

THE YALE LAW JOURNAL

BRISHEN ROGERS

Capitalist Development, Labor Law, and the New Working Class

The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America

BY GABRIEL WINANT

HARVARD UNIVERSITY PRESS, 2021

ABSTRACT. Gabriel Winant's *The Next Shift* charts the transformation of Pittsburgh's labor market and political economy from the postwar period through the era of unabashed neoliberalism. During that time, relatively well-paid and unionized employment in steel and metalworking plummeted, while low-wage, precarious, nonunion employment in health care and related sectors surged. The composition of the working class also shifted, from being disproportionately white and male to disproportionately nonwhite and female. While Winant is a labor and social historian, his book has many implications for legal scholars, including those focused on the role of law in neoliberalism. In particular, the book situates both Pittsburgh's evolution and neoliberalism itself in the historical process of capitalist development, or the process through which imperatives of accumulation generate constant technological, economic, and social changes. In Pittsburgh, Winant shows, deindustrialization was an inflection point in that process, generating social crises that were mitigated first by the rise of health care, and then by the suppression of wages among health care workers. This Book Review argues that labor law—or the whole complex of laws constituting and governing work—was transformed by those same structural forces over that same period. Postwar labor law understood employment, at least for relatively privileged industrial workers, as a social relationship jointly constituted by the working class and employers. Under neoliberalism, labor law came to understand employment more as an individual contract between putative equals, a development which enabled profitability in low-productivity service sectors like nursing homes and home care. In that sense, labor law helped to birth today's working class, even as it denies that a working *class* still exists.



AUTHOR. Professor of Law, Georgetown University Law Center. Much of the research on which this Review is based was undertaken while I was on the faculty of Temple University Beasley School of Law. For helpful comments on prior drafts, I would like to thank Kate Andrias, Michael Fischl, William Forbath, Charlotte Garden, Karl Klare, Sanjukta Paul, and Gabriel Winant. Thank you also to the staff of the *Yale Law Journal* for superb editorial assistance.



REVIEW CONTENTS

INTRODUCTION	1845
I. CAPITALISM, DEMOCRACY, AND LPE	1851
A. Neoliberalism and Critical Legal Theory	1851
B. Capitalist Development and the Law	1857
II. THE POSTWAR ORDER AND POSTWAR LABOR LAW	1861
A. Democracy and Domination in Postwar Labor Law	1862
B. The Postwar Era's Excluded Workers	1866
III. NEOLIBERALISM, CARE, AND LABOR LAW	1868
A. From Crisis to Care	1869
B. Labor Law and the New Working Class	1872
CONCLUSION: DEMOCRACY AFTER NEOLIBERALISM?	1876

INTRODUCTION

Of the many facts about steelmaking in Gabriel Winant's *The Next Shift*—a history of Pittsburgh's political economy since the 1950s—perhaps the most astonishing is that many steel manufacturers used “hot metal bridges” to carry molten iron across the Monongahela River.¹ By the late 1800s, steelmakers had already built up both shores, often smelting iron in blast furnaces on the north shore, letting it cool into “pig iron” ingots, transporting the ingots across the river, then melting them back down on the south shore to remove excess carbon and make steel. Andrew Carnegie's engineers realized they could save costs if they never had to cool the molten iron, so they developed bridges to carry torpedo-shaped cars full of lava across the river. Each bridge was overbuilt and heavily shielded, in part to protect the workers who transported the cars, but also because if the metal spilled the resulting steam explosion would have destroyed the bridge itself.² At least two of the bridges still stand, reminders of the city's storied but danger-ridden industrial past.

Today, a much newer and more mundane pedestrian bridge links two campuses of the University of Pittsburgh Medical Center (UPMC), which has replaced U.S. Steel as the city's largest employer, and whose name now adorns the former U.S. Steel Tower downtown. That bridge crosses Centre Avenue, connecting UPMC Shadyside with UPMC Hillman, one of the world's top cancer institutes, allowing patients and workers to move between the two complexes. Unlike the now-vanished steelworkers who dominate the city's cultural imagination, health care workers are rarely acknowledged,³ and many are chronically underpaid.⁴ In the mid-2010s, one health care worker told a local commission that he had not “gotten more than a 15 cent raise in the 9 years” he had worked at UPMC.⁵ Another UPMC employee— who has diabetes, high blood pressure,

-
1. GABRIEL WINANT, *THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA* 28-32 (2021).
 2. Brishen Rogers's tour of Carrie Furnace, Rankin, Pa. (July 14, 2021). Facts on hot-metal bridges were shared by the tour guide during the tour.
 3. See WINANT, *supra* note 1, at 5-7 (noting Pittsburgh's nonacknowledgement of health care workers, in contrast to the city's celebration of steelworkers).
 4. See *id.* at 2 (arguing that health care employers “sustain themselves financially by . . . suppressing wages”); see also Elise Gould, Marokey Sawo & Asha Banerjee, *Care Workers are Deeply Undervalued and Underpaid: Estimating Fair and Equitable Wages in the Care Sectors*, ECON. POL'Y INST. (July 16, 2021), <https://www.epi.org/blog/care-workers-are-deeply-undervalued-and-underpaid-estimating-fair-and-equitable-wages-in-the-care-sectors> [<https://perma.cc/9SJJ-G2MA>] (finding that “the average hourly wages for home health care and child care workers are \$13.81 and \$13.51, respectively, which is roughly half the average hourly wage for the workforce as a whole”).
 5. WINANT, *supra* note 1, at 263.

and a thyroid disorder—told that commission “there are days when I have to choose between buying food and paying for my medications.”⁶ The health care behemoth has also persistently fought worker organizing, even arguing in litigation that it does not employ any of the tens of thousands of workers at its various hospitals and clinics, and therefore owes them no duties under labor and employment laws.⁷ Yet during the COVID-19 pandemic, UPMC adorned the bridge with large white capital letters reading “Heroes Work Here.”⁸

The two bridges reflect tectonic shifts that reshaped Pittsburgh’s labor market and political economy between the postwar period and the 2008 financial crisis. During that time, relatively well-paid and unionized employment in steel and metalworking plummeted, while low-wage, precarious, and nonunion employment in care sectors surged.⁹ The composition of the working class also shifted: while industrial workers were disproportionately white and male, today’s health care workers are disproportionately nonwhite and female.¹⁰ This was also a period of growing economic inequality,¹¹ as the somewhat more egalitarian postwar order gave way to the political-economic order now broadly known as “neoliberalism,” and economic risks were shifted from the state and corporations to individuals and families.¹² Parallel economic transformations occurred across wealthy economies during the same time—and within the United States, parallel changes played out in most other northern industrial cities.¹³ But

6. *Id.*

7. *Id.* at 1. After protracted litigation around the question, an NLRB administrative law judge declined to rule on the University of Pittsburgh Medical Center’s argument because the company promised to make whole any workers who suffered unlawful retaliation. *See* UPMC, 365 N.L.R.B. 153 (2017).

8. *Centre Ave & Cypress Street*, GOOGLE MAPS, <https://www.google.com/maps/place/Centre+Ave+%26+Cypress+St,+Pittsburgh,+PA+15232/@40.4549101,-79.9418814,3a,75y,253.44h,100.78t/data=!3m6!1e1!3m4!1s002do7PKBYM9ftKZdrfUkQ!2e0!7i16384!8i8192!4m5!3m4!1s0x8834f215f775ee8b:0x78257f910fb1f39e!8m2!3d40.4550298!4d-79.9414766> [https://perma.cc/X3H6-TGZL] (the bridge is only viewable via the link in “Screenshot View”).

9. WINANT, *supra* note 1, at 7, 180–81.

10. *Id.* at 5–7 (comparing old and new working classes); *id.* at 35 (discussing the race and gender of steelworkers in postwar period); *id.* at 138 (discussing the racial composition of the new working class); *id.* at 152 (discussing racial composition of the new health care workforce).

11. *See generally* THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014) (documenting the growth of economic inequality across major economies in the last decades of the twentieth century); *see also* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 632–41 (2014) (summarizing Piketty’s findings).

12. *See* discussion *infra* Part I.

13. WINANT, *supra* note 1, at 2 (noting similar trends across wealthy nations); *id.* at 5–7 (discussing trends in the United States).

inequality has grown far more in the United States than in many other peer nations,¹⁴ and Pittsburgh's devastation and transformation were especially pronounced because metal production dominated its economy for so long.¹⁵

By focusing on one city's evolution, Winant's book illuminates two aspects of this history, and of neoliberalism's origins and dynamics more generally, that might otherwise remain obscure.¹⁶ First, the book situates both the postwar order and neoliberalism in the long arc of capitalist development, or as Winant put it in an article that preceded the book, in "the historical time of capitalism, from primitive accumulation to industrial maturity to overcapacity."¹⁷ In other words, the decline of industry and the rise of health care were driven in large part by structural dynamics of capitalism itself—most importantly, how investors' relentless demands for profits and accumulation generate constant changes to technology and social relations, while also generating political countermovements against excessive commodification.¹⁸ As Winant shows, deindustrialization was an important inflection point in that process. Second, the book argues that neoliberalism did not just come after the postwar political-economic order, but also *evolved out of* that order, carrying forward many of its tensions, exclusions, and policy choices.¹⁹ Those include racial subordination inside and outside the workplace, acute class conflicts, and limited decommodification of health care and other social goods.²⁰ As this Book Review argues, Winant's analysis of the interplay among structural forces, social relations, and institutions also helps explain the evolution of labor law over the same period. I'll come back to this after summarizing Winant's argument.

Winant argues that "both the booming market for care and the huge workforce to supply care grew out of the social and political context of the steel mill."²¹ Our postwar order encouraged unions to construct private zones of economic security for industrial workers and their families through collective bargaining—yet that order failed to extend full social citizenship to most women and workers

14. *Id.* at 3. See generally Kathleen Thelen, Presidential Address, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSPS. ON POL. 5, 14–15 (2019) (noting the high incidence of low-wage and precarious work in the United States compared to other "rich democracies").

15. WINANT, *supra* note 1, at 19–21.

16. *Id.* at 21.

17. Gabriel Winant, *Anomalies and Continuities: Positivism and Historicism on Inequality*, 19 J. GILDED AGE & PROGRESSIVE ERA 285, 286 (2020).

18. See discussion *infra* Section I.B.

19. See WINANT, *supra* note 1, at 18; discussion *infra* Parts II, III.

20. See WINANT, *supra* note 1, at 18; discussion *infra* Parts II, III.

21. WINANT, *supra* note 1, at 7.

of color.²² Moreover, class conflicts remained intense in steel throughout the postwar period, rendering the work profoundly dangerous and often economically precarious.²³ As industrial capital fled the region in the 1970s and 1980s, steelworkers were left unemployed and adrift, and “the social reproduction of the working class became an increasingly vexed question.”²⁴ Yet steelworkers retained some political power through their unions, some capacity to make legitimate moral claims against the state and capital due to their race and gender, and some purchasing power through their private health care funds.²⁵ Those health care funds then seeded the new care economy, while parallel political pressures from displaced workers and retirees led the state to increase health care funding.²⁶ Health care spending therefore “offered an economic fix to the social crisis brought about by deindustrialization.”²⁷

The modern health care sector is nevertheless “an anomalous one in the history of capitalism, in which self-sustaining productivity growth has historically been a defining feature.”²⁸ Like many other services, care work is difficult to keep profitable because the good provided is inseparable from a person’s manual or affective labor—feeding, bathing, changing bedsheets, asking what hurts—and therefore resistant to technological innovation.²⁹ Many other countries responded to this challenge by socializing a great deal of care provision, but in the United States that option was foreclosed by interest-group pressure from retirees and health care companies,³⁰ and by white citizens’ racialized suspicion of welfare programs.³¹ Accordingly, the limited and privatized welfare state of the postwar era evolved into our contemporary health care system, with its peculiar mix of public funding and private provision.³²

22. See discussion *infra* Part II.

23. *Id.*

24. WINANT, *supra* note 1, at 17.

25. See discussion *infra* Part III.

26. *Id.*

27. WINANT, *supra* note 1, at 18; see also Gabriel Winant, “Hard Times Make for Hard Arteries and Hard Livers”: *Deindustrialization, Biopolitics, and the Making of a New Working Class*, 53 J. SOC. HIST. 107, 121 (2019) (arguing that health care was one of “the mechanisms that worked to manage the dislocation of human bodies” after deindustrialization, “quietly stabilizing the crisis being produced by neoliberalism’s more visible and familiar instruments”).

28. WINANT, *supra* note 1, at 4.

29. *Id.* at 2-4, 216-19, 238-39, 254.

30. *Id.* at 2, 137.

31. *Id.* at 129-32; see discussion *infra* Part III.

32. WINANT, *supra* note 1, at 23, 136-38 (discussing the public-private nature of our health care system).

Winant further argues this policy response to the crisis of deindustrialization led to wage stagnation and the degradation of work in health care. Over time, he shows, health care companies generated profits despite lagging productivity in part by legally severing technologically advanced sectors, like advanced imaging, from labor-intensive sectors, like nursing homes.³³ To staff the latter set of jobs, businesses recruited workers who had been excluded from the postwar compact and were susceptible to hyperexploitation due to their races and/or genders, until—as Winant put it in an article that preceded the book—the “relationship between the [postwar] economy’s inside and outside became inverted.”³⁴ The industrial proletariat at the core of the postwar order shrank dramatically and a new working class formed among once-peripheral workers, whose labor was understood more as care than as work.³⁵ Companies continued to suppress wages among that group, which also eroded the quality of care, until today this system delivers only “a strange, degraded kind of security” to most consumers and patients.³⁶

The Next Shift has various implications for legal scholars, especially the growing set within law and political economy (LPE) who are focused on the role of law in neoliberalism³⁷ and on the interrelations among class, race, and gender.³⁸ As noted above, this Book Review focuses on *The Next Shift*’s implications for labor-law scholarship and theory. In particular, this Review argues that labor law—or the whole complex of laws constituting and governing work³⁹—evolved over this period in response to the same structural forces and patterns of group-

33. *Id.* at 228-31.

34. Winant, *supra* note 27, at 110.

35. WINANT, *supra* note 1, at 16-17, 22-23, 220-23.

36. *Id.* at 22.

37. For overviews of the burgeoning law-and-political-economy (LPE) movement, see generally Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784 (2020); and Angela P. Harris & James J. Varellas III, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 *J.L. & POL. ECON.* 1 (2020).

38. On the concerns of LPE scholars, see discussion *infra* Section I.A. On the intersections among class, race, and gender in Winant’s book, see *infra* Parts II and III. See also WINANT, *supra* note 1, at 63-97 (discussing gender and class throughout the entirety of Chapter 2); *id.* at 107-15 (discussing race, class, and geography); *id.* at 121-25 (discussing mobilization by Black citizens for jobs); *id.* at 129-32 (discussing white racial identity); *id.* at 261 (discussing health care as a site of class formation).

39. For ease of exposition, this Book Review follows the tradition outside the United States of referring to all the legal regimes constituting and governing work relations as “labor law.” Lawyers in the United States break that law into three categories: “labor law” (which governs unionization and collective bargaining), “employment discrimination law” (which grants civil rights protections to employees), and “employment law” (a catch-all category that addresses other rights and duties of individual employees arising under the common law and statutes).

based subordination that Winant elaborates. Indeed, Winant's metaphor of the labor market being turned "inside out" also describes labor law's evolution over this time. Since the passage of the National Labor Relations Act (NLRA), our labor law has embraced both democratic commitments to worker self-organization and employers' traditional common-law prerogatives.⁴⁰ 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. That being said, class domination – including through violence – remained constant through this era and was facilitated by law.

Through deindustrialization and the service transition, the democratic strands of our labor law receded further, and the common-law strands rose to clear dominance, in effect turning postwar labor law "inside out." Practically speaking, that shift was driven by companies' ongoing demands, in litigation and lawmaking processes, for greater freedom of action vis-à-vis workers and the state: greater freedom to hire and fire at will, to avoid unionization, and to reshape operations in ways that limit workers' power.⁴¹ In retrospect, such freedoms enabled continued profitability, first by facilitating automation and deindustrialization, and then by suppressing wages in care sectors where productivity growth is low.⁴² Those changes cohered, over time, into a new legal concept 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.⁴³ In that sense, labor law helped to birth today's working class, even as it denies that a working *class* still exists.

Part I lays the groundwork. It discusses the resurgence of interest in political economy among legal scholars and argues that the process of capitalist development shapes both political-economic orders and legal regimes over time. Part II discusses the relationship between the postwar political-economic order and postwar labor law, drawing both on Winant's argument and on the tradition of critical labor-law scholarship. That Part shows that postwar labor law granted industrial workers real (albeit limited) protections against market discipline,

40. See discussion *infra* Parts II and III.

41. See discussion *infra* Part III.

42. This argument draws on BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK (forthcoming 2022) (on file with author), which proposes a model of the relationship among legal, technological, and political-economic change, and uses that model to explain how new data-driven technologies including artificial intelligence have helped degrade work.

43. See discussion *infra* Part III.

while denying basic protections to nonworkers and many workers outside the industrial core. Those developments were apparent in both labor-law doctrine and labor-law theory during the postwar era. Part III traces the changes in our political economy and labor law as the postwar order entered a period of crisis and gave way to neoliberalism. That Part shows how labor law was reconstituted around notions of individual choice and consent, and how those shifts reinforced trends toward greater economic inequality and precarity. Finally, the conclusion considers how the democracy-enhancing strands of our labor law and welfare state could be rebuilt in today's services economy, suggesting that this will require socialization of much of health care and ambitious reforms to bolster worker and citizen power.

I. CAPITALISM, DEMOCRACY, AND LPE

Winant's book arrives at an auspicious time for legal scholars, who have recently taken up some of the same questions of political-economic governance and change that it addresses. This Part outlines this Review's theoretical approach, which views law as generally responsive to dominant groups' needs and demands, and understands capitalist development to be an important force behind both political-economic change and legal change. Section I.A summarizes the nascent but growing literature in LPE, focusing on prominent treatments of the role of law in neoliberalism. Section I.B steps back and suggests that the rise of neoliberalism and its various legal incidents are best understood in the long arc of capitalist development, as tempered by democratic norms and institutions.

A. *Neoliberalism and Critical Legal Theory*

LPE scholarship builds and draws on several prior waves of critical theorizing about law and economics.⁴⁴ The first came in the early twentieth century, when legal realists showed how existing private-law rules ratified and perpetu-

44. See Harris & Varellas, *supra* note 37, at 8-10 (discussing prior critical approaches to law and political economy).

ated substantial economic inequalities, belying classical legal thought's pretensions to neutrality and individual freedom.⁴⁵ A second wave of critical scholarship emerged beginning in the late 1970s with critical legal studies (CLS),⁴⁶ Critical Race Theory (CRT),⁴⁷ and various strands of feminist legal theory.⁴⁸ Nevertheless, from the late 1980s until the 2010s, critical approaches to law were relatively marginal, and "capitalism" as an object of legal study barely existed.⁴⁹ That began to change with the 2008 financial crisis and the publication of Thomas Piketty's *Capital in the Twenty-First Century*, which documented the growth of economic inequality in recent decades, but said little about inequality's institutional or legal determinants.⁵⁰ Meanwhile, scholars in other disciplines,

-
45. Classics of realist and postrealist scholarship that take this approach include, for example, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); and Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUDS. F. 327 (1991).
 46. Canonical summaries include ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); and Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).
 47. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (describing a realist analysis of the role of law in constructing and allocating privileges to individuals classified as white); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (providing a realist account of law's role in racial orders); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331 (1988) (criticizing neoconservatives' assertions that antidiscrimination laws require color-blindness, and criticizing critical legal scholars for "ignor[ing] the singular power of racism as a hegemonic force in American society"). See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Pellar & Kendall Thomas eds., 1995) (gathering significant and formative Critical Race Theory essays).
 48. See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (arguing that dominant understandings of the market and the family as separate spheres devalue women's economic contributions and reinforce the subordination of women); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (arguing that dominant understandings of household labor as acts of love obscure its central importance to our economy).
 49. Angela P. Harris, *Foreword* to HISTORIES OF RACIAL CAPITALISM, at viii, viii (Destin Jenkins & Justin Leroy eds., 2021) (explaining that the concept of capitalism "doesn't exist" in fields of legal scholarship addressing the economy).
 50. PIKETTY, *supra* note 11; Grewal, *supra* note 11, at 652 (arguing, in a review of Piketty's book, that "[u]nderstanding why $r > g$ has generally held—and why it briefly did not—requires an account of capitalism as a socioeconomic system structured through law").

most notably history, turned their attention back to the close relationships between slavery, conquest, colonialism, and capitalist development.⁵¹ Their scholarship helped encourage a flourishing of work on the role of law in neoliberalism,⁵² and then a broader trend in legal scholarship now known as LPE.⁵³

To date, LPE is not an academic discipline so much as a grouping of scholars who share a commitment to understanding the relationship between law – including legal rules, legal processes, and legal consciousness – and political economy, meaning the spheres of production, distribution, reproduction, and collective governance.⁵⁴ LPE is also an “entire ‘ecosystem’” of institutions, including several organizations, blogs, and journals.⁵⁵ Notably, the two articles that have done the most work to map the emerging field of LPE and its research agendas both referred in their opening sentences to contemporary *crises*, including crises

-
51. See, e.g., Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOS. REV. F. (Feb. 20, 2018), <https://bostonreview.net/forum/walter-johnson-to-remake-the-world> [<https://perma.cc/7SUS-UQDC>]; Destin Jenkins & Justin Leroy, *Introduction to HISTORIES OF RACIAL CAPITALISM*, *supra* note 49, at 1, 1-20; *Introduction to AMERICAN CAPITALISM: NEW HISTORIES* 1, 1-14 (Sven Beckert & Christine Desan eds., 2018). As Walter Johnson has argued, the moniker “new history of capitalism” is misleading here since much of this work draws on older histories of capitalism developed especially by scholars in the Black Radical Tradition. See Johnson, *supra*; see also CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 121-66 (1983) (explaining the “historical archaeology of the Black Radical Tradition”).
52. For overviews of the influence of neoliberalism on law and legal reasoning, see, for example, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1 (2014); Corrine Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 *LAW & CONTEMP. PROBS.* 71 (2014); Christopher Tomlins, *The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy’s Three Globalizations*, 78 *LAW & CONTEMP. PROBS.* 1 (2015); and Britton-Purdy et al., *supra* note 37. On the transition to neoliberalism more generally, see MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979*, at 101-28, 185-213 (Michel Senellart ed., Graham Burchell trans., 2010).
53. See *supra* note 37 and accompanying text. The last few years have also seen a growing interest in Marxism and the law. See, e.g., *RESEARCH HANDBOOK ON LAW AND MARXISM* (Paul O’Connell & Umut Özsu eds., 2021) (compiling pieces focused on Marxist critiques of the legal system); NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* (2020) (presenting a Marxist interpretation of international law).
54. See Harris & Varellas, *supra* note 37, at 10-12 (citing existing LPE scholarship that seeks to demonstrate the role of law in constituting markets; to reorient economically oriented fields such as antitrust around “ideals of fairness and flourishing” rather than efficiency; and to “illuminate the connective tissue between capitalism and [racialized] subjectification”).
55. *Id.* at 12 (describing that “ecosystem”).

of economic inequality, care and social reproduction, state violence and mass incarceration, rising authoritarianism, and climate change.⁵⁶ In that context, Angela P. Harris and James J. Varellas III's piece argued that "two central claims lie at the heart of [LPE]."⁵⁷ The first claim, reflecting the influence of realism and past waves of critical legal scholarship, is that "law is central to the creation and maintenance of structural inequalities in the state and the market,"⁵⁸ and has therefore helped to create and perpetuate those crises. The second, reflecting the importance of CRT and critical feminism, is that "'class' power is inextricably connected to the development of racial and gender hierarchies, as well as to other systems of unequal power and privilege."⁵⁹

LPE scholars have also focused on the relationship between law and neoliberalism. "Neoliberalism" itself is a controversial term.⁶⁰ But as used in this Review, it describes a set of theories that came to prominence in the 1970s holding that the state should be reorganized to reflect putative market imperatives.⁶¹ As various scholars have argued, while neoliberalism has strong overtones of *laissez-faire*, it is distinct from classical liberalism. While classical liberalism viewed "[m]arket ordering under the common law" as "part of nature rather than a legal construct,"⁶² neoliberalism supports the affirmative use of law and political power to "restructure areas of law and social life along market lines."⁶³ The market is then both the outcome of conscious legal and social projects and an ideal-typical model for social and political relations. With regard to economic governance, LPE scholars have argued that neoliberalism entailed a simultaneous roll-back of legal regimes that empower labor and citizens, and a roll-out of legal

56. *Id.* at 1; Britton-Purdy et al., *supra* note 37, at 1786; *see also* Harris & Varellas, *supra* note 37, at 2-5 (providing further details on these crises); Britton-Purdy et al., *supra* note 37, at 1786-89 (same).

57. Harris & Varellas, *supra* note 37, at 10.

58. *Id.* (emphasis omitted).

59. *Id.* (emphasis omitted).

60. Grewal & Purdy, *supra* note 52, at 2 (noting that "neoliberalism" has "a range of meanings that leaves some scholars worrying that the term is too vague or polemical for responsible use").

61. *See* WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 26-31 (2014) (outlining the transition to neoliberalism in advanced market economies in the 1970s). An overlapping body of work, which this Review draws from less, understands neoliberalism more as a political rationality that encourages individuals to apply market principles to all social spheres and to their individual behavior and self-understandings, in the process undermining democracy itself. *See generally* WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION* 1-20 (2014) (analyzing the ways that neoliberalism undermines democratic principles).

62. Cass Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

63. Grewal & Purdy, *supra* note 52, at 5.

regimes that empower companies and capital.⁶⁴ Neoliberalism also entailed austerity programs that stripped resources from the poor and working class, shifting risk onto families – and disproportionately onto women and people of color – as well as a dramatic expansion of carceral programs and other means of state surveillance.⁶⁵ As noted above and explored in more detail below, Winant’s account can supplement LPE scholars’ understanding of neoliberalism’s rise and distinctive dynamics.

Law is implicated in these developments at both a doctrinal and a theoretical level. As Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman put it, “legal discourse has helped consolidate [today’s crises] by serving as a powerful authorizing terrain for a set of ‘neoliberal’ political projects.”⁶⁶ In a development they term the “Twentieth-Century Synthesis,” dominant legal theories since the 1980s have sought to draw a clear line between the political and the economic spheres.⁶⁷ Many fields of law that concern the “market” were “reoriented around versions of economic ‘efficiency,’” crowding out concerns of distributive justice, public goods, democratic legitimacy, and basic fairness.⁶⁸ Law therefore helped to “encase” the powers and privileges of dominant economic actors against accountability to democratic processes.⁶⁹ In public-law fields, meanwhile, courts insulated various structural inequalities from legal challenge under the Fourteenth Amendment,⁷⁰ as exemplified by the Supreme Court’s refusal to recognize impoverished individuals as a suspect class in the

64. *Id.* at 5-6; Britton-Purdy et al., *supra* note 37, at 1809-11; FOUCAULT, *supra* note 52, at 131 (suggesting that neoliberalism involves “dissociating the market economy from the political principle of laissez-faire”).

65. Harris & Varellas, *supra* note 37, at 4.

66. Britton-Purdy et al., *supra* note 37, at 1789; *accord* Harris & Varellas, *supra* note 37, at 6.

67. Britton-Purdy et al., *supra* note 37, at 1790-91, 1794-1818 (describing these developments in detail).

68. *Id.* at 1790.

69. The term “encasement” comes from QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 13 (2018).

70. Britton-Purdy et al., *supra* note 37, at 1807-09.

context of education funding or housing policy.⁷¹ Other rulings ratified individual citizens' preferences for racially homogenous housing or school districts, immunizing the resulting inequalities from constitutional challenge.⁷²

LPE scholars have also asked *why* neoliberalism took root in our politics and legal system beginning in the 1970s. Part of the explanation involves elite consensus. The postwar years were characterized by more broadly shared prosperity than during the Gilded Age or New Deal⁷³ due to the relative scarcity of labor at the time, widespread collective bargaining, and Keynesian economic policy.⁷⁴ In that context, neoliberalism's emphasis on market ordering was appealing even to liberal elites in the 1970s, including legal elites, who often believed the crisis tendencies of pre-New Deal capitalism had been overcome.⁷⁵ A second and somewhat contradictory factor was that the postwar economic engine came under intensifying stress beginning in the 1970s from the rise of global manufacturing, wage and price spirals, and the OPEC crisis, which in turn encouraged businesses and financial interests to press for greater freedoms vis-à-vis workers.⁷⁶ As discussed in more detail below, this factor plays a central role in Winant's analysis. A third set of pressures involved escalating demands for structural equality from the Black Freedom movement and other new social movements, which collided with the politics of white (and male) reaction, helping to create a favorable political terrain for antiregulatory and antiwelfare state politics.⁷⁷ Winant's book lends support to this argument as well. Ultimately, this confluence of factors—elite consensus, secular economic shifts, and white reaction—set the stage for neoliberalism's rise to dominance. Legal elites then deferred to putative market principles, and enforced a sharper separation between

71. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973) (holding that poverty is not a suspect class in the education context); *Lindsey v. Normet*, 405 U.S. 56, 69-74 (1972) (rejecting the claim for a constitutional right to decent housing); see also Britton-Purdy et al., *supra* note 37, at 1808-09 (explaining how these developments illustrate the Supreme Court's adoption of a "conception of equality that ignored material deprivation and focused on improper intent").

72. *Washington v. Davis*, 426 U.S. 229, 238-45 (1976) (holding that statutes which have a disparate impact on the basis of race are not invalid under the Fourteenth Amendment unless they were adopted with the intent to discriminate); see also *Pers. Adm'r v. Feeney*, 442 U.S. 256, 276 (1979) (same, regarding claims for disparate impact on the basis of sex); Britton-Purdy et al., *supra* note 37, at 1808-09 (discussing these developments).

73. Britton-Purdy et al., *supra* note 37, at 1816.

74. Grewal, *supra* note 11, at 658-60.

75. *Id.*

76. Grewal & Purdy, *supra* note 52, at 22; Britton-Purdy et al., *supra* note 37, at 1817-18; see also discussion *infra* Part III (summarizing the political-economic transformation of the 1970s and 1980s).

77. See WINANT, *supra* note 1, at 129-32; see also discussion *infra* Part III.

the economic and the political. By demonstrating the material and ideological stakes in that separation, LPE scholars have sought to encourage a new wave of legal theory that no longer holds the two apart and that seeks greater economic, political, and social equality.⁷⁸

B. *Capitalist Development and the Law*

The rest of this Review suggests that the concept of *capitalist development* can enrich such LPE scholarship going forward by clarifying the relationship between law and political economy, as well as how each changes over time.⁷⁹ This Section first defines “capitalist development” and its relationship to group-based subordination and to democratic governance, and then sketches a theory of how those forces shape the law’s evolution. Parts II and III then apply that theory, linking up Winant’s account with changes in labor law over the same period.

As used here, “capitalist development” signifies the process of “[c]hange under capitalism,” which is “full of frictions, contradictions, and dysfunctions to be

78. See, e.g., Harris & Varellas, *supra* note 37, at 12-13; Britton-Purdy et al., *supra* note 37, at 1818-32.

79. Past legal scholars have of course addressed the relationship between law and capitalism or capitalist development. Most prominently, a set of Critical Legal Studies scholars focused on law’s role in capitalism, though those scholars mostly did so to demolish past functionalist theories of that relationship in classical liberalism and Marxism. See generally Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 71-116 (1984) (summarizing and elaborating critiques of functionalism by critical legal scholars). Over time, however, many in CLS drew increasingly from poststructuralism and semiotics, which crowded out attention to capitalism per se. See Nate Holdren & Eric Tucker, *Marxist Theories of Law Past and Present: A Meditation Occasioned by the 25th Anniversary of Law, Labor, and Ideology*, 45 LAW & SOC. INQ. 1142, 1149 (2020) (noting that “in the CLS movement legal indeterminacy increasingly lost any connection to the social and instead became grounded in the fundamental contradiction ‘that relations with others are both necessary to and incompatible with our freedom,’” which eliminated from consideration theories that viewed law as “meaningfully explained by social and economic developments external to the law” (citing Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 213 (1979))). Others in and around CLS settled on the formulation that law is “relatively autonomous” from nonlegal phenomena and forces. See sources cited *infra* note 95. I make no attempt to summarize those debates in all their complexity, much less to resolve them, but rather begin in this Review to sketch an updated theory of the role of law in capitalist development that takes account of developments – in both law and in political economy – since that scholarship was written. I plan to develop that theory in future work.

sure, but still patterned according to an identifiable logic of expansion and accumulation.”⁸⁰ Capitalism is a relentlessly dynamic system, characterized by constant economic and social changes, due in large part to two structural dynamics: investors’ never-ending demands for high profits and accumulation opportunities, and competition among companies which tends to reduce profits over time.⁸¹ As a result, capital constantly seeks out new profit opportunities through technological changes, changes in business scope or strategy, and/or changes to social relations including suppression of workers’ class-based power.⁸² Successful technological innovations are especially valuable when they give companies first-mover advantages or exclusive legal rights that grant monopoly control over a scarce resource for a time.⁸³ Such innovations, together with aggressive expansion strategies, can also give companies market power or even monopoly power, further bolstering profits.⁸⁴ As Parts II and III argue, all these strategies are pre-

-
80. Wolfgang Streeck, *Varieties of Varieties: “VoC” and the Growth Models*, 44 POL. & SOC’Y 243, 246 (2016). Marx’s own project in *Capital*, as he put it, was to “reveal the economic law of motion of modern society.” 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 92 (Ben Fowkes trans., Penguin Books ed. 1990).
81. IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION 26-30 (2004).
82. See Wolfgang Streeck, *Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy*, 9 SOCIO-ECON. REV. 137, 154-58 (2010). The analysis and understanding of class in this Review is primarily indebted to three overlapping traditions. First, the neo-Marxist tradition, which views antagonistic class relations as central to capitalism, but does not assert the working class will become revolutionary and overthrow capitalism. See, e.g., Erik Olin Wright, *Foundations of a Neo-Marxist Class Analysis*, in APPROACHES TO CLASS ANALYSIS 4, 4, 7, (Erik Olin Wright ed., 2005); ELLEN MEIKSINS WOOD, DEMOCRACY AGAINST CAPITALISM: RENEWING HISTORICAL MATERIALISM 76-107 (1995) (analyzing “Class as Process and Relationship”). Second, the Black Radical Tradition, which emphasizes the historical interrelationship of class- and race-based subordination. See, e.g., C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION (1938); ROBINSON, *supra* note 51, at 69-305. Third, the tradition of feminist labor scholarship that emphasizes the relationship between gender and class politics. See, e.g., DOROTHY SUE COBBLE, THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2004); EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE (2012).
83. WALLERSTEIN, *supra* note 81, at 355.
84. See, e.g., Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FIN. 697 (2019) (finding evidence that market power has become an important source of profits in recent decades); see also Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL’Y REV. 235, 246-60 (2017) (presenting evidence on increased market concentration over recent decades in hospitals, pharmaceuticals, agriculture, food retail, and telecommunications); Immanuel Wallerstein, *Braudel on Capitalism, or Everything Upside Down*, 63 J. MOD. HIST. 354, 356-57, 361 (1991) (summarizing Braudel’s view that throughout history most capitalists have in fact been monopolists).

sent in health care today: some subsectors generate outsized profits through major technological changes, while others eke out profits by suppressing labor costs and/or consolidating facilities to generate market power.

In addition to such economic restlessness, capitalist development constantly generates political restlessness, especially as companies push for new social arrangements that reduce workers' and others' material security. As Robert L. Hale observed in a classic realist article, workers are never in fact powerless in this process, since they always retain the capacity, "neither created nor destroyed by the law," to collectively withdraw their labor.⁸⁵ Where possible, they seek to avoid excessive market discipline by organizing and taking wages out of competition, and by leveraging political power to gain statutory employment protections or welfare benefits.⁸⁶ Such protections embed capitalist work relations within "non-capitalist social orders," including practices of solidarity that capitalist development "nevertheless permanently erodes."⁸⁷ This is, in a nutshell, the basic tension between capitalism and democracy: that capitalism's relentless pressures for accumulation always threaten to break out of the democratically enacted institutions "that both contain and sustain it."⁸⁸

There are nevertheless hard limits on capitalist nations' capacity to decommodify work and welfare, since workers depend on companies for jobs, and states depend on them for taxes, leaving both groups vulnerable to a capital strike.⁸⁹ Moreover, individuals are not equally able to demand social protections. Most notably for present purposes, white supremacy helps define the political-economic "demos." As the historians Destin Jenkins and Justin Leroy have argued, "the violent dispossessions inherent to capital accumulation operate by leveraging, intensifying, and creating racial distinctions."⁹⁰ In the United States, that process was acutely visible during slavery and Jim Crow. But it has contin-

85. Hale, *supra* note 45, at 474.

86. For a helpful summary of the background literature and a model of workers' efforts to capture rents through concerted action, see Aage B. Sørensen, *Foundations of a Rent-Based Class Analysis*, in *APPROACHES TO CLASS ANALYSIS*, *supra* note 82, at 138, 138-139, 146-149.

87. Streeck, *supra* note 82, at 162.

88. *Id.* at 164.

89. See STREECK, *supra* note 61, at 80-81 (arguing that modern states must serve both "staatsvolk," or their national citizens, and "marktvolk," or the market); see also Claus Offe & Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 *POL. POWER & SOC. THEORY* 67, 75-76 (1980) (explaining why even organized workers must be attentive to capital's needs).

90. Jenkins & Leroy, *supra* note 51, at 3.

ued through to the present, where nonwhite individuals remain especially vulnerable to wealth expropriation, for example through housing foreclosure.⁹¹ Racial subordination and ideologies of race also help to legitimate capitalism despite the acute inequalities it generates.⁹² As Kimberlé Crenshaw has argued, white supremacy has for centuries helped to enlist white nonelites in their own subordination by leading them to join forces with white elites to suppress and disenfranchise Black people.⁹³ As explored in Parts II and III, below, this interplay among capitalist development and group-based demands for social protection helps explain both how classes emerge and evolve in relationship to production strategies, and how class and race both intersect and diverge.⁹⁴

Law – again, legal doctrine, legal processes, and legal consciousness – plays several roles in this process. As noted above, a core lesson of realism, CLS, CRT, and LPE is that the law is both an important site of political-economic conflicts and a power resource in those conflicts. Those battles also leave their own marks on the law and legal reasoning over time, as parties seek to enlist the state to intervene on their behalf in material and symbolic struggles. Indeed, a significant strand of CLS scholarship explored the ongoing relationship between class power relations and legal developments in the labor-law context.⁹⁵ The discussion in Parts II and III draws heavily on that work, arguing that our political

-
91. On the history of foreclosure, see K-Sue Park, *Race, Innovation, and Financial Growth: The Example of Foreclosure*, in HISTORIES OF RACIAL CAPITALISM, *supra* note 49, at 27, 27-47.
 92. See Jenkins & Leroy, *supra* note 51, at 3 (arguing that “race serves as a tool for naturalizing the inequalities produced by capitalism”).
 93. Crenshaw, *supra* note 47, at 1360.
 94. On class, race, and their relationship to one another and to capitalist development, see sources cited *supra* note 82.
 95. See Gordon, *supra* note 46, at 112-13 (citing Karl E. Klare’s article on judicial deradicalization as a prime example of legal scholarship that recognizes both the contingency and the overall directionality of legal change, where “the path actually chosen [was] chosen not because it had to be but because the people pushing for alternatives were weaker and lost out in their struggle”). See generally Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) [hereinafter Klare, *Deradicalization*] (arguing that the NLRA’s meaning was determined over the course of legal battles over its meaning); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. RELS. L.J. 450, 451-53 (1981) [hereinafter Klare, *Ideology*] (noting the coexistence within our labor law of norms of employer domination and of workplace democracy); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (exploring the relationship between industrial pluralist ideology and postwar labor law); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 3-8 (1991) (arguing that labor unions’ relatively modest political goals in the United States were a result of unions’ encounters in the late nineteenth and early twentieth centuries with a judiciary dedicated to limiting labor’s power). For a trenchant critique of some critical legal scholars for paying too little attention to ideologies of race, see generally Crenshaw, *supra* note 47.

economy is shaped by ongoing conflicts in which capital has deep structural advantages, and in which capital incessantly seeks to reorder social relations, but where it can never wholly dominate other groups.⁹⁶ Taking a longer view, one can see this process playing out over successive business cycles, as so-called competitive capitalism gave way to Gilded Age consolidation, then to the New Deal and postwar settlement (in which high profits were still found in heavy industry), and finally to the largely automated and globalized production of basic goods and the growth of knowledge-intensive services and in-person services in wealthy nations. Those developments in turn helped to shape the law's evolution. As other legal scholars have argued, there are conceptual harmonies between classical legal thought and the laissez-faire economics of the Gilded Age, between legal realism's understanding of law as a means to social ends and the institutionalist and Keynesian economics of the New Deal and postwar periods,⁹⁷ and between the recent evolution of law and legal theory and neoliberal theory and governance practices.⁹⁸ That final development, Winant's book and this Review suggest, responded to the tectonic forces and tensions unleashed by deindustrialization and the service transition, which Parts II and III explore.

II. THE POSTWAR ORDER AND POSTWAR LABOR LAW

This Part and the next elaborate the model sketched above, drawing on Winant's book, other political-economic literatures, and the evolution of labor-law doctrine and theory. This Part focuses on the postwar period, while the next addresses the neoliberal era. Section II.A discusses how capital's imperatives shaped the law and political economy of industrial work. Section II.B explores how industrial workers' relative privileges were embedded in broader labor-market and welfare-state regimes that excluded women and nonwhite workers from full social citizenship.

96. Or to use the term of critical legal scholars at the time, labor law is relatively autonomous from politics, economics, and capital's power generally. See FORBATH, *supra* note 95, at ix-xiii (arguing for the relative autonomy of law); Klare, *Deradicalization*, *supra* note 95, at 269 n.13 (adopting the concept of the "relative autonomy" of law); Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. & SOC. SCI. 45 (2007) (summarizing and critiquing debates over law's autonomy from politics and society).

97. See Gordon, *supra* note 46, at 120-21 (observing parallels between classical legal thought and classical political economy, and between legal realism and old institutionalist economics).

98. See Tomlins, *supra* note 52, at 10-14 (suggesting that neoliberalism provides the integrating concepts of contemporary legal thought); Britton-Purdy et al., *supra* note 37, at 1789-91 (suggesting that "Twentieth-Century Synthesis" in legal thought was heavily influenced by neoliberalism).

A. *Democracy and Domination in Postwar Labor Law*

In many respects, labor law's facilitation of industrial democracy was at its apex during the postwar era. Steelworkers were understood to be at the core of the economy and were incorporated into national economic and political governance through the New Deal.⁹⁹ But at the same time, postwar labor law protected management's traditional powers over workers – and in reality, deep class fissures and intense antagonisms were ever-present even in the industrial core.¹⁰⁰

To illustrate the deep structure of postwar labor law, it may help to borrow and extend one of Winant's more arresting metaphors. In summarizing the 1937 *Jones & Laughlin* case, where the Supreme Court upheld the constitutionality of the NLRA, Winant suggests that the Court envisioned – and thereby defined and enclosed – the industrial working class.¹⁰¹ In the course of determining that steel production clearly involved interstate commerce, the Court described in detail an integrated production system that employed tens of thousands across the Midwest and elsewhere, thus rendering the industrial working class an “object of state knowledge and intervention, conceptualized as a bounded social unit.”¹⁰² The Court's reasoning was a mixed blessing, however, because once that working class was recognized as a group with its own legitimate needs, it was also subject to regulation and discipline.¹⁰³

The aspiration to limit working-class power was apparent even in *Jones & Laughlin* itself, in which the Court made sure to observe that the NLRA “does not compel agreements between employers and employees. It does not compel any agreement whatever.”¹⁰⁴ A subsequent set of Supreme Court cases imported other elements of the *laissez-faire* common law into the new industrial-relations regime, especially by sharply limiting workers' rights to strike. The Court rapidly held that the NLRA did not protect sit-down strikes or strikes during the

99. WINANT, *supra* note 1, at 8-12, 33-35.

100. Winant is not the first labor scholar to trace these contradictions. See, e.g., NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 98 (2013) (“[T]he very idea of . . . a harmonious accord is a suspect reinterpretation of the postwar industrial era.”).

101. WINANT, *supra* note 1, at 8-9 (discussing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 27 (1937)).

102. *Id.* at 9.

103. In saying the working class was “subject to regulation and discipline,” I do not mean to imply that the law did not regulate or discipline workers prior to *Jones & Laughlin*. Pre-NLRA common law obviously did so, as legal realists frequently observed. See, e.g., Hale, *supra* note 45, at 4-5. Rather, I mean that the emerging NLRA regime, as reflected in *Jones & Laughlin*, in some ways conceptualized the working class *as a class*, and in doing so rendered the working class amenable to conscious and deliberate legal oversight.

104. *Jones & Laughlin Steel*, 301 U.S. at 45; see Klare, *Deradicalization*, *supra* note 95, at 299-300 (criticizing *Jones & Laughlin* for importing contractualism into the NLRA).

course of a collective-bargaining agreement, that it permitted employers to permanently replace economic strikers, and that unlawfully terminated workers had a duty to mitigate damages.¹⁰⁵ Barely a decade later, the NLRB and courts held that slow-down strikes and intermittent strikes were unprotected,¹⁰⁶ and Congress banned “secondary boycotts,” or strikes and pickets targeting companies other than the striking workers’ immediate employer.¹⁰⁷ To paraphrase a common-sense understanding shared by American labor lawyers: due to such restrictions, strikes are lawful unless and until they are effective. Another body of postwar labor law held that workers had limited rights to protest issues that were viewed as traditional managerial prerogatives, including technological changes. The canonical case came down in 1964, where Justice Stewart famously concurred that employers have no duties 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.”¹⁰⁸

These and other cases reflected the fundamental tension of our collective-bargaining law: it protected both workers’ rights to pursue industrial democracy and employers’ traditional common-law prerogatives. While the former promoted decommodification, the latter left workers vulnerable to competition and

-
105. Klare, *Deradicalization*, *supra* note 95, at 319. These cases reinforced common-law notions of contractualism in NLRA jurisprudence. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (holding that the NLRA does not require employers to reinstate workers terminated for engaging in a sit-down strike); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (holding that economic strikers may be permanently replaced); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (requiring unlawfully terminated workers to mitigate damages).
106. *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (holding that slow-down strikes are unprotected by the NLRA); *UAW v. Wis. Emp. Rels. Bd.*, 336 U.S. 245 (1949) (upholding a state law banning intermittent strikes); *see also* *Walmart Stores, Inc.*, 368 N.L.R.B. 24 (July 25, 2019) (adopting a definition of intermittent strikes that will further restrict the use of the tactic); Craig Becker, *Better than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 356 (1994) (discussing repeated grievance strikes and advocating for their legal protection).
107. 29 U.S.C. § 158(b)(4) (2018). *See generally* Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today’s Economy*, ROOSEVELT INST. 12 (Aug. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf> [<https://perma.cc/PN2L-VTDS>] (discussing the Taft-Hartley revisions to the NLRA).
108. *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). Companies also established rights to campaign against unionization during this period. *See* 29 U.S.C. § 158(c) (2018) (protecting employers’ rights to express views on unionization); *see also* *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-30 (1953) (holding that employers may hold mandatory meetings where they communicate their opposition to unionization up until a twenty-four hour period before a vote); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-14 (1956) (allowing companies to exclude labor organizers from their property in many instances). *See generally* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969) (summarizing employers’ tactics to oppose unionization and discussing how employers can exploit their speech rights to threaten and coerce workers).

market discipline. Over the next decade, our collective-bargaining law consolidated around the ideology of “industrial pluralism,” which sought to resolve these tensions.¹⁰⁹ The canonical cases are the *Steelworkers Trilogy* of 1960,¹¹⁰ in which the Court elevated grievance arbitration to a central position in postwar labor law, insisting that the NLRA and the courts should defer to the collective-bargaining process whenever possible, and described the collective-bargaining process itself as “an effort to erect a system of industrial self-government.”¹¹¹ Under industrial pluralism, then, the industrial working class enjoyed some law-making power,¹¹² and collective-bargaining agreements had a status beyond that accorded to normal individual contracting.¹¹³ But industrial pluralism ultimately delivered a very “thin” form of workplace and economic democracy, as it bound workers’ power in myriad ways.¹¹⁴

On the ground, this labor-law regime alleviated—but by no means eliminated—class antagonisms. As Congress and the courts limited unions’ power, unions stopped pressing for a more social-democratic economy and instead built private islands of economic security, via collective-bargaining agreements with steadily increasing wages, as well as generous health care and retirement funds.¹¹⁵ In the steel industry, however, those agreements were borderline unstable, because while steel mills were already nearing technological obsolescence by the end of the war, steel companies were conservative and reluctant to invest in new production methods.¹¹⁶ Collective bargaining therefore drove up labor

109. See generally Stone, *supra* note 95, at 1511 (describing and critiquing the model of “industrial pluralism” as based on a false premise concerning labor-management relations).

110. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). While all these cases involved the steelworkers union, none actually involved companies that produced steel.

111. *Warrior & Gulf*, 363 U.S. at 580.

112. Alan Hyde and Mona Ressaissi have described this as “[o]ne of the outstanding achievements of North American labour law.” Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, 14 CANADIAN LAB. & EMP. L.J. 47, 91 (2008).

113. Stone, *supra* note 95, at 1511.

114. Eric Tucker, *Labor’s Many Constitutions, (and Capital’s Too)*, 33 COMP. LAB. L. & POL. J. 355, 358 (2012).

115. WINANT, *supra* note 1, at 11 (describing collectively bargained benefits as “walled-off zones of security for [union] members and dependents”); *id.* at 55–61 (recounting the 1959 steel strike, which was eventually resolved through White House pressure).

116. See *id.* at 33–34, 38.

costs faster than productivity, putting companies under a profit squeeze.¹¹⁷ Steel companies responded by cutting staff and pressing workers to produce faster, pursuant to managerial rights they claimed under the master collective-bargaining agreement.¹¹⁸

Those speed-up efforts made steelwork almost unfathomably dangerous, with workers confronting a “constant, inescapable risk of injury and death.”¹¹⁹ *The Next Shift* is full of examples. Workers in Duquesne vomited blood from inhaling dust near a blast furnace.¹²⁰ Another worker “watched an explosion split three workmates lengthwise; the image in his memory is of a cross-sectioned human body, burnt on the outside and red on the inside.”¹²¹ Every steelworker had similar stories to tell, and they often responded to staffing cuts with unauthorized or “wildcat” strikes.¹²² Under the *Steelworkers Trilogy* and other cases, however, employers could lawfully discipline workers for such acts, as the only proper response to mid-contract disputes was arbitration.¹²³ Courts reasoned that such restrictions were justified due to a posited shared social interest in “uninterrupted production,”¹²⁴ encapsulating their view that the working class shared lawmaking authority only so long as it did not challenge capital’s basic imperatives.

Day by day, then, steelworkers confronted a paradox created (but often denied) by postwar labor law: once workers agreed to a collectively-bargained “constitution,” they entered the hidden abode of production—the threshold of which, under the *Steelworkers Trilogy*, the courts would not cross—and encountered immense danger as an “elemental force” prior to reason.¹²⁵ And yet, workers had to advance their own interests through the reason-giving of grievance

117. See *id.* at 38-39 (on cost pressures due to wage increases, inflation, and few technological upgrades). As Winant notes, those profit pressures were mitigated by Cold War military spending. *Id.* at 12-13.

118. See *id.* at 39-62.

119. *Id.* at 51.

120. *Id.*

121. *Id.*

122. *Id.* at 53-54.

123. *NLRB v. Sands Mfg.*, 306 U.S. 332, 344 (1939) (holding that an economic strike in violation of the no-strike clause is unprotected); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960) (establishing a strong presumption that disputes during the course of a collective-bargaining agreement must be resolved through arbitration).

124. *Warrior & Gulf*, 363 U.S. at 582; see also Klare, *Ideology*, *supra* note 95, at 459-61 (explaining the connection between collective bargaining and “liberal management theory”). This logic was even extended to strikes protesting major safety problems in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

125. WINANT, *supra* note 1, at 26 (“The mill was an elemental force, like a Greek god . . . It demanded awe and sacrifice and instilled terror and resentment.”).

arbitration, rather than by withholding their labor.¹²⁶ Postwar labor law, therefore, did not reflect reason opposed to violence, or reason disciplining violence. The law and the violence of production were inseparable.¹²⁷

B. The Postwar Era's Excluded Workers

Meanwhile, this meager decommodification of steelwork was itself dependent on the unpaid work of women within steelworker homes: child-rearing, housecleaning, cooking, care for elders, and volunteer work within communal institutions like churches, schools, and hospitals that sustained working-class communities.¹²⁸ Within those institutions and practices, as Winant puts it, “what was functionally a system of social support became socially meaningful . . . [through] ethnic tradition, religious practice, solidarity, or love.”¹²⁹ The spouses of steelworkers also accommodated their husbands’ strange and changing sleep schedules due to rotating shifts and their postshift drinking.¹³⁰ Many were vulnerable to unmediated private violence at the hands of those same husbands.¹³¹ In exchange, women and their children enjoyed a modicum of social security.

The social citizenship enjoyed by steelworkers and their families was also structurally coupled to the hypercommodification of more marginal workers, especially Black workers. The exclusion of agricultural and domestic workers from the New Deal labor legislation is now broadly acknowledged as constitutive of modern racial capitalism.¹³² The postwar order also immunized employers and

126. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (holding that “when the parties have agreed to submit all questions of contract interpretation to the arbitrator,” the court is “confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract”); *Warrior & Gulf*, 363 U.S. at 578 n.4 (“Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the ‘quid pro quo’ for the agreement not to strike.” (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957))).

127. This argument regarding the relationship between law and violence is indebted to Christopher Tomlins’s exposition of that relationship in antebellum Virginia. See CHRISTOPHER TOMLINS, *IN THE MATTER OF NAT TURNER: A SPECULATIVE HISTORY* 119–20 (2020).

128. WINANT, *supra* note 1, at 63–97. On the construction of communal networks along ethnic lines for community support, see *id.* at 98–134.

129. *Id.* at 116.

130. *Id.* at 75–76.

131. *Id.* at 89.

132. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 17 (2013) (arguing that the preservation of racial segregation “was a crucial part of [the New Deal’s] supportive structure”).

others against legal consequences for discrimination in employment and other settings, at least until the Civil Rights Act of 1964. As Winant shows, Black workers rarely enjoyed the collective powers of their white counterparts. Those Black workers who were able to get steel employment were shunted into the hottest and most dangerous steel jobs, paid the least, and laid off first.¹³³ Other Black workers found employment in hospitals, which at the time were typically nonprofit, public, or religious.¹³⁴ The fact that hospitals carried out a charitable mission, as well as the racial composition of their workforce, legitimated the denial of collective-bargaining rights to hospital workers until the 1970s.¹³⁵ Those patterns also played out in residential segregation. In one shockingly depressing statistic, as of 1960, only ten percent of housing units in one majority-Black neighborhood “were structurally sound and equipped with all plumbing facilities,” and a majority lacked private indoor bathrooms.¹³⁶ Black families who moved into white and mixed neighborhoods often suffered violent reactions from their white neighbors.¹³⁷

Black Pittsburghers mobilized against these developments constantly, albeit with limited success. For example, local civil rights organizations pushed in the mid-1960s for Black workers to have equal access to manufacturing and construction jobs.¹³⁸ While those efforts met with violent reaction, including a police attack on demonstrators protesting the exclusion of Black workers from major downtown construction projects,¹³⁹ they did eventually win some gains in construction,¹⁴⁰ while parallel efforts in the steel industry led to affirmative-action plans.¹⁴¹ But there was relatively little the state could do to ensure stable Black employment so long as white workers’ seniority was protected under Title

133. WINANT, *supra* note 1, at 102-03.

134. *Id.*, at 151-52 (documenting Black workers’ employment in hospitals); *id.* at 14-15, (explaining the legal understanding of hospitals as semipublic services rather than for-profit industries in 1930s and 1940s); *id.* at 163 (noting hospitals were “almost universally voluntary, nonprofit institutions – and often religious ones” in the postwar period).

135. The story is complicated, but in essence, it was not until 1974 that all private-sector hospitals engaged in commerce were defined as statutory employers under the NLRA. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. §§ 152(14), 158(g)). For a summary of this history, see generally James R. Anderson, *Collective Bargaining Units in the Health Care Industry After American Hospital Association v. National Labor Relations Board*, 40 DE-PAUL L. REV. 505, 513-26 (1991).

136. WINANT, *supra* note 1, at 105.

137. *See id.* at 113-14.

138. *See id.* at 122.

139. *See id.*

140. *See id.* at 124 (noting that “the building trades had added 573 Black members” by 1974).

141. *See id.*; *see also* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 194-95 (1979).

VII and the industry itself was in secular decline.¹⁴² Black women, meanwhile, led a welfare-rights movement that sought to rethink the postwar social contract on a more fundamental level, in particular by making basic welfare into a right.¹⁴³ But those efforts foundered on white resistance. White ethnic groups at the time had more access to community institutions and more wealth, and therefore had less need of direct state assistance. The ideology of self-sacrifice forged in steel mills also clashed with demands for welfare without work and led many whites to resist being described as poor, a social position they associated with Black residents.¹⁴⁴ These tendencies hardened into reactionary politics with George Wallace's 1972 presidential campaign.¹⁴⁵

The New Deal and postwar political settlements therefore set the stage for neoliberalism by partially incorporating white industrial workers into political-economic governance yet excluding most women and workers of color. As the postwar economic engine broke down due to global competition and industrial overcapacity, the combination of fragile working-class institutions, elite consensus about class relations (as reflected here in labor-law theory), and white skepticism toward the welfare state created fertile ground for the conservative mobilization of the 1970s and 1980s. As the next Part shows, neoliberalism then carried forward many aspects of the postwar order, including its partial and privatized welfare state, its racial divisions, and its encouragement of business models that depend on immiserated labor.

III. NEOLIBERALISM, CARE, AND LABOR LAW

Through the postwar era, Pittsburgh's industrial working class understood that their material position was never quite secure, even if they could not foresee the devastation on the horizon. In the late 1970s and 1980s, the status quo came under increasing pressure and eventually gave way. The transition from the postwar order to neoliberalism was not disjunctive, however, but rather evolutionary or even dialectical. As capital shed domestic industrial assets, the industrial working class was eviscerated, and a new working class emerged among marginalized workers in the burgeoning care sectors. Labor law responded to these same structural dynamics, evolving in ways that both facilitated this transition

142. See WINANT, *supra* note 1, at 122, 182-83; see also Ahmed A. White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 *BUFF. L. REV.* 1061, 1111-18 (2015) (explaining the challenges of ensuring racial equity in employment during deindustrialization, given Title VII's protection of white workers' seniority).

143. See WINANT, *supra* note 1, at 126-27.

144. See *id.* at 129-32.

145. See *id.* at 132.

and helped companies eke out a profit in high-employment service sectors.¹⁴⁶ Section III.A sketches the political-economic transformation from industry to care, as facilitated by law, while Section III.B summarizes changes in labor law that emerged as a response to these transformations.

A. *From Crisis to Care*

In retrospect, the steel industry was clearly in decline by the end of World War II, even if it was kept afloat through several business cycles due in part to federal military spending. The industry entered terminal decline in the 1970s due to a number of long-running developments: its own technological obsolescence, the rise of new production centers overseas, and stagflation generated (or exacerbated) by a massive rise in oil prices.¹⁴⁷ The fatal blow came from the “Volcker Shock,” the contraction of the money supply meant to combat stagflation, which eviscerated less profitable industries like steel.¹⁴⁸ Most of the remaining mills shuttered within a few years,¹⁴⁹ precipitating epidemics of substance abuse, depression, other mental-health issues, and domestic violence.¹⁵⁰

The various institutions of the postwar political economy — unions in the industrial core, privately negotiated health care benefits, and the exclusion of most Black and women workers from full social citizenship — shaped our national response to the crisis. As argued above, the New Deal labor regime prevented the emergence of robust and multiracial labor movements.¹⁵¹ When the crisis began, labor was strong in particular industries and localities — including steel in Pittsburgh — but weak nationally, and unable to establish industrial policies to maintain and rebuild manufacturing.¹⁵² Postwar labor law also granted companies very broad rights over capital-allocation decisions, including an absolute right

146. Practically speaking, of course, labor law evolved not in response to impersonal structural forces or dynamics, but in response to demands and arguments from companies in litigation and lawmaking processes.

147. See Winant, *supra* note 1, at 181-82, 186.

148. See *id.* at 186; see also STREECK, *supra* note 61, at 32-34 (discussing the role of inflation and monetary policy in generating the recession of the 1980s that encouraged deindustrialization).

149. See Winant, *supra* note 1, at 186.

150. See *id.* at 200-01.

151. See *supra* Section II.B.

152. On labor’s local strength but national weakness and its relationship to law, see Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 5-11.

to close a business.¹⁵³ Soon after the Volcker Shock, the Supreme Court unanimously adopted Justice Stewart's reasoning regarding labor-displacing innovations, holding that unions also had few rights to bargain over economically motivated decisions to shutter aspects of a business.¹⁵⁴ These precedents and others helped establish that workers simply had no right to challenge companies' decisions to liquidate.¹⁵⁵

At the same time, displaced steelworkers had some real power both as consumers and as a political constituency. After the bottom fell out of the industry, steelworkers ended up using hospitals more often than the rest of the population.¹⁵⁶ That was due in part to epidemiological factors rooted in decades of hard labor, together with the social and emotional effects of unemployment.¹⁵⁷ Steelworkers and their families also had relatively generous health and welfare benefits from the postwar era, which they exercised beginning in the 1960s and continuing through the 1970s and 1980s.¹⁵⁸ Hospitals and clinics then drew on that source of funding to expand dramatically.¹⁵⁹ Meanwhile, inflation threatened to price elders and the poor out of the market, which generated political pressures leading to the 1965 establishment of Medicare and Medicaid.¹⁶⁰ Over time, Medicare "seemed to open a faucet of limitless funds,"¹⁶¹ and health care institutions could borrow at the low rates granted to municipalities, fueling sectoral expansion through the 1970s.¹⁶² Federal health care spending therefore became a new means of countercyclical Keynesian stabilization.¹⁶³

153. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); see also *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-74 (1965) (holding that it is not an unfair labor practice for an employer to close their business entirely, even if the action is motivated by antiunion sentiment).

154. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 680-86 (1981); see also *id.* at 686 n.22 (noting that whether employers must bargain over decisions to automate work must be decided on a case-by-case basis).

155. See, e.g., *Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) (holding that workers had no common-law property or contract right in steel mills slated for shutdown).

156. That pattern of high utilization began in the postwar period, WINANT, *supra* note 1, at 158-63, but was exacerbated by deindustrialization, *id.* at 199-202.

157. *Id.* at 159-62.

158. See *id.* at 136-37.

159. *Id.* at 167-77.

160. See *id.* at 137.

161. *Id.* at 150.

162. *Id.* at 167-69.

163. *Id.* at 18, 137-38, 167-70.

That dynamic continued through the 1970s and early 1980s, even as cuts to other forms of social assistance accelerated.¹⁶⁴ In part, this persistence reflected standard interest-group politics. Winant argues that “[d]espite repeated efforts to assert public or social control over supply, fragmentation persisted and enabled multiple constituencies to extract what they wanted. . . . Organized workers, retirees, hospitals, insurers, doctors – all benefitted handsomely.”¹⁶⁵ Eventually, however, the health care industry faced two intertwined challenges. The first was the general “cost-disease” confronting most service-intensive industries, as discussed in the Introduction.¹⁶⁶ While many other nations responded by socializing those sectors, the United States instead populated them with workers who were poorly paid and treated.¹⁶⁷ The second challenge was political pressure to limit costs, as exemplified by a 1983 Medicare reimbursement reform.¹⁶⁸ That reform altered health care companies’ incentives, since it “discouraged long hospital stays but inadvertently promoted more aggressive medical interventions, which carried higher reimbursement rates.”¹⁶⁹

Since that time, Winant argues, the industry has bifurcated. The first tranche is highly profitable and includes technologically sophisticated intensive care, acute care, and specialized advanced services such as transplants and cancer care, as well as biotech and pharma. Many of the advanced-care facilities partner with research institutes, such as UPMC Hillman, and frequently market their services on a national or even global scale.¹⁷⁰ The second tranche includes labor-intensive services including nursing homes, other outpatient treatment facilities, and home-based services.¹⁷¹ Those facilities have been cash-starved for decades now,

164. *Id.* at 135-78; *see also id.* at 207 (discussing the growing health care spending during recession of the 1970s).

165. *Id.* at 137.

166. *See generally* William J. Baumol, *Macroeconomics of Unbalanced Growth: The Anatomy of Urban Crisis*, 57 *AM. ECON. REV.* 415, 421 (1967) (arguing that productivity growth in the manufacturing industry will almost inevitably increase costs of services).

167. *See generally* Torben Iversen & Anne Wren, *Equality, Employment and Budgetary Restraint: The Trilemma of the Service Economy*, 50 *WORLD POL.* 507, 508, 517-18, 533-34 (1998) (arguing that service-dominated economies can achieve only two of three goals—high employment, wage equality, or budgetary restraint—and that the United States has emphasized budgetary restraint and high employment at the expense of wage equality); WINANT, *supra* note 1, at 2-3 (“In the United States, through our hybrid public-private welfare state, we have selected the option of mass low-wage private-sector employment.”).

168. WINANT, *supra* note 1, at 218.

169. *Id.* at 219.

170. *Id.* at 229-30.

171. *See id.* at 218-58.

especially when they serve poorer and working-class communities.¹⁷² Profitability pressures also led to a consolidation wave in the industry, such that regional markets came to be dominated by a few players – like UPMC in Pittsburgh.¹⁷³

B. Labor Law and the New Working Class

The characteristic challenges and experiences of today's service sector working class have resulted from intense pressures to maintain low labor costs in such labor-intensive sectors.¹⁷⁴ Companies accomplished this in several ways, all of which were facilitated by law.

For example, reflecting the ideologies of care, race, and gender in the early postwar period, health care employers sought out Black and women workers, finding a ready workforce who had been excluded from industrial work and were sometimes already engaged in caregiving at home.¹⁷⁵ As a result, "care" continued to be coded as not-labor, and thus ripe for exploitation.¹⁷⁶ When care workers sought to organize, hospitals responded by pointing to their charitable or community-focused mission, casting themselves as an extension of the family.¹⁷⁷ Those tensions came to a head when the precarity of the work combined with the Black Freedom movement to generate "a nationwide uprising of Black health care workers in the late 1960s."¹⁷⁸ While that movement won impressive gains in some hospitals, it quickly confronted the fact that health care and hospital workers were excluded from the NLRA.¹⁷⁹ By the time hospital workers gained NLRA protections in 1974, their earlier defeat had "locked in place a dynamic in which caregiving could be offered at large volume to the insured fractions of the working class because its costs were passed on in such significant proportion to hospital employees via low wages."¹⁸⁰

172. See *id.*, at 230-41, 252-57 (on funding pressures and associated staffing cuts over the last several decades).

173. *Id.* at 242-52.

174. *Id.* at 231-41.

175. *Id.* at 214; see also *id.* at 216 ("[T]he displaced homemaker . . . could be said to have been in training for the position [of home care aide] for years."); *id.* at 221 (discussing women health care workers who derive affective benefits from their care work).

176. *Id.* at 220-23.

177. *Id.* at 135-36. Compare *id.* at 62 ("Steel work made workers feel heroic, resentful, and embattled all at once."), with *id.* at 223 ("Workplace conflict in hospitals often took on themes of obligation, duty, and guilt.").

178. *Id.* at 152.

179. *Id.* at 154-55.

180. *Id.* at 157.

Various branches of labor law then made it possible for health care employers to suppress wage growth going forward. For example, employment discrimination doctrine evolved in ways that limited Black and women workers' rights to demand equal or fair treatment.¹⁸¹ As noted above, our lack of an industrial policy made it structurally impossible to ensure racial equity in industrial employment when industry evaporated.¹⁸² Meanwhile, beginning in the 1970s, and continuing through today, courts increasingly found liability for discrimination only when decision makers manifested individual animus.¹⁸³ That stalled many legal efforts to attack ingrained patterns of segregation and inequality, including poverty, housing, educational inequality for racial minorities, and disproportionate care burdens for women. To this day, Black hospital workers often find they have limited or disparate access to training for skilled jobs.¹⁸⁴

Collective-bargaining laws also facilitated wage suppression. Beginning around the 1980s, the Supreme Court became markedly less sympathetic to unionism per se. Where in the postwar era the Court frequently viewed unionism as a means of reducing workplace conflict,¹⁸⁵ after 1980 the Court often assumed that worker organizing actually generated such conflict.¹⁸⁶ Companies also ramped up their antiunion efforts during this time, campaigning hard against unionization and permanently replacing economic strikers more often.¹⁸⁷ Health

181. A major turning point was *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which tightened the standards for a showing of actionable disparate impact. While *Wards Cove* was overturned in substantial part by Congress in the 1991 Civil Rights Act, disparate-impact cases have become far less common in recent decades. See generally Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734-49 (2006) (summarizing evidence that disparate-impact cases are rarely brought anymore).

182. See generally White, *supra* note 142.

183. This basic logic was clear in the 1970s. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing the "perpetrator perspective" that dominates antidiscrimination doctrine). Recent developments in individual-disparate-treatment doctrine show the logic's development. See, e.g., *Gross v. FBL Fin. Servs., Inc.* 557 U.S. 167 (2009) (summarizing doctrine and holding that an employee bringing a disparate-treatment claim under the Age Discrimination in Employment Act cannot recover without showing that age was the but-for cause of the employer's discriminatory decision).

184. WINANT, *supra* note 1, at 256-57 (describing Black workers excluded from technical positions today).

185. See *supra* notes 110-116 and accompanying text (discussing the *Steelworkers Trilogy*).

186. See, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981).

187. See generally John Logan, *Labor's "Last Stand" in National Politics? The Campaign for Striker Replacement Legislation, 1990-1994*, 13 ADVANCES INDUS. & LAB. RELS. 191, 192-93 (2004) (noting the increased use of striker replacements after 1980).

care chains also responded to the cost disease by “fissuring” away workers,¹⁸⁸ ensuring that low-productivity functions were carried out through firms legally separate from highly profitable functions like imaging, cancer treatment, and transplants. Within low-productivity sectors, companies even fought to deny workers the most basic protections, as evidenced by home-care workers’ long struggles to establish rights to overtime pay, a matter that was appealed to the Supreme Court twice.¹⁸⁹

Over time, these and other changes coalesced into a new legal understanding of work.¹⁹⁰ Rather than a social relationship jointly constituted by capital and labor, employment became more like any other arm’s length contract between formally equal liberal individuals. For example, courts came to understand union organizing as a means of enacting employees’ uncoerced preferences toward unionization – a contractual value – rather than facilitating countervailing power. In one prominent opinion, Justice Thomas held that a union did not need access to the employer’s parking lot because it had alternative means of reaching workers, including advertising in local newspapers or putting up signs in public property abutting the lot.¹⁹¹ In that view, the organizing effort was more like a marketing operation than an agonistic social process with real democratic value.¹⁹² Meanwhile, the employment-at-will doctrine has returned to a place of central importance in our law, exercising a gravitational pull on the rest of the field.¹⁹³ The rule is not new – it was foundational to labor law in the era of laissez-faire. As the Supreme Court wrote in a canonical *Lochner*-era case, *Adair v. United States*, the employee’s right to quit for any reason “is the same as the right of the

188. See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014) (describing how modern employers increasingly do not employ workers directly).

189. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (holding as valid a Department of Labor (DOL) regulation that exempted home-care workers employed by third-party agencies from full Fair Labor Standards Act coverage); *Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084, 1087 (D.C. Cir. 2015) (holding valid a later DOL regulation that did not exempt such third-party-employed home-care workers), *cert. denied*, 136 S. Ct. 2506 (2016).

190. The evolution of labor law over this period, and the new legal understanding of employment sketched here, is discussed in more detail in ROGERS, *supra* note 42, ch. 2.

191. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540–41 (1992).

192. Cf. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313 (2012) (discussing labor law’s increased emphasis on employee choice in recent years).

193. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, U. PA. J. LAB. & EMP. L. 65, 65 (2000) (arguing that the employment-at-will doctrine “has been, and still is, a basic premise undergirding American labor law,” and that the doctrine’s underlying “assumption regarding the relation between an employer and its employees . . . gives American labor law much of its distinctive character”).

employer, for whatever reason, to dispense with the services of such employé In all such particulars, the employer and the employé have equality of right”¹⁹⁴ Employment at will was far less important in the postwar period, though, because collective-bargaining agreements provided that employees could be terminated only for cause.¹⁹⁵

In recent years, the *Adair* Court’s view that the employer and employee have equal and reciprocal rights has made a comeback. In *Epic Systems Corp. v. Lewis*, a 2018 case on the enforceability of class-action waivers in agreements to arbitrate employment disputes, Justice 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?”¹⁹⁶ This suggests that, for the Court, the issue is not whether an employer may require the employee to sign such an agreement, taking into account the clear imbalance of bargaining power or the fact that arbitration may undermine enforcement of statutory employment duties or other public goods. Rather, in the Court’s view, the issue is whether the employee should have the power to contract for such a term – as if the employee had demanded it.¹⁹⁷

This set of interlocked doctrinal changes enabled at least some continued profitability for care industries and other service industries. But workers paid the price. As Winant shows, nonprofessionals in health care frequently earn very low wages, and many report very high levels of stress amid perpetual conflicts over understaffing.¹⁹⁸ In some cases, health care workers endured acute physical

194. 208 U.S. 161, 174-75 (1908).

195. As deindustrialization and the service transition led to union collapse, workers and employment lawyers pressed courts and state legislatures to mitigate or even overturn the at-will rule. While they won some victories, the logic of contract in such cases was eventually deployed to limit workers’ rights. See, e.g., *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1266-67 (N.J. 1985) (holding that an employee’s continuing to work when he had no duty to do so constituted an acceptance of his employer’s offer of job security as conveyed in the employee handbook); cf. *Asmus v. Pac. Bell*, 999 P.2d 71, 78 (Cal. 2000) (holding that an employee’s decision to continue working after his employer changed the policies on job security constituted acceptance of the new terms). The overall effort also slowed after an employer-led offensive in courts and legislatures. See Sophia Z. Lee, *Employment Law’s Other Public-Private Distinction* (unpublished manuscript) (on file with author) (tracing this history).

196. 138 S. Ct. 1612, 1619 (2018).

197. Cf. *id.* at 1633 (Ginsburg, J., dissenting) (writing, in the summary of facts, that “[t]o block” class-action claims, the plaintiffs’ “employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind”).

198. See WINANT, *supra* note 1, at 230-34, 253-57; see also *id.* at 239 (noting high rates of injuries among nursing home workers); see also Jay Shambaugh, Ryan Nunn, Patrick Liu & Greg Nantz, *Thirteen Facts About Wage Growth*, HAMILTON PROJECT 2 fig.2 (Sept. 2017), <https://www.hamiltonproject.org/factsheets/wage-growth>

harms, including a medical secretary who believes she suffered bladder damage in her twenties from not being able to use the restroom for hours at a time.¹⁹⁹ In still other cases, short staffing generated horrific patient abuses, the details of which are best left to Winant's own telling.²⁰⁰ As a result, the landscape of care work was transformed by the end of Winant's narrative, the mid-2000s: "Where there had once been a service ethic—exploitative but also with real resonance—there was now something more like servitude, for a social purpose unrecognized by the employer itself."²⁰¹

Labor law's understanding of class was also turned inside out. While postwar labor law gave industrial workers some protections against commodification, in the process rendering them susceptible to collective discipline, contemporary labor law helped create a new working class and yet left workers subject to employers' whims. Through this transformation, the notion that workers are not just objects of state protection, but also part of a collective agent with lawmaking authority in the workplace has been simply lost. So has a sense that workers deserve protection simply by virtue of their position in the division of labor. The shift from the postwar to the present was a shift from one regime of accumulation to another, one set of class relations to another, driven by the conflict between investors' quest for high returns and workers' and citizens' needs for basic material security. That shift between regimes—that phase in the longer-term process of capitalist development—left its mark on our labor law. Today, to borrow another of Winant's phrases, care workers are an "absent presence" in that law—at once called into being and disregarded—just as they are in our political culture.²⁰²

CONCLUSION: DEMOCRACY AFTER NEOLIBERALISM?

Winant's book suggests that neoliberalism evolved out of the postwar compact, carrying forward many of its ills, exclusions, and tensions.²⁰³ This Book Review has argued that labor law's evolution over this same period both responded to and helped to facilitate this broader political-economic shift. Deun-

[//www.hamiltonproject.org/assets/files/thirteen_facts_wage_growth.pdf](http://www.hamiltonproject.org/assets/files/thirteen_facts_wage_growth.pdf) [https://perma.cc/TX2Y-E32P] (showing that real wages stagnated in the bottom two quintiles of the income distribution between 1979 and 2016).

199. WINANT, *supra* note 1, at 262.

200. *Id.* at 175, 237-38.

201. *Id.* at 258.

202. *Id.* at 7.

203. *See id.* at 18.

ionization, the individualization of employment, fissuring, and other mechanisms of wage suppression have been, in large part, legal projects. In that sense, contemporary labor law shows the mark of the broader “Twentieth-Century Synthesis” in legal theory, whereby fields of law understood to be about “the economy” were reoriented around market values of efficiency, choice, and individual autonomy.²⁰⁴ Through that process, those fields of law were largely “emptied of democracy.”²⁰⁵

But as Winant’s book also suggests, today’s neoliberal political economy contains new conditions of possibility.²⁰⁶ Health care’s growth resulted from the population’s demands for basic material security, since health care spending both provided necessary care and stimulated job growth. Today’s care and social-reproduction sectors remain essential for social flourishing, especially after COVID-19, which gives care workers and educators some latent power. Indeed, in 2018, a full ninety percent of workers who went on strike worked in health care and education.²⁰⁷ More recently, many service-sector businesses, including restaurants and hotels, have struggled to staff back up after COVID-19, in part because some restaurant and hotel workers were unwilling to tolerate physically grueling and risky work any longer.²⁰⁸ The second half of 2021 even brought a bona fide strike wave, drawing forth nurses, telecommunications workers, and factory workers, among others.²⁰⁹ In all such efforts, workers may find the public to be more supportive than in the recent past. The 2019 Chicago teacher’s strike, for example, garnered more support from parents than from other city residents, likely because the union made demands—such as for smaller class sizes, more support staff within schools, and even affordable housing—that would benefit parents.²¹⁰ Rising health care costs also put pressure on consumers as well as

204. Britton-Purdy et al., *supra* note 37, at 1789–91.

205. Cf. STREECK, *supra* note 61, at 96 (suggesting that under neoliberalism, capitalism is “emptied of democracy”).

206. See WINANT, *supra* note 1, at 23–24, 261–65.

207. See *id.* at 263.

208. See The Daily Podcast, *Stories from the Great American Labor Shortage*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/03/podcasts/the-daily/coronavirus-hiring-job-vacancies-hospitality-industry.html> [<https://perma.cc/4ZCJ-VLWS>].

209. For an overview of the recent strike wave, see Jonah Furman & Gabriel Winant, *The John Deere Strike Shows the Tight Labor Market Is Ready to Pop*, INTERCEPT (Oct. 17, 2021, 7:00 AM), <https://www.theintercept.com/2021/10/17/john-deere-strike-labor-market> [<https://perma.cc/D9BR-JSWR>].

210. Kathleen Foody & Don Babwin, *Affordable Housing Among Striking Chicago Teachers’ Demands*, ASSOCIATED PRESS (Oct. 21, 2019), <https://apnews.com/article/chicago-schools-us-news-il-state-wire-strikes-ca-state-wire-7bc567d71d974a8789ffe955df254b02> [<https://perma.cc>]

workers, creating favorable conditions for alliances between care workers and consumers.

Indeed, today's resurgent social movements are envisioning quite different political economies of production, care, and ecology.²¹¹ One set of scholars and unions have begun trying to rethink basic elements of the postwar order, asking whether new mechanisms of worker representation could be built at the sectoral level.²¹² For present purposes, an intriguing aspect of such proposals is that they would respond to the particular challenges faced by this new working class, in some cases giving workers rights to codetermine wages based simply on their employment in exploitative industries. An overlapping set of efforts seeks to address problems of care, climate, and racial subordination by fundamentally altering practices of investment, industrial policy, job creation, and the like.²¹³ Both groups are also pushing for democratic reforms to ensure enfranchisement and prevent political domination by corporate interests and regional minorities.

These projects—of worker empowerment, economic transformation, and democratic resurgence—are intimately linked. If social democracy required an

/77MY-47EG]; Nader Issa, *Poll: Chicagoans More Likely to Back Teachers than City Over Potential Strike*, CHI. SUN-TIMES (Oct. 14, 2019), <https://chicago.suntimes.com/city-hall/2019/10/14/20914655/poll-chicagoans-support-teachers-strike-lightfoot-union-ctu-cps> [https://perma.cc/JY7E-VDKH] (finding that parents were more likely to support teachers than the general public). Recent controversies around school reopenings may complicate that alliance. See Dana Goldstein & Noam Scheiber, *As More Teachers' Unions Push for Remote Schooling, Parents Worry. So Do Democrats.*, N.Y. TIMES (Jan 8, 2022), <https://www.nytimes.com/2022/01/08/us/teachers-unions-covid-schools.html> [https://perma.cc/AM3J-MGYD] (noting some tensions between teachers and parents regarding reopening plans); cf. Donna St. George, Hannah Natanson & Nicole Asbury, *D.C.-area Parents and Teachers Split Over Return-to-School Plans*, WASH. POST (Jan. 3, 2022), <https://www.washingtonpost.com/education/2022/01/03/schools-covid-omicron-dc-md-va/> [https://perma.cc/88YU-B2VN] (noting that many parents and teachers shared concerns about reopening during the Omicron wave).

211. See generally Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 90-92 (2020) (summarizing THE recent upsurge in social movements seeking transformative change).
212. See generally Andrias & Rogers, *supra* note 107 (discussing how to construct a labor law that centers on representing the interests of workers); Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM (2020), https://uploads-ssl.webflow.com/5fa42ded15984eaa02a7ef2/5fa42ded15984e6a72a806b_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf [https://perma.cc/P8E4-GQQN] (compiling recommendations to reform labor law to empower all workers and build a more equitable democracy).
213. See, e.g., WINNING THE GREEN NEW DEAL: WHY WE MUST, HOW WE CAN (Varshini Prakash & Guido Girgenti eds., 2020) (collecting essays on the Green New Deal from individuals affiliated with the Sunrise Movement); 2020 Policy Platform, MOVEMENT FOR BLACK LIVES (2020), <https://m4bl.org/policy-platforms> [https://perma.cc/EN7Z-HQDN] (proposing interrelated policy reforms to advance economic justice and reshape our political economy).

empowered but constrained working class, and neoliberalism required a demobilized working class, this new political economy would require a far more mobilized workforce and citizenry. In other words, we cannot address today's crises of care and inequality without a democracy strong enough to contain capital's relentless drives. The essential work of care and reproduction could then be central to a more just and equal political economy, rather than a source of shame, humiliation, or danger.