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Lowering the Stakes of the Employment Contract

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LOWERING THE STAKES OF THE EMPLOYMENT CONTRACT

ADITI BAGCHI*

ABSTRACT

Every country has to make hard choices about the distribution of entitlements. But employers control the entitlements that individual Americans enjoy to a far greater extent than those in other rich democracies. In this Essay, I argue that, in the absence of the political consensus necessary to deliver state solutions to political questions, employers here are assigned an exaggerated role in employees' lives. Government incentives for and directives to employers have become a strategy of political deflection. The effect has been to raise the stakes of employment well beyond the scope of those terms and conditions that relate to attracting and extracting productive labor.

I consider three examples of political deflection to employers. Employers control employees' access to healthcare and free speech and, more recently, have imposed public health measures such as vaccination mandates. Employers' rules are backed by the threat of termination. This Essay argues that relying on contractual authority rather than political authority to distribute social rights and obligations in this way undermines political legitimacy. Governments might see the private sector as a relatively apolitical refuge through which public policies can be pursued stably over the course of political shifts. But removing questions about who gets and owes what from politics and subjecting employees to raw power, as we do when we raise the stakes of employment and lower the stakes of politics, detracts from the rightful function of politics to mediate disagreements among us.

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INTRODUCTION

As a child, one does not grasp why it matters which job you will end up with. Children tend to talk a lot about what they will do and who they will be, and they are encouraged to think about what they like or whom they admire. Only decades later, if ever, are they encouraged to think about starting salaries, career ladders, and job structure. As luck would have it, our early naïveté may be inconsequential: the choices that we make tend not to matter as much as external factors outside of our control. Although the factors that determine how we are sorted into different jobs are not those that animate childhood whimsy, we were right to intuit all along that the kind of job we end up with matters enormously.

Most obviously, the job one has—together with the job of one's spouse—drives the amount of resources available to a person to pursue her life projects. Will she live paycheck to paycheck, eating better at the beginning of the month than toward the end of it, or will she have disposable income to spend on luxury goods and services? Will she travel the world or feel trapped by her zip code? How many children can she afford and on what life path will she set them?

Some of her income may buy leisure time. The working hours associated with her job will also directly determine the quantity of her leisure time. Employment will determine stability and security, social status, potentially self-respect, and, of course, how she experiences most of her waking hours as an adult.

Compensation and status are variable features of employment in every variety of democratic capitalism.¹ Even security, leisure, and self-respect, though they may vary less in other wealthy countries, are rarely uniform across the labor market.² To the extent that these goods depend on employment to a greater degree in the United States, this appears to be the result of negative rather than affirmative public policies.³ Neither state nor federal governments set out to delegate to employers the task of distributing anxiety or prestige; the distribution of those goods and burdens is incidental to the system we use for allocating social resources like labor, capital, land, and other property. Most people in the United States are persuaded that relying on the marketplace to allocate such resources benefits us overall, even though the market rewards people differently for their contributions.⁴

¹ See, e.g., David Rueda & Jonas Pontusson, *Wage Inequality and Varieties of Capitalism*, 52 *WORLD POL.* 350, 350-51 (2000) (noting increases in distribution of wages in capitalist economies).

² Omer Moav & Ofer Cohen, *Who Needs Job Security?*, *AZURE*, Autumn 2008, at 1, 8 (noting flexibility of U.S. labor market is due, in part, to variable wages—lack of extensive income protection—and lack of uniform severance pay and job security).

³ *Id.* at 8 (stating U.S. employees do not have extensive income or welfare protection).

⁴ Hannah Hartig, *Stark Partisan Divisions in Americans' Views of 'Socialism,' 'Capitalism,'* PEW RSCH. CTR. (June 25, 2019), <https://www.pewresearch.org/fact-tank/2019/06/25/stark-partisan-divisions-in-americans-views-of-socialism-capitalism/> [<https://perma.cc/XJH4-QCSS>] (observing 65% of Americans have positive impression of capitalism, wherein people rely on market for resources instead of government, in contrast to 42% for socialism).

Remarkably, though, there are some basic social entitlements that the federal government has intentionally delegated to private employers, even though employers themselves might not otherwise have sought to control them.

That is, we have not simply accepted that people will be paid more or less, enjoy greater or weaker job security, work harder or less hard, depending on their labor market power. We have effectively upped the ante and expanded the set of life consequences associated with labor market power beyond what a market-based economy in principle entails by way of tax incentives and other legal and social pressure on employers.

Without aiming to be exhaustive, I will discuss two disparate entitlements: speech rights and healthcare. In the United States today, an individual's ability to speak and write freely and her ability to access healthcare are both critically dependent on her employer.⁵ We have not and probably could not agree on a more direct government role for controlling access to speech and healthcare.⁶ In light of social divisions, ours has been a deliberate public policy of lowering the stakes of political discourse in favor of raising the stakes of the employment contract.

More recently, we have seen this go still further, beyond defining individual entitlements and into the context of defining individual responsibility. In the face of significant public health pressures, city, state, and federal governments have sought to require individuals to get vaccinated against COVID-19.⁷ But they have not dared to impose a vaccine requirement on citizens *qua* citizens. Instead, they have deflected political responsibility for mandates by delegating to employers enforcement of a vaccine mandate. It is clear that there is no appetite for a direct mandate on American residents and that, one way or the other, management of public health will be delegated to employers to a considerable degree.

⁵ See *infra* Part II.

⁶ See, e.g., Bradley Jones, *Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage*, PEW RSCH. CTR. (Sept. 29, 2020), <https://www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/> [https://perma.cc/H5GF-RYPQ] (noting that 63% of U.S. adults who say government has responsibility to provide health coverage for all, 36% say it should be via single national government program, and 26% say it should be provided through mix of private insurance companies and government programs).

⁷ See, e.g., Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021) (requiring COVID-19 vaccination for federal government employees and contractors); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (requiring employers of over 100 workers to develop, implement, and enforce mandatory COVID-19 vaccination or testing policy), *withdrawn*, 87 Fed. Reg. 3,928 (Jan. 16, 2022) (to be codified at 29 C.F.R. pt. 1910); Erin Tiernan, *Boston Mayor Michelle Wu Announces Vaccine Mandate amid Jeers*, BOS. HERALD (Dec. 23, 2021, 9:10 PM), <https://www.bostonherald.com/2021/12/20/boston-mayor-michelle-wu-announces-vaccine-mandate-for-restaurants-gyms-sports-venues/> (discussing vaccine mandates of Boston, New York City, and Los Angeles).

The effect of using employer authority to compensate for a weak state is that employment, more so than ever or elsewhere, is the site at which one's entitlements and obligations are set. And these entitlements and obligations are set and controlled by employers, with government incentives and directives in the background; they are imposed on employees, backed by the threat of termination.⁸ I will argue that relying on contractual authority rather than political authority to distribute social rights and obligations beyond compensation and other basic terms and conditions of employment undermines political legitimacy even when it is intended to protect it. Governments might see the private sector as a relatively apolitical refuge through which public policies can be pursued stably over the course of political shifts. But removing questions about who gets and owes what from politics and subjecting them to raw power, as we do when we raise the stakes of employment and lower the stakes of politics, detracts from the rightful function of politics to mediate disputes among us about how we should live together.

My argument will proceed in three parts. In Part I, I will review the concept of decommodification developed in the literature on comparative political economy and propose an analogue concept about "employment stakes" for local use that is not attached to Marxist theory. In Part II, I will show how employment stakes are singularly high in the United States by reviewing the examples of speech, healthcare, and vaccination requirements. In Part III, I will argue that relying on contractual authority rather than political authority to decide individuals' rights and obligations is a perverse strategy that ultimately undermines the quality of our democracy.

I. VARIETY IN EMPLOYMENT SCOPE

In 1990, Gøsta Esping-Andersen published his now classic study of welfare states in the twentieth century, *The Three Worlds of Welfare Capitalism*.⁹ Despite over two decades of debate about whether his typology of capitalist regimes accurately or most productively captures the range of states that we observe, Esping-Andersen's three broad regime types remain an intuitive and powerful lens through which to make sense of institutional diversity.¹⁰

⁸ See, e.g., *More than 150 Houston Methodist Hospital System Workers Fired or Quit After Refusing to Get COVID-19 Vaccine*, CBS NEWS (June 23, 2021, 5:01 AM), <https://www.cbsnews.com/news/houston-methodist-hospital-system-workers-fired-quit-covid-19-vaccine/> [<https://perma.cc/B3DT-N3EJ>] (noting Houston Methodist Hospital required employees to be completely vaccinated by June 7, 2021, and suspended 178 employees for two weeks without pay after they did not comply).

⁹ GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990) (recasting methodology and concepts of political economy to evaluate welfare state).

¹⁰ See Wil A. Arts & John Gelissen, *Models of the Welfare State*, in *THE OXFORD HANDBOOK OF THE WELFARE STATE* 569, 571-72 (Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger & Christopher Pierson eds., 2010) (discussing widespread comment on Esping-Andersen's work spanning twenty years). While critics have offered modifications,

Esping-Andersen proposed three ideal types of welfare regimes: liberal (or neo-liberal or libertarian states, like the United States), conservative (or neo-corporatist states, like Germany), and social-democratic states (most famously, Sweden).¹¹ These states vary on many subtle dimensions,¹² and of course, no one state conforms perfectly to its “type”;¹³ I cannot do credit to his nuanced study here. Roughly, liberal states are characterized by minimalist, means-tested welfare assistance and individualized labor markets in which employment contracts are set at the firm level, often without any labor union involvement.¹⁴ Conservative regimes offer assistance that reinforces the family as the first unit of social relief, as well as traditional gender roles within it.¹⁵ Their social insurance programs build on neo-corporatist labor market institutions and also reinforce occupational status distinctions across the labor market through segmented collective bargaining.¹⁶ Finally, social-democratic regimes, such as those in Scandinavia, offer universal and generous welfare schemes sponsored by strong states that aim to decommodify citizens and reduce social stratification.¹⁷ Decommodification “occurs when a service is rendered as a matter of right, and when a person can maintain a livelihood without reliance on the market.”¹⁸ Social-democratic states are associated with cross-class labor confederations that coordinate across the economy.¹⁹ Esping-Andersen is Danish, but scholars working in all three regime types that have used his typology tend systematically to reserve their accolades for the social-democratic model.²⁰

some friendly and others critical, no competitive typology has displaced Esping-Andersen’s as the dominant one. *See, e.g., id.* at 571-72, 580-83.

¹¹ ESPING-ANDERSEN, *supra* note 9, at 26-28 (noting that the three types of regimes have differentiated expectations).

¹² *Id.* at 26 (recognizing there are qualitatively different arrangements between state, market, and family across social rights and welfare-state stratification).

¹³ *Id.* at 28.

¹⁴ *Id.* at 42-43.

¹⁵ *Id.* at 27 (stating that corporatist regimes are typically shaped by traditional familyhood and family benefits encourage motherhood).

¹⁶ *Id.* at 24 (recognizing neo-corporatist markets have distinct programs for different class and status groups, each with its own set of distinct rights and privileges designed to complement their “appropriate” station in life).

¹⁷ *Id.* at 27-28.

¹⁸ Esping-Andersen, *supra* note 9, at 21-22.

¹⁹ Arts & Gelissen, *supra* note 10, at 572-77.

²⁰ *See, e.g.,* ROBERT E. GOODIN, BRUCE HEADEY, RUUD MUFFELS & HENK-JAN DIRVEN, *THE REAL WORLDS OF WELFARE CAPITALISM* 261-62 (1999) (“[O]ur analysis, however, has . . . single[d] out the social democratic welfare strategy as strictly dominant over both the others.”); Duane Swank, *Social Democratic Welfare States in a Global Economy: Scandinavia in Comparative Perspective*, in *GLOBALIZATION, EUROPEANIZATION AND THE END OF SCANDINAVIAN SOCIAL DEMOCRACY?* 85, 89, 95 (Robert Geyer, Christine Ingebritsen & Jonathon W. Moses eds., 2000) (“[P]ublic provision of social services, including health and employment services, is more developed in the Nordic model than in other welfare states.”).

While most critiques of the original typology quibble with the number of regime types or the labeling of particular countries,²¹ the most potent critique came from Clare Bambra and others, arguing that Esping-Andersen had concentrated on the effects of a regime only on the male worker, neglecting the extent to which “welfare state regimes[] facilitate female autonomy and economic independence from the family.”²² In later work, Esping-Andersen largely conceded this point and attempted to incorporate the concept of “defamilialization” by broadening his inquiry into the range of means by which individuals manage social risks.²³

One of Esping-Andersen’s main insights is that capitalist countries with developed welfare states do not all aim to achieve the same objectives, and in fact, they do not produce the same results.²⁴ Most importantly, he emphasized variation on the matter of whether citizens have rights by virtue of their citizenship to social services and benefits or, alternatively, whether they must rely on the labor market to secure basic necessities.²⁵ This is the question of decommodification.²⁶ He also differentiated countries on the matter of where individuals look for security in the face of risk: the state, the market, or family.²⁷ Finally, he evaluated states for their degree of social integration, or alternatively, stratification by income or other status.²⁸

²¹ See, e.g., Peter A. Hall & David Soskice, *Introduction to VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 1, 8 (Peter A. Hall & David Soskice eds., 2001) (offering new two-regime typology); John Hudson & Stefan Kühner, *Analyzing the Productive and Protective Dimensions of Welfare: Looking Beyond the OECD*, 46 SOC. POL’Y & ADMIN. 35, 38-39, 42-43 (2012) (contesting regime criteria and extending application outside Organisation for Economic Co-operation and Development); Francis G. Castles & Deborah Mitchell, *Worlds of Welfare and Families of Nations*, in FAMILIES OF NATIONS: PATTERNS OF PUBLIC POLICY IN WESTERN DEMOCRACIES 93, 106 (Francis G. Castles ed., 1993) (disaggregating liberal type).

²² Clare Bambra, *Defamilisation and Welfare State Regimes: A Cluster Analysis*, 16 INT’L J. SOC. WELFARE 326, 327 (2007).

²³ See GØSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* 45-46 (1999) (noting that, for example, while large proportion of women are precommodified in that their welfare derives from being in family, female independence necessitates defamilializing welfare obligations).

²⁴ ESPING-ANDERSEN, *supra* note 9, at 22.

²⁵ *Id.* at 21 (“[I]f social rights are given the legal and practical status of property rights, if they are inviolable, and if they are granted on the basis of citizenship rather than performance, they will entail a de-commodification of the status of individuals *vis-à-vis* the market.”).

²⁶ *Id.* at 21-22; see also Gøsta Esping-Andersen, *Multi-Dimensional Decommodification: A Reply to Graham Room*, 28 POL’Y & POL. 353, 353 (2000) (referring to decommodification “a citizen’s relative independence from pure market forces”).

²⁷ ESPING-ANDERSEN, *supra* note 9, at 26-28.

²⁸ *Id.* (noting liberal regimes result in class stratification that is a blend of relative equality of poverty among those receiving welfare and market-differentiated welfare among the rest, conservative regimes emphasize upholding status differentials, and social-democratic states offer the same rights regardless of status).

While scholars of political economy have long been interested in levels of inequality, Esping-Andersen's emphasis on decommodification introduced a different standard by which to evaluate capitalist economies. While inequality speaks to integration or stratification and turns on the relative resources that individuals have, decommodification asks about entitlements, not just outcomes. A citizen is "decommodified" if she does not have to rely on the market to meet basic needs and wants.²⁹ Esping-Andersen did not originate the concept of decommodification; its origins are in Marxist theory.³⁰ As Esping-Andersen's peer Karl Polanyi explained, capitalism treats labor as a commodity available for exchange.³¹ A worker is commodified in the Marxist sense as long as he sells his labor rather than the goods produced with it.³² Esping-Andersen did not incorporate the Marxist concept as such.³³ He does not focus on workers' productive roles; he is not concerned, therefore, with ownership of the means of production and whether workers are alienated from their labor. Instead, he is interested in their consumption, that is, their access to goods and services.³⁴ He reads history to deliver a clear verdict in favor of promoting workers' returns to labor by enhancing reservation wages rather than by intervening in structure of production.³⁵

Nevertheless, Esping-Andersen sets another sweeping and overambitious threshold for decommodification. He provides that the minimal definition of decommodification entails that "citizens can freely, and without potential loss of job, income, or general welfare, opt out of work when they themselves consider it necessary."³⁶ As Mark Kleinman observed, no capitalist country

²⁹ *Id.* at 37.

³⁰ *See id.* (noting that issue of commodification was central to Marx's analysis of class development).

³¹ *See* KARL POLANYI, *THE GREAT TRANSFORMATION* 73 (Beacon Press 1957) (1944). The extent and scope of Polanyi's concept of decommodification is itself unclear and contested. *See, e.g.,* Gareth Dale, *Social Democracy, Embeddedness and Decommodification: On the Conceptual Innovations and Intellectual Affiliations of Karl Polanyi*, 15 *NEW POL. ECON.* 369, 386-87 (2010) (criticizing Polanyi's understanding of decommodification based on his misjudgments of economic policy regimes); CLAUS OFFE, *CONTRADICTIONS OF THE WELFARE STATE* 14 (John Keane ed., 1984) (developing decommodification idea further while noting contradiction in fact that various branches of welfare state are compelled to perform commodification and decommodification, two incompatible functions).

³² *See* ESPING-ANDERSEN, *supra* note 9, at 21 ("Stripping society of the institutional layers that guaranteed social reproduction outside the labor contract meant that people were commodified.").

³³ Esping-Andersen, *supra* note 26, at 355 (noting he does not believe that "self-realisation in working life is intrinsic to the commodity status of labour").

³⁴ *Id.* at 354.

³⁵ *Id.* at 353-54 (arguing that, historically, welfare strategy, the need for workers to be secure and resourceful before creating communal economy, demonstrated superiority over orthodox strategy, which is characterized by altering means of production for equality).

³⁶ ESPING-ANDERSEN, *supra* note 9, at 23.

would aspire to such a standard.³⁷ No country sets out to make it possible for people simply to choose not to work without suffering any kind of setback, and most of us would reject such a standard in principle as outside the demands of justice.

Perhaps the lesson is that decommodification should be reconceptualized further. But given how far it has already come from its Marxist origins, a different lesson can be that decommodification as such is not the best measure of success for welfare state regimes. The idea is compelling because it is a proxy for a more specific phenomenon than the theory behind it implies: the degree of power that employers exercise over workers. Indeed, Esping-Andersen himself observed that decommodification “strengthens the worker and weakens the absolute authority of the employer.”³⁸

Others have more or less directly pointed to the short discussion of employers in Esping-Andersen’s work as a significant limitation. Robert E. Goodin and Martin Rein have suggested that we think more about who pays for and supplies the services of the welfare state.³⁹ Peter A. Hall and David Soskice not only reduced the three types to two clusters—liberal market economies and coordinated market economies—but also shifted focus to employers as the engine that determines which model prevails in a given country, as well as that model’s evolution over time.⁴⁰

Combining the interest in employer control and employer provision, we arrive at the following question to ask of any regime: To which social goods do employers regularly control access? Or as I will suggest below, when are employers the gatekeepers and allocators of goods for social purposes other than labor compensation? In every capitalist society that Esping-Andersen and his interlocutors considered, employers offer varied remuneration to employees for their work.⁴¹ In some countries, employers have more latitude than others about the terms and conditions they may offer.⁴² That latitude gets at the question of how much turns on the particular job that an individual holds. Elevating the social wage by mandating minimum wages or paid time off is one way of

³⁷ MARK KLEINMAN, A EUROPEAN WELFARE STATE?: EUROPEAN UNION SOCIAL POLICY IN CONTEXT 30 (2002).

³⁸ ESPING-ANDERSEN, *supra* note 9, at 22.

³⁹ Robert E. Goodin & Martin Rein, *Regimes on Pillars: Alternative Welfare State Logics and Dynamics*, 79 PUB. ADMIN. 769, 770 (2001) (“The central organizing question in regime discourse is ‘who gets what, and on what conditions?’ The ‘pillar’ perspective sees things from the provider’s point of view. The central organizing question in pillar discourse is ‘who pays, and who provides?’”).

⁴⁰ Hall & Soskice, *supra* note 21, at 8.

⁴¹ See ESPING-ANDERSEN, *supra* note 9, at 43 (noting in liberal regimes, social insurance pegs entitlements and benefits to varied employment, work performance, and contributions).

⁴² See *id.* at 23 (noting that, for example, in some countries, sickness insurance that guarantees benefits equal to normal earnings, with minimal proof of medical impairment requirements and for the duration that the individual deems appropriate, are usually reserved for white-collar employees).

reducing variation among employment contracts. Such variation speaks to the level of inequality and stratification in a society.

However, the concept of commodification is powerful because it captures something more than inequality at the aggregate level. It speaks to the power dynamic in employment relationships at the micro level.⁴³ It does not, however, distinguish between the various goods and services that employment contracts might control. The concept did not seem to anticipate that employment contracts would be a site for distribution of goods even beyond the “ordinary” terms of remuneration for labor. In the United States, employment determines the extent to which employees have access even to goods that the employer would not wield as compensation *but for* public policies that affirmatively assign responsibility for those entitlements to employers. While the welfare state might shield employees from dependence on employers for certain kinds of goods and services, our institutions also rely on employers to allocate other goods and services that employers would not use as compensation absent legal incentives.

One might immediately and rightly object that there is no natural line between goods or entitlements that employers would offer as compensation and those that are “artificially” introduced as consequences of employment. This is no doubt true—and I would not attempt to draw a clear line. Nevertheless, it is useful to distinguish in principle between terms of the employment contract that the employer itself uses in order to attract and extract productive labor from terms that the employer uses in order to avoid some legal liability. The most clear example of a compensation-driven term are cash wages. Employers will pay employees different amounts depending on their marginal productivity and the available supply of substitutable labor.⁴⁴ By contrast, a hypothetical term that offers employees free iPads because the tax code makes them cheaper for the employer to provide them than for the employee to purchase them directly is “artificial.” If the price difference for employers and employees is substantial, employers would be gatekeepers for access to iPads. Whether one has an iPad would then turn on what kind of job one has and who one works for, more so than if iPads were purchased directly. If iPads were purchased directly, we would expect people with more money to be more likely to have an iPad (or to have multiple iPads or newer models), but the iPads that people have will also reflect to a considerable degree the strength of their own preferences with respect to iPads. Some high-income employees will choose not to buy one at all. Some low-income employees will spend their first disposable dollars on the newest model. Most importantly, an employee’s decision to work or remain with a particular employer will not turn on her eligibility for an iPad at her place of

⁴³ Graham Room, *Commodification and Decommodification: A Developmental Critique*, 28 POL’Y & POL. 331, 332 (2000).

⁴⁴ See Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT’L ECON. REV. 257, 258, 269 (1998) (noting employers pay wages conditional on other workers’ behavior and that productivity impacts wages).

employment. She will not, for example, be reluctant to leave her employer when she is nearing the hypothetical six-month eligibility mark.

Is it terrible for employers to allocate iPads to employees directly? We might not worry too much about this hypothetical role of employers if iPads are not regarded as a critical resource for individuals. I will argue below that we should worry about it when the stakes we have introduced into the employment relationship are higher, as they are in the case of speech rights and healthcare.

II. ASSIGNING PUBLIC FUNCTIONS TO EMPLOYERS

In this Part, I will discuss three consequences of American employment that are the result of legal incentives for employers rather than their desire to optimally attract and extract productive labor. The first two are social goods, albeit quite fundamental ones: speech rights and healthcare. I will then turn to a more recent condition of employment, a potential duty to be vaccinated. In each case, the state has effectively delegated to employers the task of allocating a good or a burden. In each case, there are good reasons why policy evolved as it did. But we are nevertheless left with an unsavory state of affairs, in which, far from decommodifying employment, our institutions have artificially raised the stakes of employment even beyond those that follow from employers' business interests.

A. *Off-site Speech*

Speech rights are at first blush universal in the United States. After all, the First Amendment guarantees them for everyone.⁴⁵ Because the First Amendment only limits government regulation of speech, however, it does not ensure that individuals are permitted to say whatever they want without penalty.⁴⁶

Nor should it. There are good reasons to think that individuals should face consequences for certain kinds of harmful speech even when the government ought not to regulate that speech. This is most obviously true of entirely private speech: if your friend repeatedly says hurtful things to you, you probably should cease to be her friend. Unfortunately, it is less clear who should be in the position to “cancel” harmful speech that is public. Employees are just people, and they often make false, irrational, dangerous, ridiculous, or vicious statements, including racist or sexist comments—both at work and outside of it.⁴⁷ When people make comments at work, it is easier to see that employers are both

⁴⁵ U.S. CONST. amend. I.

⁴⁶ *Roth v. United States*, 354 U.S. 476, 482, 486-87 (1957) (holding that certain categories of speech are not protected, and the government can prohibit and punish those types of speech without violating First Amendment).

⁴⁷ See, e.g., Stella Chan, Augie Martin & Alicia Lee, *Tech CEO Resigns After Video Shows His Racist Rant Towards Asian-American Family at California Restaurant*, CNN BUS. (July 13, 2020, 5:58 PM), <https://www.cnn.com/2020/07/13/business/michael-lofthouse-resign-racist-rant-trnd/index.html> [<https://perma.cc/R6K8-8GP7>].

appropriately responsible for the work environment and have a legitimate interest in controlling its tenor.⁴⁸

But of course, employees make comments that are potentially wrongful outside of work as well, and then it is less clear what the appropriate role of the employer is in policing their speech.⁴⁹ After all, they also make comments that are not wrongful but are simply unfavorable to the employer; the employer may “idiosyncratically” judge such comments as wrongful.⁵⁰ Still, when speech targets vulnerable members of society or operates to perpetuate social hierarchies, it is doubtful that the speakers are entitled not to suffer any consequence for their speech acts, even if the government ought not to directly prohibit or penalize such speech. But what lesser, civil consequence should such speech have, and equally important, who decides in each case? Should irresponsible speakers simply lose their friends? Should they lose their jobs? Should they be shunned by grocery stores and banks, common carriers and utility companies? I do not purport to offer a solution to the problem here. My point is that we not only disagree about what kinds of speech are harmful, but there is also a further absence of public consensus on what the consequences of harmful speech should be, if any, and who should decide them.

What has emerged is a default regime: employers are frequently called upon to terminate employees when they are associated with offensive speech, and employers frequently oblige.⁵¹ Because this social practice enables us to punish those who engage in wrongful speech without running afoul of the First Amendment, there is little initiative to question whether employers are the right entities to decide to punish offensive speech when it is far removed from the workplace. After all, as discussed further below, employers’ incentives as to how to handle off-site speech turn on factors that do not systematically correspond to the merits of that speech or its relevance to the workplace. Assigning the social function of policing speech to employers also has consequences for many employees who do not engage in speech that is offensive to public values: once

⁴⁸ See, e.g., Lora Kolodny, *Tesla Factory Workers Have Filed a Lawsuit Claiming Widespread Racism, Unsafe Conditions*, CNBC (Nov. 15, 2017, 11:48 AM), <https://www.cnbc.com/2017/11/14/tesla-class-action-lawsuit-alleges-racism-unsafe-factory-conditions.html> [<https://perma.cc/2JJM-KND4>] (stating that Tesla and Elon Musk personally contributed to racist culture at Tesla by failing to stop factory workers from using racial epithets, failing to take corrective action against harassers, and firing Black workers who complained).

⁴⁹ See, e.g., Nicholas H. Meza, Comment, *A New Approach for Clarity in the Determination of Protected Concerted Activity Online*, 45 ARIZ. ST. L.J. 329, 329-30 (2013) (noting employees regularly share opinions online, and employers struggle to determine when discipline is appropriate).

⁵⁰ See, e.g., *id.* at 351-52 (detailing incident where bartender was dismissed for criticizing employer’s tipping policy on Facebook).

⁵¹ See, e.g., Jonah E. Bromwich, *Amy Cooper, Who Falsely Accused Black Bird-Watcher, Has Charge Dismissed*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/02/16/nyregion/amy-cooper-charges-dismissed.html> (noting that Cooper was fired after gaining notoriety for her racist conduct at the park).

employers are empowered to monitor and control employees' off-site speech, they can terminate employees for many kinds of speech that are not to their liking, including speech that is simply critical of the employer and its goods or services.⁵²

My limited purpose here is to observe that the consequence of our disagreement about liability for speech, either the substantive standards of propriety or the procedural question of who should apply those standards and how, has made employers the gatekeepers for speech. In some cases, they are reluctant gatekeepers; they are responding to the concurrent threats of legal liability and consumer boycott. In other moments, they can abuse their gatekeeper status to control speech with limited public consequence that is simply critical of the employer itself.⁵³

Employers are subject to some limitations in their control of employee speech. Most notably, the government itself is prohibited from using the threat of dismissal from public employment as a means of inhibiting speech. In *Pickering v. Board of Education*,⁵⁴ the Supreme Court balanced a citizen's interest in speaking about matters of public concern against the government-employer's interest in efficiently providing public services.⁵⁵ Although *Pickering* protection is to some extent vulnerable to the ideologies of the government in power,⁵⁶ it enjoys the robustness of constitutional grounding. But while the *Pickering* rule is significant in its own domain, it does not apply to employees of private employers, who are not subject to the constraints of the First Amendment.⁵⁷

However, employees of private employers are not altogether without protection. At the federal level, protection is narrow: section 7 of the National Labor Relations Act prevents employers from interference with concerted action by employees.⁵⁸ This has been interpreted to encompass speech, including speech outside of work.⁵⁹ If an employee's speech is directed to another employee, the Board considers a slew of factors to determine whether any disciplinary measure taken against the employee was permissible, including whether the employer maintained a specific rule prohibiting or otherwise previously condemned the language used by the employee, whether the employee's statement was impulsive or deliberate, whether the discipline imposed upon the employee was consistent with past discipline for similar acts,

⁵² See, e.g., Meza, *supra* note 49, at 351-52 (stating employee was dismissed not for hate speech but for criticizing employer's tipping policies).

⁵³ See, e.g., *id.*

⁵⁴ 391 U.S. 563 (1968).

⁵⁵ *Id.* at 565-67, 574.

⁵⁶ See, e.g., Nancy M. Modesitt, *The War on Whistleblowers*, 6 U. PA. J.L. & PUB. AFFS. 603, 627 (2021) (describing Trump Administration's hostile moves to weaken whistleblower protection for federal employees).

⁵⁷ See *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952) (noting First and Fifth Amendments only restrict federal government, not parties such as employers).

⁵⁸ National Labor Relations Act § 7, 29 U.S.C. § 157.

⁵⁹ *Pier Sixty, LLC*, 362 N.L.R.B. 505, 531 (2015).

whether the disciplinary measures were directed at offensive speech rather than protected activity, and whether the employer had a record of anti-union hostility.⁶⁰

The Board has found itself increasingly charged with adjudicating cases in which employees have posted comments on social media and has issued guidance by way of examples of protected and unprotected conduct.⁶¹ Employees' disparaging comments about an employer are protected as long as the comments are related to working conditions or other workplace grievances.⁶² However, the Board recently pulled back under the Trump Administration by requiring more evidence that an employee intended to "initiate, induce, or prepare for group action."⁶³ While some commentators would have the Board adopt a still more restrictive but also more predictive rule,⁶⁴ others regard the evolution of doctrine concerning social media as broadly consistent with long-standing precedent.⁶⁵

While the interpretation of section 7 and satisfaction with it has varied (and this observer would favor a more protective standard), on the whole, the generic language of the statute has been broadly construed to ensure that speech plausibly intended to mobilize employees toward concerted action is protected.⁶⁶

⁶⁰ *Id.*

⁶¹ See Memorandum from Anne Purcell, Nat'l Lab. Rels. Bd. Assoc. Gen. Couns., to Reg'l Dirs., Officers-in-Charge & Resident Officers (Aug. 18, 2011) (available at <https://apps.nlr.gov/link/document.aspx/09031d458056e743>) ("Recent developments in the Office of the General Counsel have presented emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules."); Memorandum from Anne Purcell, Nat'l Lab. Rels. Bd. Assoc. Gen. Couns., to Reg'l Dirs., Officers-in-Charge & Resident Officers (Jan. 24, 2012) (available at <https://apps.nlr.gov/link/document.aspx/09031d45807d6567>) (collecting cases where employees were terminated as result of social media activity).

⁶² *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir. 1989) ("[A]ppeals to third parties forfeit § 7 protection only if their connection to the employees' working conditions is too attenuated or if they are unrelated to any grievance which the workers may have.").

⁶³ *Alstate Maint., LLC*, 367 N.L.R.B. No. 68, 4, 8 (Jan. 11, 2019) (noting that "other evidence that a statement made in the presence of coworkers was made to initiate, induce or prepare for group action—such as an express call for employees to act collectively—would also support a finding of concertedness").

⁶⁴ See, e.g., *Meza*, *supra* note 49, at 367 (arguing for a more bright-line but less protective rule).

⁶⁵ See, e.g., Ariana R. Levinson, *Social Media and the National Labor Relations Board*, in RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 337, 337 (John A. Rothchild ed., 2016) ("This chapter buttresses the claim that Board regulation of social media policies is consistent with past practice and precedent by analogy to Board precedent governing employer policies on solicitation and distribution and on the wearing of insignia, which are similar to the social media policies currently being regulated.").

⁶⁶ *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. 151, 167 (2014) (Miscimarra, Member, concurring in part and dissenting in part) ("[T]he Board majority announces a broad

However, it does not even aspire to limit employer discipline of any other kind of employee speech intended only to complain about the employer, colleagues, or customers, let alone matters unrelated to employment. Even when speech falls within the bounds of section 7, the employer can still discipline or terminate the employee if the speech was sufficiently “disloyal.”⁶⁷

State legislatures have offered protection beyond the context of collective mobilization.⁶⁸ Many states, such as California, Colorado, North Dakota, and Louisiana, have statutes that protect employees from dismissal for political activity or specific categories of protected speech.⁶⁹ And many unionized workplaces offer protections against arbitrary dismissal that arguably protect speech more ably than more narrowly drawn protections that are speech-specific.⁷⁰ But most workers are subject to at-will dismissal and do not benefit from those procedural protections.⁷¹

Legislative protections of speech are critical but fall short of what many employees might intuitively expect given the vaulted status of “free speech” principles in the popular American imagination.⁷² These statutes do not embrace the more holistic protection recommended by, for example, the Restatement (Third) of Employment Law. The Restatement rule would protect employees whenever they engage in “lawful conduct that occurs outside of the locations, hours, and responsibilities of employment and does not refer to or otherwise involve the employer or its business,” and allow employees to express “political, moral, ethical, religious, or other personal beliefs” outside of work as long as it

holding that ‘an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection’”).

⁶⁷ See *Sierra Publ’g Co.*, 889 F.2d at 216-18.

⁶⁸ Genevieve Lakier, *The Non-First Amendment Law of Free Speech*, 134 HARV. L. REV. 2299, 2339-42 (2021) (“Today, as a result of all this [state] legislative activity, a significant body of . . . ‘quasi-first Amendment law’ protects the expressive autonomy of public- and private-sector workers even when the First Amendment cases do not.”).

⁶⁹ Andrew Melzer & Whitney Barth, *Whether Employees Can Be Fired for Participating in Peaceful Protests*, 2020 U. ILL. L. REV. ONLINE 221, 228.

⁷⁰ Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 102-03 (1995) (“[I]n the typical unionized workplace, employees enjoy much greater freedom of expression—perhaps more than many public employees protected by the First Amendment.”).

⁷¹ *Id.* at 102 (“[M]any employees in both the public sector and the private sector enjoy no general legal protection against arbitrary discipline or discharge.”).

⁷² See, e.g., William R.H. Mosher, *Speak No Evil – The Right to Limit Employee Speech This Election Season and Beyond*, FISHER PHILLIPS (Oct. 7, 2020), <https://www.fisherphillips.com/news-insights/speak-no-evil-the-right-to-limit-employee-speech-this-election-season-and-beyond.html> [<https://perma.cc/4G3H-TMWS>] (“[M]ost state laws granting private employees the right to engage in free speech limit those rights in clear and specific ways. . . . New York’s free speech law only protects employees’ actions if they are legal, take place off the employer’s premises, without use of the employer’s equipment or property, and do not create a material conflict of interest with the employer’s business.”).

is done “in a manner that does not refer to or otherwise involve the employer or its business.”⁷³ While such protection for private speech is intuitively consistent with the spirit of autonomy and free discourse implicitly endorsed by the First Amendment, there is no blackletter law on the books that comes close to realizing it.

To the contrary, instead of carving out a zone for private speech into which employers may not intrude, public policies affirmatively push employers to regulate employee speech. Again, the reason for relying on employers as gatekeepers is compelling: we do not have a good alternative way to control harmful speech.

One way employers are engaged as gatekeepers is by way of the threat of liability. Employers are potentially liable when their employees post racist or sexist comments on social media.⁷⁴ Employers also face market pressure to discipline or terminate employees whose words or conduct have made them infamous online.⁷⁵ In some cases, the employee’s notoriety is well deserved; in other cases, it is not. In all cases, however, there is disagreement about whether the employee deserves termination—and it is the employer that decides this social question.

There is an important, attendant social cost to allocating such power to employers. Risk-averse employees will avoid public expression that might ignite the ire of either their employer or some other segment of the public that could mobilize to pressure their employer. The chilling effect is not unlike the chilling effect we could expect from the prospect of government sanctions; given the immediate bread-and-butter implications of losing one’s job, the threat of employer sanctions might be considerably greater.⁷⁶ The role of employers as speech gatekeepers has expanded just as employees are more likely to engage in controversial public speech. At least two phenomena might contribute to this

⁷³ RESTATEMENT (THIRD) OF EMP. L. § 7.08 (AM. L. INST. 2014).

⁷⁴ See *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966-69 (9th Cir. 2002) (holding that employer can be liable for off-site speech); *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 73 n.4 (1st Cir. 2019) (finding that Facebook messages could be considered when determining if employee’s harassment created hostile work environment, particularly when those messages were about workplace conduct and sent by someone who worked with plaintiff); *EEOC v. Fed. Express Corp.*, No. 94-cv-00790, 1995 WL 569446, at *3 (W.D. Wash. Aug. 8, 1995) (stating that there is “no serious dispute that an employer may face liability for sexual harassment of employees by non-employees inside the workplace” and expressing doubt that location matters).

⁷⁵ Vikram R. Bhargava, *Firm Responses to Mass Outrage: Technology, Blame, and Employment*, 163 J. BUS. ETHICS 379, 379 (2018) (“When an employee’s off-duty conduct generates mass social media outrage[, b]usinesses commonly respond by firing the employee.”).

⁷⁶ Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 240 (2021) (“The chilling effect of these costs and liabilities on First Amendment protest rights cannot be overstated.”).

trend: First, social media has lowered the cost of access to a large audience.⁷⁷ Second, there may be a cultural trend that encourages people to “speak their mind” about a broader range of social causes but especially ones connected in some way to their employer.⁷⁸ While there is much to worry about concerning the quality of contemporary public discourse, we should also worry about the role of employers in regulating this discourse.

It is tempting to favor a simple solution to the gatekeeper problem, that is, more expansive, categorical protections for employee speech—enacted by statute or developed in case law.⁷⁹ The problem is that there is a legitimate social interest in controlling or creating accountability for online speech, which can be genuinely harmful to workers subject to hostile work environments.⁸⁰ The same progressive forces that might otherwise have mobilized to protect a sphere of employee autonomy will rightfully balk at eliminating accountability for certain kinds of harmful speech. Public employees, including police officers, have been terminated on many occasions for violating codes of conduct on social media by posting racist comments.⁸¹ The same logic of harm and accountability apply to private workplaces. But while the government is at least constrained by the First Amendment and the *Pickering* doctrine when it draws a balance between the rights of employees subject to harmful speech and the rights of employees to engage in harmful speech, private employers are free to draw their counterpart lines by reference to their interests alone.⁸² Each employer will draw it

⁷⁷ See Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2306 (2021) (observing that online speech has democratized access to public discourse).

⁷⁸ See Kelley Changfong-Hagen, “Don’t Be Evil”: *Collective Action and Employee Prosocial Activism*, 5 COLUM. HUM. RTS. L. REV. ONLINE 188, 209 (2021) (discussing “growing phenomenon of employee activism in the tech sector”).

⁷⁹ See, e.g., Meredith McCaffrey, Comment, *Public or Private? The Split over First Amendment Protection of Union Speech by Public Employees*, 60 B.C. L. REV. II-274, II-288 (2019) (arguing Second Circuit was wrong for adopting a per se rule that any person who speaks as a union member does so as a private citizen and thus is protected from retaliation by the First Amendment).

⁸⁰ See Tatiana Hyman, Note, *The Harms of Racist Online Hate Speech in the Post-COVID Working World: Expanding Employee Protections*, 89 FORDHAM L. REV. 1553, 1588 (2021) (“Racist hate speech can damage an employee’s psychological well-being and have adverse effects on work performance both inside of the workplace and over the web.”).

⁸¹ See, e.g., *Grutzmacher v. Howard County*, 851 F.3d 332, 340 (4th Cir. 2017); *Liverman v. City of Petersburg*, 844 F.3d 400, 405-06 (4th Cir. 2016); *Venable v. Metro. Gov.*, 430 F. Supp. 3d 350, 354 (M.D. Tenn. 2019).

⁸² See DAVID L. HUDSON, JR., *FIRST AMENDMENT CTR., BALANCING ACT: PUBLIC EMPLOYEES AND FREE SPEECH 2* (2002), https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/fac_firstreport_public-employees-free-speech.pdf [<https://perma.cc/BG5G-CTTE>] (“While the private employer probably can fire an employee whose speech he dislikes, the First Amendment governs the circumstances under which public employers may discipline employees for their speech.”).

differently—thereby raising the stakes of which employer an employee happens to work for.

If the blunt approach of adopting a blanket zone of protection for employee speech imposes unacceptable costs on a few and threatens to erode the legitimacy of public discourse for us all, the narrower alternative would be spelling out in greater detail—by statute or case law—what kinds of speech employers may or must penalize and carving such speech out from an articulated sphere of protected speech. It is difficult to see those steps in our future. We might agree that it is desirable to reign in employer power with respect to employee speech. We might even accept, as a pragmatic compromise, the idea of legal standards that specify precisely which speech employers may discipline. But such standards ultimately would have to be developed by state actors—legislative, administrative, or judicial. These state actors would then have to make substantive judgments about what kinds of speech are permissible and too harmful to others to warrant protection. In the current state of public discourse, it is hard to imagine productive political action in this direction. Even if a political faction could enact a substantive standard, they may not trust judges with enforcing it.⁸³ The vitriol of civic discourse makes the prospect of political action dangerous. The impotence of politics reinforces our reliance on employers to police speech, however imperfect guardians of civic discourse they may be.

B. *Healthcare*

Healthcare is the most evident and entrenched area in which American employers exercise surprising control over employees—surprising in comparison to employers in other advanced industrialized democracies.⁸⁴ Nowhere else do employers control whether employees have access to a good that many people regard in some form as a human right.⁸⁵

⁸³ See William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 566 (2000) (book review) (explaining mistrust comes from legislatures being unable to predict how courts will interpret statutes).

⁸⁴ Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES: THE UPSHOT (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html> (“The basic structure of the American health care system, in which most people have private insurance through their jobs, might seem historically inevitable, consistent with the capitalistic, individualist ethos of the nation.”).

⁸⁵ Jeneen Interlandi, *Why Doesn't the United States Have Universal Health Care? The Answer Has Everything to Do with Race.*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html> (“[T]he United States remains the only high-income country in the world where such care is not guaranteed to every citizen.”).

The history behind America's employer-based health insurance regime is quintessentially path dependent.⁸⁶ During World War II, wage controls made it difficult for employers to attract employees.⁸⁷ Employers used benefit packages to compete for workers because insurance and pension fund contributions were not subject to the prevailing wage caps.⁸⁸ American labor unions have famously operated in the voluntarist tradition, seeking to improve working conditions through private firm-level bargaining rather than political action.⁸⁹ It was consistent with this broad strategy that unions helped entrench employer-based healthcare by advocating for health insurance as a benefit in the context of firm-level collective bargaining.⁹⁰ Later, tax incentives made health insurance an even more enticing form of compensation: while taxable income for an employee does not include employer contributions to health insurance, employers can deduct those contributions from their income.⁹¹ The effect is a federal subsidy that increases with the marginal tax rate to which an employee is subject. It is the second-largest subsidy of the federal tax code after the mortgage interest deduction.⁹²

Recent healthcare reform efforts have shown that individuals are attached to their existing insurance and that any pivot away from the employer-based model would be politically costly, if not impossible.⁹³ Therefore, recent legislation like

⁸⁶ See Jacob S. Hacker, *The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy*, 12 *STUD. AM. POL. DEV.* 57, 76 (1998) (describing path dependence in healthcare policy); see also Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 *AM. POL. SCI. REV.* 251, 251 (2000) (describing path dependence in social policy generally).

⁸⁷ Stephen Mihm, Opinion, *Employer-Based Health Care Was a Wartime Accident*, *CHI. TRIB.* (Feb. 24, 2017, 3:30 PM), <https://www.chicagotribune.com/opinion/commentary/ct-obamacare-health-care-employers-20170224-story.html> (“As companies struggled to deal with wartime labor shortages, the wage freeze left them in a serious bind: How could they retain workers if they couldn’t give raises?”).

⁸⁸ See David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 *YALE J. HEALTH POL’Y L. & ETHICS* 23, 25 (2001).

⁸⁹ See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 6-8 (1991) (arguing American labor movement turned to voluntarism after political action was repeatedly thwarted by judicial hostility); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 *HARV. L. REV.* 1394, 1419 (1971) (arguing various features of the American worker impeded class consciousness in favor of individualist approach to labor reform).

⁹⁰ Allison K. Hoffman, *An Optimist’s Take on the Decline of Small-Employer Health Insurance*, 98 *IOWA L. REV. BULL.* 113, 114 (2013) (noting that “labor unions advocated for health insurance as a benefit for workers”).

⁹¹ I.R.C. § 106 (excluding employer contributions to health insurance from employee taxable income).

⁹² See Hyman & Hall, *supra* note 88, at 25-26.

⁹³ Shefali Luthra, *Do 160 Million Americans Really Like Their Health Plans? Kind Of*, *KAISER HEALTH NEWS* (Nov. 21, 2019), <https://khn.org/news/do-160-million-americans-really-like-their-health-plans-kind-of/> [<https://perma.cc/9F2J-5S4U>] (“Articulating his

the Affordable Care Act (“ACA”) relies on the employer model to expand access.⁹⁴ Most importantly, it imposes a mandate on large employers.⁹⁵ It creates tax incentives for small employers to provide insurance, offering credits up to 35% of premium costs to small business that insure their employees.⁹⁶

While the problems with the employer-based model discussed below have led some observers to predict its demise,⁹⁷ we have yet to see any retrenchment. Instead, we have primarily continued down the path we started, attempting to correct for specific problems of access and portability without facing down the structural limitation of the model.⁹⁸

What are the limitations of the employer-based model? There are several. Most fundamentally, relying on employers for coverage renders employees vulnerable to retrenchment in coverage. Indeed, we have observed in recent decades that employees’ share of healthcare costs is increasing as a fraction of total costs and that the mean quality of their coverage has fallen.⁹⁹ The effect is to shift the risk of both illness and medical costs to individuals from

proposal for health care reform, former Vice President Joe Biden emphasized the number of Americans who, he said, were more than perfectly satisfied with the coverage they have.”).

⁹⁴ *Employer Shared Responsibility Provisions*, IRS, <https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions> [<https://perma.cc/W8TC-D8AW>] (last updated Nov. 23, 2021) (“Under the Affordable Care Act’s employer shared responsibility provisions, certain employers (called applicable large employers or ALEs) must either offer minimum essential coverage that is ‘affordable’ and that provides ‘minimum value’ to their full-time employees (and their dependents), or potentially make an employer shared responsibility payment to the IRS.” (citation omitted)).

⁹⁵ Affordable Care Act, 26 U.S.C. § 4980H(a), (c)(2).

⁹⁶ *Small Business Health Care Tax Credit and the SHOP Marketplace*, IRS, <https://www.irs.gov/affordable-care-act/employers/small-business-health-care-tax-credit-and-the-shop-marketplace> [<https://perma.cc/4KA6-ADDA>] (last updated Feb. 24, 2022) (“If you are a small employer, there is a tax credit that can put money in your pocket.”).

⁹⁷ See, e.g., Warren Greenberg, *Employer-Based Health Insurance: At the End of the Line?*, 20 HEALTH LAW. 38, 40 (2008) (“Since . . . employer-based health insurance has been the main source of health insurance in the private sector for more than sixty years, realistic policy proposals may have to encourage the demise of the employer-based system in a gradual way.”); see also Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 IOWA L. REV. 1935, 1935 (2013) (“[A] number of interweaving provisions embedded within the Affordable Care Act create strong incentives that, starting in 2014, will tend to undermine these markets and, in the process, increase the fiscal cost of reform.”).

⁹⁸ See David S. Caroline, Comment, *Employer Health-Care Mandates: The Wrong Answer to the Wrong Question*, 11 U. PA. J. BUS. L. 427, 446 (2009) (“[T]he challenge of increasing efficient access to health care requires shifting employers out of the business of providing health care, and instead finding creative ways to enable individuals to purchase the care they want and need in a market-based system.”).

⁹⁹ Michael Supanick, *Private Insurance and Universal Healthcare: How Can Private Insurance Be Utilized Within a Universal Healthcare System in the United States?*, 30 S. CAL. INTERDISC. L.J. 551, 557-58 (2021) (discussing employees’ rising costs not matched by increases in income).

employers—a shift that employers can effectuate unilaterally at the contractual level.¹⁰⁰

Even when employers do provide high-level coverage, it is not clear that the kinds of policies they purchase would be those that employees would purchase themselves.¹⁰¹ I will discuss specific divergences between employer and employee preferences below, but for now I point only to the basic agency problems associated with an intermediary with imperfect information acting on behalf of a heterogenous group of employees.¹⁰²

Still another famous deficiency of the employer-based model is the problem of portability. Most employees do not remain with a single employer for any significant duration of their working lives; job tenure is shrinking.¹⁰³ When an employee leaves her job, she cannot take her insurance with her to her new position. Even if she is able to purchase insurance for the interim at substantial individual cost, transferring to another insurance network frequently requires a change of healthcare provider.¹⁰⁴ The effect is the phenomenon known as “job lock.”¹⁰⁵ Employees are artificially immobilized in the labor market, exacerbating the labor market power of employers. While welfare measures intended to promote healthcare access are ordinarily associated with employee leverage and decommodification,¹⁰⁶ the power exercised by employers over

¹⁰⁰ See generally JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE AND RETIREMENT AND HOW YOU CAN FIGHT BACK* (2006) (arguing that economic risk, previously borne by corporate sector and government, has shifted to individuals).

¹⁰¹ Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and a Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037, 1040-41 (1996) (arguing that employers are poor agents for employees and their insurance purchases do not reflect employee preferences well).

¹⁰² See Hyman & Hall, *supra* note 88, at 26-28 (describing agency problems). However, Hyman and Hall contend that “employers do a reasonably good job reflecting their workers’ values and preferences,” *id.* at 30, and point out that employer-based insurance pools attenuate the problem of adverse selection and facilitate cross-subsidization of high-cost consumer-patients, *id.* at 32-33.

¹⁰³ See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 540 (2001) (describing increasing shift to temporary work).

¹⁰⁴ See Hoffman, *supra* note 90, at 123 (“This means that when an individual leaves a job, she cannot take her insurance with her, causing disruptions in coverage and often requiring individuals to change their care providers.”).

¹⁰⁵ See Jonathan Gruber & Brigitte C. Madrian, *Health Insurance, Labor Supply, and Job Mobility: A Critical Review of the Literature*, in HEALTH POLICY AND THE UNINSURED 97, 98 (Catherine G. McLaughlin ed., 2004) (reviewing job lock phenomenon); see also Uwe E. Reinhardt, *Employer-Based Health Insurance: A Balance Sheet*, 18 HEALTH AFFS. 124, 127 (1999) (“Because the employer-based system ties health insurance to a particular job, it can induce employees to remain indentured in a detested job simply because it is the sole source of affordable health coverage.”).

¹⁰⁶ See *supra* Part I.

employees in the United States is actually greater than what would be expected absent the intervention of federal healthcare policy.

Besides the structural effects of the employer-based healthcare model, in recent years we have seen a more specific set of challenges arise from the power of employers to choose what kind of healthcare benefits they offer employees. These judgments turn out not to be driven by economic considerations alone or information that the employer has about employee preferences. They turn too on judgments about appropriate medical care.

Among its many new requirements, the ACA provided that employer-insurance must cover contraceptives for insured women. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,¹⁰⁷ the Supreme Court permitted the Trump Administration to grant exemptions from that requirement to employers with moral or religious objections to contraceptive coverage.¹⁰⁸ This decision crystallized the limits to treating employers as neutral agents on behalf of either the federal government (which subsidizes healthcare by way of tax policy) or employees themselves. This decision was a culmination of a long-term political and social movement in favor of recognizing autonomy interests on the part of business-employers. The Religious Freedom Restoration Act of 1993 allowed individuals, including businesses, whose exercise of religion has been burdened by a statute to sue.¹⁰⁹ About a decade later, in *Burwell v. Hobby Lobby Stores, Inc.*,¹¹⁰ the Supreme Court held that a contraceptive mandate could impose a substantial burden on religious exercise for for-profit, closely held corporations.¹¹¹ For some observers, these developments fairly vindicate the idea that employers have genuine interests in what kind of health benefits they purchase for their employees.¹¹² If businesses are the kinds of entities that can have religious liberty interests, the government can hardly regulate choices that implicate those religious commitments.¹¹³

But as Elizabeth Sepper has argued, “courts [have] draw[n] incorrect conclusions about the legal and moral responsibility of employers for the contents of their employees’ insurance plans.”¹¹⁴ If employers are independent moral agents making profound and intimate choices about appropriate medical care, it is not clear how we can justify their involvement in those choices for

¹⁰⁷ 140 S. Ct. 2367 (2020).

¹⁰⁸ *Id.* at 2386.

¹⁰⁹ 42 U.S.C. § 2000bb-1(c).

¹¹⁰ 573 U.S. 682 (2014).

¹¹¹ *Id.* at 726 (“[T]he mandate clearly imposes a substantial burden on those beliefs.”).

¹¹² See, e.g., Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1429-32 (2012) (defending religious exemptions).

¹¹³ See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1456-58 (2015) (describing tenets of business religious liberty movement).

¹¹⁴ Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y & L. 303, 304-05 (2014) (“Employee use of benefits no more burdens employers than does their use of wages.”).

other moral agents. Even if employers do have *some* kind of interest in which benefits they proximately fund, their interest ought not to override the rights of employees to make their own health care choices.¹¹⁵ The effect of *first* delegating to employers the task of insuring employees and *then* deferring to their deeply personal judgments about what kind of insurance to buy has been to vault employers to almost lord-like status over employees.¹¹⁶ Our unusual reliance on employees to manage the social need for healthcare—a social policy problem that every developed country has answered in some form—has made employees dependent on employers for access to particular kinds of medical care. The stakes of the employment contract are higher under this model than Esping-Andersen ever contemplated.

C. *Vaccine Mandates*

My two examples of artificially elevated stakes of employment have concerned the allocation of social entitlements: rights to speech and rights to healthcare. In these contexts, employers operate as gatekeepers that control individual employees' access to public discourse and healthcare, respectively. More recently, vaccine mandates have raised the specter of employers controlling another kind of fundamental social allocation: the burdens of responding to a national public health crisis.

The United States may be at one extreme in this respect, but its policies are not so aberrant in the spectrum of industrialized democracies as are its policies in respect of speech and healthcare. While there are few countries in which the state has directly imposed vaccine mandates on the population, in most countries, mandates are tied in some way to employment.¹¹⁷ Here, we go further, and employers not only manage the mandates but are responsible for their enforcement.

Employer mandates preceded any governmental orders that required them. The federal Equal Employment Opportunity Commission issued guidance early on in the pandemic to the effect that employers were permitted to require their employees to be vaccinated as a condition of employment as long as employers made reasonable accommodations for disabilities and religion.¹¹⁸ Private

¹¹⁵ See Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 75 (2015) (criticizing *Hobby Lobby's* extension of employers' rights "beyond the workplace and into the employee's doctor's office").

¹¹⁶ *Id.* at 78 ("Corporate paternalism was not an incidental aspect of the scheme: paying workers in scrip, and controlling where they could live, enabled employers to police all aspects of their workers' lives.").

¹¹⁷ Robert Hart, *Europe Kicks Off Some of the World's Most Sweeping Vaccine Mandates and Fines*, FORBES (Jan. 17, 2022, 9:52 AM), <https://www.forbes.com/sites/roberthart/2022/01/17/europe-kicks-off-some-of-the-worlds-most-sweeping-vaccine-mandates-and-fines/>.

¹¹⁸ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about->

initiative proved inadequate; thus, local, state, and federal governments began imposing vaccine mandates on employees in particular sectors, especially the healthcare sector.¹¹⁹ These culminated in the most sweeping mandate of all, a federal executive order requiring that all large employers impose a vaccine mandate on their employees unless those employees would not have exposure to other employees.¹²⁰ Most targeted vaccine mandates at the state level have survived legal challenge.¹²¹ On the federal level, the Supreme Court recently struck down the Biden order as an unauthorized exercise of agency power.¹²²

The question that vaccine mandates raise for this discussion is not whether they are a good idea as a general matter but whether the requirement to which employees are subject should come from employers or from a governmental body. Governments appear reluctant to directly order people to do anything with their bodies. Vaccine mandates indeed implicate a fundamental liberty interest and the specter of government coercion here is alarming, not unlike the manner in which the specter of government regulation of speech offends the core anxieties of the First Amendment. The problem is that relying on employers to regulate vaccination does not make the coercive element of the mandate go away. It merely switches the power behind the mandate. If vaccines mandates are justified on public health grounds, they must be justified whether the mandate comes most immediately from an employer or the government. The prospect of individual employees avoiding the coercive effect of an employer mandate by leaving their jobs promotes the illusion of free choice. If it is wrong to force people to be vaccinated, it is wrong to force them to forego their livelihoods to avoid vaccination. But if it is appropriate in an emergency to require vaccination, then the public reasons that justify vaccination justify the invocation of public authority to back the mandate. Relying on employers to pursue the public objective expands the contractual authority of employers over employees in an unprecedented and insidious way. There is a high bar before citizens can demand vaccination of each other, but it is a demand we can make

covid-19-and-ada-rehabilitation-act-and-other-eco-laws [https://perma.cc/43DT-Y6NV] (last updated Mar. 14, 2022) (“The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations” (citation omitted)).

¹¹⁹ See, e.g., Tiernan, *supra* note 7.

¹²⁰ *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, WHITE HOUSE (Nov. 4, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> [https://perma.cc/4VJU-6GLY] (“All covered employers must ensure that their employees have received the necessary shots to be fully vaccinated – either two doses of Pfizer or Moderna, or one dose of Johnson & Johnson – by January 4th.”).

¹²¹ See, e.g., *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 296 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *Doe v. Mills*, No. 1:21-cv-00242, 2021 WL 4783626, at *17-18 (D. Me. Oct. 13, 2021).

¹²² *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, No. 21A244, slip op. at 1-2 (Jan. 13, 2022) (per curiam) (holding mandate exceeded OSHA’s statutory authority).

under exigent circumstances. It is still more rarely the kind of demand employers should have the power to make on us.

III. DISTINGUISHING CONTRACTUAL AND POLITICAL AUTHORITY

Why does it matter whether employers decide whether to provide certain goods or impose certain burdens if the alternative is that the state will decide? We might think that what really matters is the substance of the entitlements and burdens that individuals bear. We might even think that it is in principle better for important value judgments to be made privately rather than by the state.

I will argue to the contrary that the role of employers in allocating entitlements and burdens is significant at multiple levels. First, the substance of who gets what can be expected to be different when employers play a mediating role. Second, the source of the authority behind an act of power is not only important to the legitimacy of that act but, in a political community, important to the legitimacy of political authority. Allocative judgments that are constrained by principles of liberty and/or principles of distributive justice should be made by public authorities, or if delegated, remain regulated to ensure adherence to those public principles.

A. *Who Gets What*

Most goods are allocated by employers as a set on the basis of features of individual employers and of individual employees. In the case of healthcare, for example, we would expect the kind of healthcare package offered by a given employer (including, possibly, no healthcare package, if a smaller firm not subject to the ACA mandate), to turn on the firm's productivity, its size, the costs of insuring its employee pool, and its perception of its workers' preferences for health insurance as compared to other modes of compensation. The employer might then charge individual employees differently depending on the compensation they are prepared to offer that employee, or the expected cost of insuring them (including the number of their dependents). One fundamental question raised by the employer model is whether the criteria that drive the allocation of an entitlement are the right ones. All the criteria named above, with the possible exception of the expected cost of insurance (especially if driven by the number of insured), are morally arbitrary. No one *deserves* better health insurance either because the firm that employs them is more competitive than a rival or because the employee herself is more productive than a rival.¹²³ However, in a market society, almost no goods and services, not least income, are allocated on the basis of individual moral desert.¹²⁴ The money we make in

¹²³ See Ronald Dworkin, *Comment on Narveson: In Defense of Equality*, 1 *SOC. PHIL. & POL'Y* 24, 29 (1983) (rejecting view that people deserve what they earn based on their talents).

¹²⁴ There is a vast literature discussing the relationship between earnings and desert. See generally, e.g., FRIEDRICH A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* (1976); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Samuel Scheffler, *Justice*

our jobs, like the jobs themselves, reflect facts about the relative demand for our labor and the particular skills we happen to have, and our basic structure assumes that we are all better off for allowing differential rewards to labor even if those differences do not align with desert.¹²⁵

However, what we have observed is that the gatekeeper role that employers play is not fully explained by the general benefits of relying on a market to allocate social resources.¹²⁶ Their role is enhanced by federal policy that pushes them to play that role. The moral arbitrariness of the criteria that employers use might be mitigated by specific federal laws that alter their incentives (for example, by penalizing so-called Cadillac health plans as the ACA originally did),¹²⁷ but expanding the employer's role in the provision of basic social goods simultaneously expands the role of morally arbitrary criteria. Moreover, in the case of intimate goods like healthcare, relying on employers as an intermediary empowers employers to impose their idiosyncratic private judgments on employees, raising still further the morally arbitrary consequences of a job.

The problem is present with respect to the other two examples of employment stakes reviewed here. It might be less apparent that our speech rights depend on morally arbitrary criteria because those criteria are not the familiar criteria that drive demand for our labor. Instead, speech rights enjoyed by individuals will turn on the sensitivity of an employer to the prospects of either legal liability or retail accountability. A small manufacturing employer with a cohesive and homogenous workforce might not find it worthwhile to police its employees' social media presence. If the individual owner of the firm shares the cultural and political sensibilities of her employees, she may have even less reason to care what her employees are saying. These employees may enjoy great latitude and not experience the threat of termination or discipline at work as constraining at all in the context of speech. By contrast, even a low-level employee of a large retail firm with a sophisticated human resources department may be subject to a finely articulated social media policy; she may know that any misstep on social media could easily be reported to her employer by any ill-wisher and it would be used as grounds for termination—without severance, without notice, and without appeal. She has every reason not to speak out about any topic that might

and Desert in Liberal Theory, 88 CALIF. L. REV. 965 (2000); ERIC RAKOWSKI, *EQUAL JUSTICE* (1993); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (1999); Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFFS. 158, 174-83 (1990); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 914 (1989). I adopt here the “egalitarian” view that while earnings may reflect *some* desert-relevant criteria, such as effort, earnings do not *track* desert given the significant role played by the accidents of birth.

¹²⁵ See RAWLS, *supra* note 124, at 75-83 (articulating “difference principle,” which holds that inequalities in basic resources are only justified to extent they benefit least advantaged). I do not address here whether it is empirically true that the inequalities we observe in our own society in fact operate to the benefit of the least advantaged.

¹²⁶ See *supra* Part II.

¹²⁷ I.R.C. § 49801(e)(1) (2012) (repealed Dec. 20, 2019).

upset anyone. These two employees enjoy the same First Amendment protection, of course. But at least some of the principles of autonomy and free discourse that animate the First Amendment are undermined by a regime in which individuals' speech is regulated so unevenly by private employers, and on grounds that do not track the criteria that might justify consequences for wrongful speech acts.

Similarly, the desirability of vaccine mandates should be separated from the question of whether it is desirable to rely on employers to impose and enforce them. Not everyone is subject to a vaccine mandate. Most obviously, if the executive order requiring that large employers impose them had stood, employees of small businesses outside of certain essential or public-facing sectors would not have been subject to the mandate.¹²⁸ One might think that the uneven application of the federal mandate cuts in its favor, as employees who feel strongly against vaccination can gravitate to the employers that are not subject to the directive. But not all employees are capable of switching jobs in this way. Within the set of those individuals who are against vaccination, whether one is effectively coerced into vaccination will depend on her ability to get a job with an employer that does not impose a vaccine mandate. Even those of us who would advocate more categorical public mandates recognize the seriousness of demanding, subject to threat, that a person accept a chemical injection into their bodies. The idea that people will or will not be subject to this burden depending on their labor market power—which has nothing to do with the justification for such a mandate and everything to do with its political costs—is alarming. Employers are never a simple conduit for government policy. They are not assigned their gatekeeping role for the sake of administrative convenience. Their role is substantive. And it skews the all-important matter of who gets what.

B. *Who Decides*

Even if employers distributed entitlements and burdens according to optimal criteria on the merits, the fact that employers decide who gets what can be problematic in itself. I do not refer here to the social and personal costs of employer authority per se. Instead, I largely take for granted for purposes of the present discussion, that employers should control (subject to legal constraints) basic pay, working hours, and the substance of what employees are asked to do. When we rely on the market to allocate social resources, we rely on individual firms to buy and use labor based on their ground-level information about how it can be most productively utilized. This reliance on the market has harsh consequences and so we have a range of employment and other protections intended to limit the human toll of the market as an institution. But I am not challenging here the power that employers enjoy in principle.

¹²⁸ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021), *withdrawn*, 87 Fed. Reg. 3,928 (Jan. 16, 2022) (to be codified at 29 C.F.R. pt. 1910).

My concern is more narrow. When we collectively allow employers to decide how much money a person takes home at the end of the week, we do so because we think that there are social gains to be had from allocating that power to employers. We have developed a collective habit, however, of allocating power to employers not because we think they have the best information or incentives to make decisions that ultimately operate to the public benefit but because the state does not have the wherewithal to exercise its relevant power directly. We have adopted an employer-based health insurance model not because we concluded that it made sense to tie healthcare to employment but because we have been unable to decouple them. We have not empowered—indeed, expected—employers to control employee speech because we think they are especially wise about the optimal boundaries of free speech or because we think their interests mirror those of the public. Their power has emerged from a regime incapable of articulating a zone of protected speech, given the fraught nature of the boundary-drawing exercise. And finally, we have not allocated to employers the job of getting people vaccinated because infection occurs primarily at work or because its toll falls primarily on employers. We rely on employers because the state dares not invoke its own authority; because we regard employers' power over employees as less controvertible in this time and place.

Once an employer's authority over an employee is not justified by reference to a theory about market efficiency, however, it is not justified except by virtue of the immediate consent of the employee. The employer's authority is then nothing but contractual authority. Contractual authority, though, is contingently rather than deeply justified. That is, when *A* agrees to be subject to some power of *B* through contract, the legitimacy of the authority *B* gains through contract depends on the legitimacy of background institutions, and in particular, the initial entitlements that led *A* and *B* to contract on the terms they ended up with. In any individual case, we rarely have reason to assess the legitimacy of the backdrop to a contract, such as any given employment contract. If the market power that *B* has *ex ante* is legal, she (mostly) may extract what she will with it from other market actors. But when a type of contract term is not specific to any two parties but is a patterned response to background legal incentives, we should ask whether and why we should set up so many *As* to the sweeping authority of *Bs*. The fact that any one individual agrees to this arrangement does not justify the social deference to contract as the mechanism by which to settle the matter covered by that term. This is all the more so because, once the matter is "settled" by contract by way of an allocation of discretion, the resulting allocation across employers is opaque and difficult to reconstruct. Both for the individual employee and from the standpoint of the public, there is no accountability for the allocations made by "employers" as a set when the social outcome is the unplanned result of millions of micro decisions. Again, for certain kinds of outcomes, we have an affirmative theory—traditional economic theory—that leads us to be optimistic about aggregate outcomes. This is not true when the matter (of healthcare or speech access, etc.) is only within the realm of the employment contract by virtue of legal interventions.

Unlike contractual authority, which is literally purchased and reflects relative market power, political authority in a well-organized state is *deeply* justified. Political authority in a democracy has higher pedigree than other kinds of contingent authority. The judgments of the state about what to require of citizens are often wrong, and rightly subject to constitutional limitation, but they are as close as we can get to autonomous decision-making because they are literally the requirements we collectively impose on ourselves. This Essay cannot fully defend the justice of political authority, either in general or in the United States today. I invoke instead the prevailing intuition, held on the basis of widely disparate theories of political authority, that democratic governments have the duty to provide and protect certain social goods; the right to impose burdens as necessary to fulfill that affirmative duty, and; further, that it is the responsibility of state actors to make hard judgments about these open-ended questions even though they will always get them wrong in the eyes of many people.

If an employer's prerogatives are too capacious, the employer is lordly. The employment relationship no longer resembles an economic exchange because its terms are not explicable by reference to the economic dynamic of the relationship. Because the state has handed employers the task of making allocative decisions for which the state should bear responsibility, employers dominate employees more completely than even their market power alone would enable. This is the opposite of what the state's role in the employment relationship should be.

CONCLUSION

My purpose in this Essay has been primarily to elucidate the way in which political choices, or perhaps, political inertness, has raised the stakes of the employment contract. We tend to justify the morally arbitrary differential rewards of employment by reference to the function of the labor market in helping to allocate social resources efficiently. We accept the moral costs of inequality and hope tax and transfer regimes will mitigate its injustice. But relying on employment to regulate the allocation of both goods and even burdens in society has become a political strategy of deflection. It is an alternative to making hard political choices about who gets what. The effect has been to raise the stakes of employment even beyond the scope of those terms and conditions that relate to attracting and extracting productive labor. To lower the stakes of employment, we would need to take steps seemingly distant from the sphere of employment narrowly construed. We would need to revitalize political discourse to the point where we can rely on politics to deliver authoritative social judgments. We would then no longer need to delegate those judgments to private employers that lack the moral authority to make those judgments for the rest of us.