extension of data-driven technologies across the economy.

Labor law and workplace technology As discussed in chapter 1, the growth of heavy industry and the factory system involved intense conflicts between craft workers and companies over the control of workplace technology and the labor process. Companies won that battle for the most part, but after the

New Deal, insurgent industrial unions sought to put the issue back into contention. For example, soon after World War II, the UAW struck GM for nearly four months, demanding both higher wages and a freeze in consumer prices.[90] This was part of UAW President Walter Reuther's agenda to give workers a greater voice in production planning and economic management generally. GM resisted furiously, and the UAW lost. Two years later, Congress passed Taft-Hartley, restricting unions' capacity to organize and strike in myriad ways. After that point, unions tended to focus on winning a share of productivity gains rather than a voice in production strategies themselves.

As a matter of practice, that settlement was formalized in the so-called Treaty of Detroit, the landmark 1950 UAW-GM contract in which GM "regained control over one of the crucial management functions . . . long-range scheduling of production, model changes, and tool and plant investment," in exchange for guaranteed wage growth over time and generous private benefits.[91] The Supreme Court later ratified the settlement, in a sense. In a famous 1964 concurrence, Justice Potter Stewart wrote that employers have no duty to bargain over issues of company strategy and related matters at the "core of entrepreneurial control," including the decision "to invest in labor-saving machinery."[92] The full Court mostly adopted Stewart's reasoning in 1981, amid the Reagan-era deindustrialization wave, holding that employers have a duty to bargain over decisions to adopt technologies that would displace workers only "if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[93] That standard counts the employer's interests on both sides of the balance, which may explain why there is little case law addressing the duty to bargain over labor-displacing innovations.[94]

Unionized workers nevertheless retained important legal rights and extralegal sources of power around workplace technology. Legally, employers must bargain over the *effects* of technological changes that displace workers.[95] In practice, that mostly means that the employer must meet and confer with the workers' union in good faith.[96] But well-organized unions can often achieve *some* voice in technological change through extralegal means.[97] Employers that wish to avoid shop-floor unrest (regardless of its legality) then have incentives to engage with unionized workers before rendering jobs redundant through technology, or even before adopting new machinery that required retraining. As unions lost ground within firms and

the broader political economy, however, workers were less able to protect themselves through such means.

A different set of rules apply to technological changes that enhance employers' surveillance capacities or that alter disciplinary practices. In the unionized context, since employers have a duty to bargain over wages, hours, benefits, and disciplinary policies, they must bargain with unions *before* adopting such technologies.[98] Even in a nonunion workplace, workers may be protected against employer discipline if they protest a new technology that would lead to a faster pace of work.[99] In one recent case, an NLRB administrative law judge held that a nonunion teacher could not be disciplined over her complaints about a higher workload resulting from the school district's request that teachers use a new technological platform.[100] Such cases are nevertheless rare, again due to the general decline of unions and workers' associational power. As a result, for most workers, the key protections against harms resulting from workplace surveillance arise under workplace privacy laws.

Employee privacy The broad and general expansion of employers' powers over enterprises and workers discussed previously has also influenced the development of workplace privacy laws. There have been two developments in this area that at first glance push in opposite directions. Courts and legislatures have established various privacy protections that apply in discrete circumstances, at the same time that they have tolerated (or even facilitated) significant increases in employer surveillance and searches. This subsection gives a brief overview of privacy as a concept and of those developments. Chapter 4 discusses these issues in more detail.

"Privacy" is a deeply complex and contested idea, in part because privacy law is called on to protect numerous distinct interests, and in part because a wide array of statutes and common law doctrines affect privacy.[101] As other scholars have argued, the social or normative value of privacy cannot be understood simply in terms of individual liberty or control, or in terms of one's ability to keep information secret or inaccessible from another person or entity. Rather, "privacy law" here denotes a variety of rule complexes that govern information flows and protect interests in individual dignity and autonomy, as well as some forms of collective autonomy.[102] As chapter 4 will discuss, privacy protections in that sense are essential for workers to build associational power. Reflecting that need, our labor law tries to carve out space for workers to speak with one another about common workplace

concerns, and to meet and plan collective action, without their employers' knowledge. As chapter 4 also indicates, novel information technologies have nearly eviscerated those protections by vastly expanding companies' surveillance capacities.

The most important generally applicable workplace privacy protection is the tort of intrusion upon seclusion,[103] under which employers may be liable to workers for searches that harm their dignity or lead to humiliation.[104] Courts have held employers liable under that tort when they placed video cameras in a changing room, for example, or searched an employee's home or hotel room.[105] That tort has only a limited impact on contemporary data practices, however, for a few reasons. It was designed to address invasions of individuals' living quarters or persons, so courts have held that private-sector employers may often search employees' desks, personal effects, or even their automobiles without individualized suspicion of wrongdoing.[106] The bar for recovery is also high: to win, a plaintiff must show that the invasion at issue was "highly offensive to a reasonable person."[107] Moreover, the *reasonableness* of an intrusion is determined in part by reference to common practice. As a result, when many companies adopt new surveillance techniques in significant numbers and require workers to accept them or quit, that widescale adoption itself can limit those companies' possible liability.[108]

As employers have implemented new monitoring devices across the economy, the law has mostly ratified their actions. For example, in a public-sector case, where employee privacy rights are somewhat broader, a federal court held that a public employer could utilize video surveillance in public areas of the workplace, reasoning that workers in that context had no reasonable expectation of privacy.[109] As a result of these doctrines, and of the general expansion of employer property rights discussed earlier, there are in reality few legal restrictions on employers' rights to monitor employees while they are performing work tasks. It is worth reiterating that, practically speaking, employers did not always have that power: in the early industrial era, workers often acted collectively to prevent such surveillance, as discussed in chapter 1.

In the workplace context, privacy also indicates a very different set of interests in employee *autonomy*, or the freedom to engage in personal, political, and expressive conduct.[110] A key dividing line here is between the workplace and other areas. While employers have now established their rights to surveil workers in the workplace in many circumstances, their monitoring of

workers' off-duty conduct is in flux. Only a few states have adopted legislation or constitutional provisions protecting workers against discipline for off-duty activities,[111] and a number of state courts have held that employers may terminate workers for off-duty political or personal conduct, with or without a good reason, under the employment-at-will doctrine.[112] There is also quantitative evidence that employers frequently press employees to take political action supporting their favored candidates or issues.[113] Companies' ability to track employees' off-duty conduct, as well as to use the data gleaned from that tracking to reshape labor practices, has been substantially augmented by new technologies, as discussed in chapter 4.

Companies' surveillance and data-gathering powers are mitigated somewhat by legislative prohibitions on specific acts that have triggered public concern.[114] One wave of legislation developed around drug testing in the 1980s, and subsequent waves covered health and genetic information,[115] biometric information,[116] and, more recently, privacy in electronic communications.[117] Those laws provide important protections but still permit companies to surveil workers right up to the line of prohibition. California recently passed the California Consumer Privacy Act (CCPA), the first omnibus data privacy regulation in the US.[118] However, like most other privacy regulations in the US, the CCPA does not treat privacy as a fundamental right; rather, it presumes that companies may collect and use data as they wish unless those actions are prohibited by specific legal rules.[119] That approach contrasts with the dominant approach in Europe. The European General Data Protection Regulation (GDPR), for example, treats data protection as a fundamental right and prohibits data collection and processing unless the gathering and processing are legally justified.[120]

Moreover, many privacy statutes in the US effectively or explicitly exempt employers from coverage. The Federal Stored Communications Act, for example, prevents employers from accessing workers' personal email accounts in most cases,[121] but it does not apply to employer-provided email accounts.[122] In other cases, workplace privacy statutes permit employer monitoring or privacy invasions, so long as workers consent. This is the approach that various states have taken to employer monitoring of telephone or electronic communications.[123] Employers often have little problem obtaining such consent, however, from at-will employees. The result, as detailed in chapters 3–5, is extensive and expanding worker surveillance, especially in low-wage sectors.

Enclosure of employee knowledge and know-how Finally, employers have increasingly claimed property-like rights in employee knowledge and know-how. Those efforts parallel other developments under neoliberalism through which companies have used IP doctrines and contracts to affect "the propertization (or enclosure) of intangible resources."[124] This process also has been going on for decades, with the trend over time clearly toward expansion of IP protections.[125] For example, the Supreme Court and Congress have classified more and more goods as proper subject matter for patents (with some important exceptions, such as for data), and have progressively extended the temporal length of protections under copyright laws, while also creating new property rights in subsidiary works.[126] As corporate-held IP is developed by employees in most cases, this entire process involves companies' extracting and legally encasing their workers' knowledge. Indeed, as Catherine Fisk has shown, IP doctrine itself was transformed in the late nineteenth and early twentieth centuries—the era of Taylorism, as discussed in chapter 1—to grant employers legal title in their employees' writings and inventions.[127]

The standard justification for those rule complexes has also shifted over time: whereas in earlier eras legal actors tended to emphasize "the public benefits to be gained from underwriting progress in science and learning," today they more often emphasize "incentives to production."[128] That again reflects the influence of neoliberal ideas about the role of law in creating and sustaining market orders. Similarly, legal actors have increasingly argued that the benefits of "innovation" justify various forms of regulatory avoidance or forbearance with regard to networked information technologies.[129] This contrasts with the more precautionary approach in food and drug regulation, under which agencies balance the potential benefits of innovation against the risks of unsafe drugs or food additives, and again reflects broader trends under neoliberalism toward a focus on market ordering.

Data occupies an ambiguous or even contradictory space in IP law and some other bodies of law. On the one hand, lawmakers have consistently held that data itself cannot be owned under IP law.[130] For example, while the act of compiling a database can lead to a copyright in the database,[131] the Copyright Act specifies that the data itself cannot be the subject of a copyright. Similarly, algorithms themselves cannot be patented under Supreme Court doctrine because they are abstract ideas or mathematical formulas rather than devices.[132] On the other hand, consumer-facing companies have enclosed user data through a variety of methods. They

often deploy contract doctrine and user agreements to claim and maintain exclusive property-like rights over data, including the rights to sell or process that data in the future with few restrictions.[133] Companies have also enclosed data through expanded trade secrets protections, in a development that cuts across the consumer and employment fields. Current doctrine in most states, and under the federal Defend Trade Secrets Act, enables a company to claim property-like protections for information that has value due to its secrecy, and that the company has taken reasonable steps to keep confidential.[134] Employers have even claimed trade secrets protection in data flows generated from hiring practices.[135] Moreover, once a company asserts that certain information is a trade secret, courts will typically not compel its disclosure without a fight that public interest litigants may be unable to wage.[136]

Companies have frequently justified those efforts to the public, meanwhile, by casting user data as what Julie Cohen calls a "bio-political public domain"—that is, a pool of resources that are just there for the taking, much like the public domain in IP law.[137] This helps explain the common refrain in public-facing discussions of big data and tech that data is "the new oil"—both a natural substance and the most important economic resource of the day.[138] The analogy is misleading, as data is a human creation through and through, but it helps to justify and legitimate data collection and collation efforts.

In the workplace, meanwhile, companies have expanded the legal tools at their disposal to claim property-like rights in workers' knowledge and know-how. For example, companies may require employees who develop firm-specific knowledge to agree not to work for a competitor for some period of time after leaving their current jobs.[139] Historically, courts strongly disfavored such noncompete agreements because they may prevent workers from leaving an undesirable employment relationship, and could therefore undermine one of the key rationales for employment at will. The modern trend, reflecting courts' deference to the terms of employment contracts, has been to hold employees to the terms of noncompetes so long as they are reasonable in terms of duration, covered work, and geographic scope.[140] In some cases, courts have even held that employees were bound to a covenant because they continued to work after their employer presented it to them.[141] In states where covenants are not enforceable, employers have at times achieved similar goals through nonsolicitation and nondealing clauses in employment contracts, which prohibit past employees from soliciting or doing business with clients of the company.[142] The net effect

of such efforts is that companies are claiming extensive rights over workers' knowledge or "cognitive property."[143] As we'll see in subsequent chapters, at times companies can even reverse-engineer that knowledge through advanced forms of data analytics, and then lease it back to workers.[144]

Conclusion: Workplace Legality and Employer Power

Under industrial pluralism, employment was jointly constituted by unions and management, at least in theory. Now employment is constituted largely by contract, and companies have broader property rights in the workplace and in workplace technology and data. To be sure, companies' authority over workers is far from absolute. But institutions and norms of workplace democracy have clearly diminished in power and importance. To return to an argument developed in chapter 1, this new legal regime did not emerge in a political-economic vacuum, nor did it emerge randomly. Rather, it came about as companies pressed for a new operating environment amid the crisis of the postwar order and the secular economic shifts of deindustrialization and the service transition. Through those efforts companies established greater freedom of action vis-à-vis workers and the state: freedoms to hire and fire at will, to establish and enforce workplace rules without workers' involvement, to establish lines of production that deny workers basic employment protections, to gather data on workplace processes and workers themselves, and to develop new tools from that data that become their property.

Contemporary labor law thus helped birth today's working class, all while denying that a working *class* still exists. The notion that workers are not just objects of state protection, but also part of a collective agent that deserves lawmaking authority, has been largely lost. So has a sense that workers deserve protection simply by virtue of their position in the division of labor. It is surely no accident that these shifts occurred at the very historical moment when the working class became less white and less male. Along with other legal changes and the maturation of networked information technologies, these shifts in our labor law helped to establish a new accumulation regime, in which high-voltage profits are in high-end services and high tech, but employment is concentrated in lower-end services. As the next three chapters explore, under that accumulation regime major service sector employers have increasingly used data-driven technologies to suppress workers' associational power.

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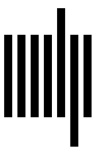

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