Julia Tomassetti, City University of Hong Kong*

The Powerful Role of Unproven Economic Assumptions in Work Law

Abstract: Many rules and statutory interpretations in US work law that entrench employers' power over workers rely on unproven economic assumptions. This article explores three. First, courts assume that the individual employee and employer have relatively equal bargaining power, an assumption often framed and defended within the circular logic of "freedom of contract." Second, courts assume that the employer's authority over the enterprise—its managerial prerogative—must be near absolute to promote efficiency in the enterprise and economy. Third, courts assume that the costs of maintaining the status quo of managerial prerogative and an employer's at-will authority are less than the costs of altering it. Courts use these assumptions to give employers broad rights to terminate employees, to impose arbitration agreements, and to limit worker collective rights.

Keywords: employment at will, freedom of contract, balanced power, managerial prerogative, arbitration, noncompete agreements

I. Introduction

Several legal rules and statutory interpretations in US work law[1] that entrench employer power are premised on assumptions about how the economy works, and courts rely on these assumptions to justify their decisions without subjecting them to empirical scrutiny. This paper focuses on three:

1. *The assumption of balanced power*: That there is no acute, systematic imbalance of power between an individual employee and employer. The worker's right to quit or withhold assent to employment is comparable to, if not equal to, the employer's power to terminate the worker or withhold employment. Courts often telegraph this assumption by reciting the value of "freedom of contract."

2. *The assumption of managerial prerogative:* That the employer's control over nearly all aspects of the commercial enterprise must be near absolute to prevent adverse economic consequences. Courts claim that restricting this prerogative will harm the enterprise and the economy by restricting the employer's ability to adjust to market dynamics.

3. *The status quo assumption:* That even if the individual worker and employer do not have relatively equal bargaining power, and even if managerial prerogative does not reflect the

* Assistant Professor of Law, City University of Hong Kong. Please direct correspondence to jtomasse@cityu.edu.hk.
I am grateful to Michael Harper, Wilma Liebman, Larry Mishel, and Brishen Rogers for their invaluable feedback, and to Larry Mishel for inviting me to be a part of the Unequal Power Project.

[1] By "work law," I refer to a trilogy of subfields: labor law (the law dealing with worker collective action and unionization); employment law (the law dealing with individual worker rights, like minimum wage laws, the common law of employment, and contracts); and employment discrimination law.

most efficient economic system, the costs to workers and the economy of maintaining the status quo are less than those of altering it.

Courts rely on these assumptions for several purposes:

- To give employers extremely broad rights to terminate employees. Thus, courts have relied on the assumptions to justify decisions (1) maintaining the at-will presumption, which enables the employer to terminate an employee at any time, for any reason; and (2) limiting the reach of exceptions to the employer's authority to terminate employees, such as the public policy exception, the ordinary contractual duty to act honestly (in "good faith"), and obligations that the employer had agreed to voluntarily.

- To give employers rights to alter employment terms and working conditions on a take-it-or-leave-it basis, usually leaving employees with no option but to quit if they do not want to accept the change. In particular, courts have used the assumptions to justify decisions (1) allowing employers to impose noncompete agreements and to rescind benefits; (2) allowing employers to impose mandatory arbitration agreements, under which employees waive their rights to bring employment disputes to court and to pursue employment claims collectively in other forums; and (3) allowing employers to revoke job security commitments.

- To limit employee protections under statutes that were premised on the finding that the individual worker does *not* have power comparable to that of the employer. In particular, courts have used the assumptions to limit workers' collective rights under the National Labor Relations Act (NLRA)[2] and state collective bargaining law.

The following sections show how the legal rules and statutory interpretations protecting employer power rely on these three assumptions, and they illustrate the economic arguments that courts make based on the assumptions.

Part II examines the assumption of balanced power (see Bagenstos 2020 for a complementary analysis). It shows that courts use the maxim of freedom of contract as shorthand for the assumption and as a circular means to legitimate the legal rules it underlies. The Supreme Court has used the assumption in several decisions ruling that the Federal Arbitration Act (FAA) enables employers to require that employees waive their rights to go to court and to pursue claims collectively; other courts have used the assumption to justify decisions to narrow public policy and contractual limits on the employer's at-will authority. Further, courts assume there is no substantial inequality of bargaining power between an employer and employee when they give employers unilateral rights to change the terms of the employment agreement to the employee's disadvantage, for instance, by requiring employees to submit disputes to arbitration. The assumption enters into interpretations of statutes governing worker collective rights as well.

The balanced-power assumption gives rise to arguments about labor markets and market competition that then legitimate legal rules protecting employer power over workers:

- An employee can just or almost as readily walk away and find an equivalent position as the employer can terminate the employee and find an equivalent employee.

[2] By focusing on the NLRA, I do not mean to imply that this is the only legislation whose interpretation is shaped by these assumptions.

- There is power in threatening to quit, because the employee can inflict economic harm on the employer comparable to the harm that the employer can inflict on the employee by termination.

- The market disciplines employers to act rationally in the best interests of their businesses; employers are therefore unlikely to abuse their authority. Employees who perform well have little need to worry that the employer will treat them badly.

- Changing the at-will rule would give employees unfair economic and legal advantages. The legal system provides an avenue of redress for employees that is not available on the same terms to employers.

Part III shows that courts assume the necessity of managerial prerogative when protecting and legitimating the employer's power to control virtually every aspect of the enterprise—from personnel to capital allocation decisions. So powerful is the inclination to protect employer prerogative that, when presented with the opportunity to subject employers to the same contract rules as other commercial parties, the courts generally decline. Courts invoke managerial prerogative to relieve the employer of contractual limitations on the employer's rights to terminate employees, modify the employment relationship unilaterally, and abide by job security commitments. The assumption of managerial prerogative also underlies interpretations of the NLRA.

The courts make several economic claims to justify these rules, all based on the assumption that managerial prerogative is necessary for economic efficiency:

- The employer must have the flexibility to adjust to dynamic market conditions.

- Contract law does not adequately protect the employer's managerial prerogative.

- We can trust the employer—and only the employer—to exercise its business judgment in a manner beneficial to the enterprise and the economy as a whole, because employers are best positioned to understand and react rationally to market conditions.

- We should not second-guess the employer even where it appears to exercise its prerogative inscrutably, irrationally, or based on incorrect facts.

- Managerial prerogative over hiring and firing is so critical that, even where it appears the employer has relinquished some of this prerogative, courts must sometimes save an employer from its imprudent bargain.

- Courts must in particular defer to managerial prerogative when interpreting job security commitments and contractual obligations to terminate employees only for "cause." Enforcing these can impose formidable costs on employers and lead to bankruptcy.

The status quo assumption, discussed in Part IV, sometimes masquerades as an argument about the separation of powers rather than an economic one. Even where courts may not subscribe to the assumptions of balanced power or the necessity of managerial prerogative, they often assume that altering the rules built on these assumptions would be more costly than maintaining the status

quo, because the alteration would create commercial uncertainty and instability. Thus, courts argue that only the legislature should effect such big policy changes.[3]

It is important to identify and critique these assumptions because, if they fail under empirical scrutiny, then much of the legitimacy of the rules and interpretations they support evaporates, with scant other sources of legitimacy to replace it, whether those be democratic, regulatory, or doctrinal. For instance, the at-will rule was not created by elected legislators;[4] judges began announcing it as the rule in the late 19th century, following the lead of a treatise that claimed it was the rule across the US without demonstrating this claim. In fact, courts rely on the at-will rule to undermine protective legislation that workers achieved through political contests (Bagenstos 2020). Nor is the at-will rule a product of regulatory processes that draw on social science or policy expertise. Some of the legal rules sustained through the assumptions cannot even claim doctrinal coherence, since they exempt employment from contractual norms. With respect to the NLRA, the Supreme Court argues or implies that its use of the assumptions is consistent with legislative intent, although it has made little attempt to excavate Congress's precise intent and in either case has offered no empirical support for the assumptions.

In sum, these unproven assumptions about economic phenomena play a substantial role in legitimating law that devalues workers' dignity and welfare and protects employer power over workers. By identifying how courts rely on them, this paper exposes the assumptions for empirical examination.

II. The Assumption of Balanced Power

One of the most persistent and pervasive economic assumptions underlying the case law on work relationships is the assumption of balanced power. Courts often assume that the employee's leverage in quitting or in withholding assent to employment is roughly equal to the employer's power to terminate or refuse to hire the employee. An iteration of this assumption is that any disparity in bargaining power has no real bearing on individual autonomy and therefore does not negate the employee's ability to make meaningful choices.

A. Forced Arbitration

The Supreme Court assumes balanced power between employees and employers in its jurisprudence on forced arbitration in employment relationships. The Federal Arbitration Act promotes arbitration as an alternative to resolving disputes through litigation by making such agreements enforceable; however, Congress never intended the FAA to apply to employment relationships, and the statute expressly excludes them. Nonetheless, the Court has several times held that the FAA allows employers to force employees to arbitrate employment-related disputes.[5] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), holding that an employee's age discrimination claim was subject to compulsory arbitration, a Supreme Court majority held, "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," because the FAA's "purpose was to place arbitration agreements on the same footing as other contracts." 500 U.S. at 33.

[3] Given that the common law rules discussed in this paper are products of judicial law-making, the argument that courts should let the rules stand to avoid treading on legislative authority is somewhat wanting.
[4] Some states have since codified the presumption, however, including Louisiana and California.
[5] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

Such analysis ignores the reason for anti-discrimination legislation—the legislature's judgment that contract rights were inadequate to prevent discrimination in some relationships, particularly employment. Under a mandatory arbitration agreement, the employee must submit almost all employment-related disputes to individual arbitration and waives the right to bring these claims to court.[6] Employers usually "offer" arbitration agreements to employees on a take-it-or-leave it basis, as a condition of employment. With some exceptions, employees can only "reject" the arbitration agreement by rejecting the offer of employment or, for someone already employed, by quitting. Likewise, contract law generally deems that, by accepting the job or not quitting, the employee assents to the agreement. Thus, by subjecting employment to the FAA, the court "allow[s] the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts." *Gilmer*, 500 U.S. at 43 (J. Stevens dissenting) (internal citation omitted). Further, despite its "same footing" reference, the Court has been hostile to state court efforts to limit arbitration on contractual grounds where the contract is characterized by an acute power imbalance. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

B. Freedom of Contract

Courts often express the assumption of balanced power in the adage of freedom of contract, as illustrated by the Supreme Court's recent case of *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), where the majority held that the NLRA did not prohibit employers from requiring employees to agree to mandatory, *individual* arbitration as a condition of employment. 138 S. Ct. 1612, 1619 (2018). Under these agreements, the employee not only waives the right to bring disputes to court but waives the right to bring them to any forum for collective redress, such as arbitration where multiple employees bring claims together. In practice, imposing an individual arbitration agreement often leaves the employee without any recourse to pursue claims against the employer. Given the expense of litigation, one employee's claim is often not enough to make it cost-effective for an attorney to bring the claim.

Passed in 1935[7] along with two other pillars of the New Deal—the Fair Labor Standards Act (FLSA) and the Social Security Act—the NLRA protects workers' rights to associate, organize, form unions, and bargain collectively with employers. Its proponents recognized that a severe inequality in bargaining power between employers and employees was a major cause of the Great Depression and the ruinous competition it entailed. US workers did not have enough spending power to sustain the economy, let alone forfend the misery of privation. The idea behind the NLRA was that, while the individual employee had little bargaining leverage, employees organized on the scale of capital could raise and stabilize wages across employers (Cobble 2010; Gross 1974).

At issue in *Epic Systems* was whether, by requiring an *individual* arbitration agreement, the employer was violating its employees' rights under Section 7 of the NLRA to take *collective* action for purposes of "mutual aid or protection."[8] Despite the NLRA's guarantee, the Supreme Court found that courts could enforce these agreements. The majority opens its opinion with a question:

> Should employees and employers *be allowed* to *agree* that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to

[6] For a discussion of the shortcomings of forced arbitration, see Colvin (2017).
[7] The Supreme Court upheld its constitutionality in N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[8] Section 7 guarantees employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

> bring their claims in class or collective actions, no matter what *they agreed* with their employers? *Epic Systems*, 138 S. Ct. at 1619 (emphasis added).[9]

Above, the majority suggests that employees' freedom of contract was at stake. So, what is freedom of contract, and what is its connection to the balanced-power assumption? The maxim of freedom of contract embodies several normative and empirical claims, but most relevant here is the tenet that there is no real imbalance of power between two parties who strike a deal under the auspices of contract law and without other state "interference."

The connection between the ideas of freedom of contract and balanced power is circular. Freedom of contract is shorthand for the conflation of actual freedom with the formal freedom to transact in the market, signified by "contract" as the main legal instrument of market transactions. Thus, the maxim is often invoked not as a reference to contract law per se but as the tenet that government should not "regulate" or "interfere" with how individuals engage in market transactions (whether or not these transactions are strictly contractual).

Inscribed in freedom of contract is a theory about markets, efficiency, and individual freedom: by participating in markets (buying and selling or refraining from doing so), individuals optimize their preferences according to their true interests. Under market governance, social resources are produced and allocated according to the demand of these preference-optimizing individuals. Therefore, markets are "efficient" because they channel resources to those who value them most. The theory depends on two assumptions: market decisions are presumptively voluntary, and they provide the best evidence—and the only legitimate evidence—of how an individual values something.[10]

That market deals are voluntary and result in optimal contracts presupposes the absence of true power imbalances. And contract law reflects this tautology by defining most agreements as the products of voluntary choice. Where courts invoke employees' freedom of contract and its contributions to efficiency and autonomy, they likewise assume balanced power. For example, where individuals have a formal right to engage in the market trades of their choosing, no systematic power imbalances along class or other status lines should persist—only those related to the vagaries of fortune and natural endowments. Justice Pitney captured this sentiment in a *Lochner*-era decision striking down a state law prohibiting yellow-dog contracts: "[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." *Coppage v. Kansas*, 236 U.S. 1 (1915). An implication is that courts and legislatures need not worry that unemployment or low wages will lead to durable social inequality, because these phenomena cannot be systematic and persistent under a free contracting regime. Their existence in any individual case is attributable to low skills, low productivity, low motivation, or some other demerit causing reduced demand for an individual's labor.

As illustrated in *Epic Systems* and the following examples, courts often suggest that virtually all employment agreements are efficient because they reflect the decisions of parties who, according to contract law, act voluntarily and who would not otherwise have chosen the agreement.

Apart from the circular logic, the problem with the Supreme Court's invocation of freedom of contract in *Epic Systems* is that, in passing the NLRA, Congress determined that individual

---

[9] For a similar framing of the arbitration issue as one of contractual freedom, see Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122 (2001).

[10] See Naidu and Carr in this issue for a fuller critique of this theory as applied to labor markets.

employees did *not* enjoy "actual liberty of contract" when they faced capital in its organized form as the employer. The preamble is crystal clear on this:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

The NLRA rejects the equation of liberty with formal freedom of contract. The court's framing of the question in *Epic Systems*—about agreements between "employ*ees* and employers"—elides the critical issue of whether an *individual* employee should be required to waive collective rights, as Justice Ginsburg highlighted in her dissent.

C. The First Amendment and the Assumption of Balanced Power

In *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018), the Supreme Court also relies on the balanced-power assumption and purported benefits of free contracting, although more subtly than in *Epic Systems*. The *Janus* majority held that requiring an objecting public employee to pay a fee (an "agency fee") to cover the costs of services provided by the workplace union violates the employee's First Amendment rights. Because public-sector unions are under legal mandate to represent *all* employees in the bargaining unit, not just union members, *Janus* creates an incentive for employees to free ride rather than pay dues, in turn making it more difficult for unions to promote and protect workers' interests.

At first blush, *Janus* seems to reject the premise that employees have freedom of contract, since, unlike in *Epic Systems*, the *Janus* majority finds that an employee *does not* make a voluntary choice when presented by the employer with a take-it-or-leave-it condition of employment: pay the agency fee or find employment elsewhere (Bagenstos 2020). Yet, the decision disregards why states enacted collective bargaining laws for public employees and why public employees form unions under these laws: the unequal power between the individual employee and the employer. The majority largely dismisses the interests expressed by a majority of workers in having an effective bargaining agent.

Janus makes little sense as a case about free expression—to strike down mandatory agency fees, the majority had to carve out an exception in First Amendment jurisprudence regarding the government's ability to regulate public employee speech about workplace matters. *Janus* (J. Kagan dissenting). What most stands out is the majority's repeated suggestions that public-sector unions foist costly, inefficient agreements on states, a consequence of the "tremendous increase in power" (*Janus* at 2467) they realize as employees' exclusive representative and the "considerable windfall" that agency fees provide (ibid. at 2462, 2473–77, 2486). The connotation is that, if employees were not forced to pay agency fees, unions would have less power, and governments would enter more efficient employment contracts. It seems that the majority's concern with agency fees is that they interfere with an employee's freedom of contract (the freedom not to contract with the union), and that this interference distorts the market, enabling the union to impose inefficient bargains on the state.

D. *Assuming Balanced Power to Protect Employer Power*

This part next looks at a key manifestation of the assumption of balanced power—the at-will presumption. It then illustrates how the presumption underlies case law protecting the employer's power of termination and modification more generally, even outside of the at-will context. The part concludes by illustrating how the assumption shapes NLRA jurisprudence.

1. Termination

a. Background: At-Will Employment and Exceptions

The at-will presumption is the law in all but one state.[11] This means that courts presume, in the absence of other evidence, that the employer and employee agreed either party would have a right to end the relationship for any reason at any time. Thus, the employer can terminate the at-will employee "for good reason, bad reason, or no reason at all." *Harris v. Mississippi Valley State University*, 873 So.2d 970, 987 (Miss. 2004). With some exceptions, particularly for employees covered by collective bargaining agreements, employers do not have to act honestly, rationally, or fairly when making termination decisions.

As a presumption, the at-will term is formally a default term that the parties can contract around. For example, the employer and employee may alternatively agree that their relationship will last two years or that the employer may only terminate the employee for some "cause," such as "just cause." The party arguing that the relationship is *not* at-will (usually the employee) has the burden of proving in court that the parties departed from the at-will term. The vast majority of nonunion employees in the US serve at will, and nonunion employees constitute the vast majority of the workforce today (Shierholz 2022).

The at-will presumption is a creature of the common law, meaning it was created and is maintained by judges. Only a few states have codified it. Scholars trace its origins to a 19th-century treatise by Horace Wood, where Wood claims, without adequate support, that the at-will presumption is the predominant legal rule in the US (VanderVelde 2020). Following publication of Wood's treatise, more courts began adopting the rule (Beermann and Singer 1988; VanderVelde 2020). Where the rule is not codified, state judiciaries could eliminate it, since it was their creation; however, no state judiciary has done so.

For a time, however, state courts were willing to impose limits on the employer's at-will authority, mainly through two ways: the tort of wrongful discharge and the "implied-in-fact" contractual limitation.

Around the 1980s, most states began recognizing the employee claim of wrongful discharge in violation of public policy, where a termination was illegal if it undermined the state's ability to achieve an important public policy. Examples include terminations in retaliation for the employee exercising a legal right, fulfilling a legal duty, or refusing to violate the law. The scope of the exception varies across states, but normally it is illegal for the employer to terminate an employee for filing a workers compensation claim, assuming jury duty, or refusing to commit perjury on behalf of the employer.

[11] Montana abrogated the at-will rule via statute, and it is not the rule in Puerto Rico or the US Virgin Islands.

Further, in most states, courts have found that in some circumstances employees can hold employers to *implied* promises of job security, meaning a promise not expressed orally or in a written contract. Thus, in some situations, employees can enforce job security policies described by the employer in a handbook issued to all employees or a group of employees.[12]

This trend of recognizing tort or contract-based limits on the employer's right to terminate basically ended in the 1980s, and the implied-in-fact exception is less relevant today: many employers now include disclaimers in their written policies stating that the employment is at-will and that nothing in its policies should be interpreted as contractually binding. Courts find a clear, conspicuous disclaimer to be strong evidence against allowing the employee to enforce the policy.[13]

b. An Illustration

Courts have relied on the assumption of balanced power, sometimes expressed in the credo of freedom of contract, to justify decisions to keep the at-will rule, to circumscribe exceptions to the rule, and to otherwise give employers almost unlimited authority to terminate employees.

For instance, in ruling that the public policy exception did not protect a hospital employee who was terminated for reporting unsafe patient care, the Missouri Supreme Court stated that the at-will doctrine is "[r]ooted in freedom of contract and private property principles, designed to yield efficiencies across a broad range of industries." *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342, 346 (St. Ct. Mo. 2010) (internal citations omitted).

The court assumes that the employee's power is comparable to that of the employer, so that both realize "freedom of contract" and their arrangement produces an optimal allocation of social resources. The court's inaccurate allusion to the origins of the rule suggests the potency of the assumption. As noted, we cannot trace it to a deliberate design to achieve efficiency.

Courts suggest that the symmetry in the parties' formal rights reflects a symmetry in bargaining power. The presumption is merely the legal expression of balanced power:

> The employee usually feels free to leave and take another job if it presents a more desirable opportunity. Similarly, the employer generally feels free to discharge the employee if he no longer wants his services. The at-will presumption is simply a legal recognition of the parties' normal expectations. *Greene v. Oliver Realty, Inc.*, 363 Pa.Super. 534, 547 (1987).

2. Keeping Management Rights Unfettered

Within the balanced-power assumption are additional assumptions about the employee's bargaining power and labor markets, and courts rely on them to explain why the employer must have almost unlimited rights to terminate employees and to modify employment agreements unilaterally.

---

[12] For example, see Woolley v. Hoffmann–La Roche, Inc., 99 N.J. 284 (1985). In most of these states, however, courts permit employers to modify these policies unilaterally, including by rescinding job security assurances.

[13] This and the redirection of disputes from the courts to arbitration explains why many of the cases discussed below that rely on the balanced-power assumption are from the 1980s and 1990s, and also why they represent the definitive law on these issues despite their age.

a. The Power of Quitting

The case law tends to assume balanced power by assuming that employees can adequately protect their interests by quitting or threatening to quit. We see this assumption in legal rules regarding the employer's right to change the employment agreement unilaterally and to impose binding obligations on employees that outlast the agreement. Most states permit the employer to modify agreements to the disadvantage of its at-will employees through unilateral action. The employer can, on a prospective basis, lower wages, decrease benefits, impose a noncompete agreement, require arbitration, or retract promises of due process regarding disciplinary action. Because courts claim that at-will employment is a contract, formally the employee must assent to the change to make it enforceable. However, the law in most states deems that the employee assents by not quitting (Arnow-Richman 2016). The reasoning is that, because the at-will employee can walk away at any time without legal penalty, by not quitting the employee accepts the change voluntarily. Thus, where the employer introduces an arbitration agreement, the employee assents by turning up for work. This was the situation in *Epic Systems,* and explains how millions of US workers have lost their rights to go to court and pursue claims collectively.[14] Also, in most states, an arbitration agreement binds the employee even if the employer terminates the employee the next day.

b. Market Discipline

Another iteration of the balanced-power assumption is the argument that employees do not need legal protection from termination because the market disciplines employers for acting irrationally or treating employees badly. Employers must compete for employees, and labor is in such demand relative to its supply that employers will not terminate employees for arbitrary or undeserved reasons: "It is, of course, not economically feasible for an employer to frequently discharge employees for purposes unrelated to the betterment of his business," *Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199, 213 (1986), and "Employers pay a price if they get a reputation for tricky dealings with their employees. . . . Employees work under contracts of employment at will because they think it unlikely they will be fired as long as their work is satisfactory and the firm does not encounter rough weather." *Curtis 1000, Inc. v. Suess*, 24 F.3d 941 (7th Cir. 1994). Another court suggested that the at-will rule was not a legal rule at all, but instead just a legal expression for the rigorous market discipline under which employers operated: If an employer fails to maintain a good employee, "the penalty for any mistake will be paid in the market (because the [employer] will have a harder time recruiting a quality replacement, or will need to pay more to make up for the greater uncertainty) rather than in the courts." *Garcia v. Kankakee Cty. Hous. Auth.*, 279 F.3d 532, 536 (7th Cir. 2002). On this reasoning, some courts have found that an employer and employee who want to contract around the at-will default must articulate their intentions *more* clearly than parties who seek to contract around a default in other kinds of agreements. *Martin*, 354 Pa. Super. at 213. The possibility that an employer might terminate a well-performing employee because it could find someone else to perform the work for less, with fewer benefits, or under more onerous conditions does not enter the court's reasoning.

c. Changing the Rules Would Be Unfair to Employers

Another kind of argument based on the assumption that the employee can readily damage the employer by walking away is the argument that changing the status quo would give employees unfair economic and legal advantages. One court cites "simple fairness" as the reason for the at-

[14] The same applies to *non*-at-will employees if the employer promised the job security via a policy issued to multiple employees rather than through a contract with the individual employee.

will presumption, criticizing the notion that "it leaves the 'poor' employee without legal protection." *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534 (1987).

The court argues that, if the law instead presumed that employment contracts were for a certain duration or were otherwise not at will, employers would generally be unable to recover damages from employees who breach the agreement by quitting:

> Absent the presumption, the law is naturally prone to favour the interests of the employee. The presumption may make it slightly more difficult for the employee to recover if he brings an action. But this merely serves as a partial redress of the unfair situation which would otherwise occur. (Ibid., 549)

The court remarks, "The old adage that you can not get blood from a stone is particularly apt in this situation." Ibid.

For this situation to be *unfair*, it must be that the employer who loses an employee *needs* a legal remedy to a comparable extent as the employee who loses a job. The court is assuming that a worker can more readily leave the employer and find a new job than the employer can find a new employee. Under contract law, if an employer wants to sue an employee for quitting before the expiration of the agreement, the employer's damages will be limited to whatever loss the employer could not avoid by hiring a replacement. The court's argument in *Greene* assumes that an employer is generally unable, without difficulty, to hire someone to replace the employee who quit. Thus, for redress the employer must go to court to seek damages from the breaching employee. Since the employee is likely impecunious, however, the employer would be without real recourse under this non-at-will regime.[15]

3. The NLRA and Balanced-Power Assumption

The Supreme Court has not entirely disregarded the inequality of bargaining power between the employee and employer when interpreting the NLRA; however, it has overlooked where this inequality comes from, as illustrated by its opinion in *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974), holding that "managerial" employees were excluded from the NLRA. The majority adopts the rationale from the dissenting opinion in a case holding that foremen could unionize under the NLRA:

> The present decision . . . tends to obliterate the line between management and labor. . . . It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. . . . The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership. *Bell Aerospace*, 416 U.S. 267, 278 (quoting Justice Douglas' dissenting opinion in *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947)).

Bell Aerospace excludes managerial employees from the NLRA so as not to create (expose) fault lines of class conflict between those who produce and those who possess capital, something the majority deems Congress could not have intended. The majority assumes that the opposing interests of employees and employers come from occupying different strata in an organizational hierarchy rather than class position. While the precise legislative intentions behind the NLRA are beyond the scope of this paper, the majority's rationale ignores the preamble's conclusion that

[15] For another example, see Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561(1983) (J. Day, concurring).

workers needed the right to organize because of the imbalance of power between an individual and aggregated capital.

III. The Assumption of Managerial Prerogative

Courts also protect employer power on the assumption that the employer must have nearly full authority over the commercial enterprise to promote efficiency and prevent adverse economic consequences, both at the enterprise and macroeconomic levels. Courts appeal to managerial prerogative to carve out exceptions for employers from contract law and to limit worker rights under the NLRA. Legal rules and statutory interpretations assume or state that the employer's managerial prerogative must include the right to command nearly every aspect of the business, including hiring and firing, compensation and benefits, working conditions, investment decisions, product lines (what to produce), the labor process (how to produce it), and whom to do business with.

A core claim is that restricting managerial prerogative will harm the enterprise and economy by restricting the employer's flexibility to adapt to changing circumstances. The courts make several economic arguments based on this claim: Employers are better positioned than anyone else to perceive and respond rationally to market conditions. So confident are we in the employer's business judgment that we must not second-guess it and must sometimes defer to inscrutable and apparently irrational decisions. Contract law does not provide adequate protections for managerial prerogative; we cannot impose on employers the same rules we impose on other commercial parties. So critical is managerial prerogative that we must sometimes save employers from their own bargains. The costs of restricting managerial prerogative would be formidable and create chaos.

The courts' arguments about managerial prerogative are, above all, *policy* assumptions about how they think the economy works and, with respect to the NLRA, how they think Congress thought the economy worked. The idea that an employer-as-business entity "owns" the enterprise as a going concern and therefore has a near absolute right to command it has achieved taken-for-granted status in the law. However, courts have never been able to articulate a sound legal foundation for this proposition, including through property rights (Atleson 1983; Racabi 2022). In cases of statutory interpretation, particularly NLRA cases, the Supreme Court has suggested that deferring to managerial prerogative is consistent with legislative intent, on the assumption that the legislature could not have meant to intrude upon the powers that companies claim for themselves.

A. Contract Law Exceptions

The assumption of managerial prerogative is so tenacious that courts have created exceptions within contract law for employers, sometimes without any pretence that they are conferring advantages on employers unavailable to parties in other commercial agreements.

1. Termination Authority

The court's preservation of the at-will rule relies on the assumption of managerial prerogative. As illustrated in Part II, some courts defend the employer's at-will presumption based on freedom of contract. However, the at-will presumption is unique in contract law and hard to reconcile with it. Courts do not presume that any other kind of contract is at will, and it is hard to find another at-will agreement that courts will recognize as a contract—at a minimum, courts generally require a term providing for notice before termination (Tomassetti 2021).

The peculiar status of the at-will rule within contract law makes managerial prerogative an important source of its legitimacy. Courts contend that the employer's prerogative over hiring and firing must be near absolute, because a "variety of unforeseen business and economic conditions that can and do arise, require the ability to adapt to prospective needs." *Woolley v. Hoffmann–La Roche, Inc.,* 99 N.J. 284, 491 n. 8 (1985). Another court notes:

> . . . an employer is free to run his business as he sees fit. In a day-and-age when government regulation tends to act as an impediment to free enterprise, stifling initiative in the private sector, courts must be mindful to remember that freedom of contract still reins [sic]: absent contractual restrictions or federal or state laws [that] restrict management prerogatives, an employee serves at the whim of the employer. *Bass v. M & S Music Co.*, No. 78-556, 1979 WL 1969, at *4 (S.D. Ala. Oct. 12, 1979) (internal citation omitted).

The assumption is so taken for granted that courts have wrongly attributed its origin to rational, "policy" reasons. Thus, a court provides that the at-will rule "reflects the nation's historical policy favoring rapid industrial development." *Riquelme v. Comcast Cellular Commc'ns, Inc.,* 1994 WL 273415, at *4 (D. N.J. June 14, 1994).

Courts also turn to the necessity of managerial prerogative to explain why employers are not required to exercise their termination authority in good faith. Despite its peculiarity, courts claim that at-will employment is a contract, but that designation would subject employers to a duty of good faith in making termination decisions. Contract law implies a duty of good faith into every contract, and parties cannot contract out of it. However, when it comes to at-will employment, courts in every state except Montana reject this idea. The employer may act dishonestly, irrationally, and opportunistically in terminating at-will employees. Courts have invoked the assumption of managerial prerogative to explain their position, for instance, arguing that it is "unnecessary and unwarranted for the courts to become arbiters of any termination that may have a tinge of bad faith attached. Imposing a good faith duty to terminate would unduly restrict an employer's discretion in managing the work force." *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 569 (1983).

2. Revoking Promises and Protecting Employers from Bargaining Away Their Prerogatives

Courts also appeal to managerial prerogative to give the employer a right to modify the terms of an employment agreement without meeting the ordinary requirements of contract law. While the courts provide the most flexibility to employers with respect to at-will employees, in most states they also permit employers to revoke promises to non-at-will employees if the employer made the promise via personnel policies.

For instance, in *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000), the California Supreme Court permitted an employer to unilaterally, on notice, deem non-at-will employees to be at-will employees. Pacific Bell had made a written promise to managerial employees that it would not terminate them unless the company ran into certain business difficulties. Years later, however, the employer terminated the employees despite conceding that the contractual condition permitting it to terminate them had not occurred. The court did not dispute that the employer's promise was contractually binding, and the company did not dispute that the promise was clear. Under these circumstances, the court should have enforced it or required the employer to follow the usual requirements to negotiate the managers' departure. Instead, it decided that, because the job security policy for the managers could last an indefinite time, it would be unreasonable to hold the employer to it. Without citing any case law, the court created a new rule for employers allowing them to rescind job security

promises upon notice after the policy has been in place for some time. The court remarked that to rule otherwise would be "leaving the employer unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles." 23 Cal. 4th 1 at 13.[16] *Asmus* illustrates the tendency of some courts to save an employer from what the court sees as an imprudent limitation on its prerogative.

Other courts have likewise used dramatic language to describe the consequences of requiring employers to abide by job security policies or otherwise follow the usual requirements for modifying contracts. One case finds, "It would be unreasonable to think that an employer intended to be permanently bound by promises in a handbook, leaving it unable to respond flexibly to changing conditions." *Ferrera v. Nielsen*, 799 P.2d 458, 460 (Colo. App. 1990). The Michigan Supreme Court ruled that employers could unilaterally transform non-at-will employees into at-will employees by amending its policies, because otherwise, "many employers would be tied to anachronistic policies in perpetuity. . . ."[17] *In re* Certified Question, 432 Mich. 438, 456 (1989). And, while finding in favor of a furloughed employee, a court still sympathizes with the employer's concern about being "shackled with a workforce it is unable to reduce without fear of wrongful discharge litigation. . . ." *Brooks v. Trans World Airlines, Inc.*, 574 F.Supp. 805, 810 (D.Colo.1983).

Sometimes courts find that employers should not be expected to abide by job security policies because, if the employer were to create new policies from time to time, this could leave an employer with different agreements in place for different employees. The administrative costs of keeping track of different agreements would be too high. One court explained that such a situation would "create chaos for employers who would have different contracts of employment for different employees. . . ." *Bedow v. Valley Nat'l Bank*, 5 IER Cases 1678, 1680 (D. Ariz. 1988). This position seems to assume that keeping track of the policies in place for different employee cohorts is a logistical challenge beyond others inherent in managing an enterprise (like managing relationships with suppliers, customers, investors, etc.).

3. Interpreting Contractual Limitations on At-Will Authority

The case law on interpreting cause limitations on employer termination rights also assumes the necessity of managerial prerogative.[18] Courts generally divide for-cause terminations into two types: (1) terminations allegedly based on the individual employee's conduct, for instance, where the termination is allegedly based on the employee's poor performance or misconduct; and (2) terminations unrelated to the employee's conduct and based on "economic decisions." In both situations, courts protect the employer's prerogative in a somewhat anomalous manner from the perspective of contract law.

a. Employee Conduct

In contractual terms, where the cause for termination is related to the employee's conduct, the employer is essentially saying that the employee breached the employment agreement or failed to fulfil contractual obligations. An employee who disputes the termination on the basis that the

[16] Normally, how one enters a contract does not determine how one may get out of it. Despite its doctrinal incoherence, however, *Asmus* provides more protections for employees than courts that never enforce employer policies or courts that do not require employers to provide notice or wait some period before making unilateral modifications.

[17] For another example, see Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 532 (1991), noting the "traditional reluctance of courts to interfere with management decisions and the needed flexibility of businesses to change their policies to respond to changing economic circumstances."

[18] Note that the vast majority of US employees are at will; they have no for-cause limits on their termination.

conduct did not warrant termination is essentially claiming that the employer breached the agreement by terminating the employee without cause.

Courts have interpreted cause limitations to extend the employer's managerial prerogative to what is normally the prerogative of a judge or jury. Normally, under contract law it does not matter whether a party *believes* it fulfilled its contractual duties if the party did *not* fulfil them, even if the party's belief was reasonable. Likewise, it does not matter whether a party breaches its obligations intentionally, carelessly, or even after exercising all reasonable precautions to avoid breaching them. For instance, "a defaulting borrower's good faith belief he or she has repaid a loan is not a defense to a lender's claim for payment." *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93, 102 (1998) (internal citation omitted). Also under contract law, the trier of fact (a judge or jury) determines whether the party breached the contract. In employment disputes, however, several courts allow the employer to avoid liability for terminating an employee without cause by showing that it had reasonable grounds to *believe* it had cause. The California Supreme Court has ruled that employers have a "fact-finding prerogative," one they do not automatically "relinquish . . ." when agreeing to a for-cause limitation. Ibid. (quoting *Simpson v. Western Graphics Corp.,* 293 Or. 96, 100-101 (1982)). Courts have suggested that this fact-finding prerogative is accessory to the employer's at-will authority, since a right to terminate at will is a right to terminate regardless of "facts." *Towson University v. Conte*, 384 Md. 68 (2004). It is unclear, however, why the employer retains this accessory after it has expressly contracted away some of its at-will authority.

What seems to drive the courts' conclusions is the assumption that only employers have been inducted to the arcana of the market and only they can be trusted to respond to its mysterious tides for the benefit of the enterprise and economy. The California Supreme Court relies on this assumption to rationalize departing from the normal position of contract law and displacing the jury's role as a "fact-finding board":

> [A]llowing a jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of "good cause" for discharge, made in good faith and in pursuit of legitimate business objectives, is a highly undesirable prospect. . . . In effect, such a system would create the equivalent of a preeminent fact-finding board unconnected to the challenged employer. . . . This ex officio "fact-finding board," unattuned to the practical aspects of employee suitability over which it would exercise consummate power, and unexposed to the entrepreneurial risks that form a significant basis of every state's economy, would be empowered to impose substantial monetary consequences on employers whose employee termination decisions are found wanting. *Cotran*, 17 Cal. 4th at 104 (quoting *Southwest Gas v. Vargas*, 111 Nev. 1064, 1075 (1995)).

The majority extends the employer's "broad latitude" over personnel decisions to being "factually incorrect," a prerogative not enjoyed by other contractual parties. Ibid. at 101 (internal citation omitted).

b. Economic Decisions

Where the employer argues that it terminated an employee for an "economic" reason, such as a layoff or business reorganization, this reason satisfies a for-cause limitation on its termination authority.[19] *Taylor v. Nat'l Life Ins. Co.*, 161 Vt. 457, 466 (1993). The employer has "complete

[19] Statutory law in Montana, the only state not recognizing at-will employment, also deems that "good cause" for termination includes "disruption of the employer's operation, or other legitimate business reason." Mont. Code Ann. §39-2-903(5).

discretion" when discharging employees for economic reasons. *Friske v. Jasinski Builders, Inc.*, 156 Mich. App. 468, 472 (1986). Unlike the situation where the employer alleges that the decision is based on the employee's conduct, here the employer need not establish that it had reasonable grounds to believe the decision was justified.

As noted, normally a party has cause for terminating a contract where the other party breached the agreement, meaning the party failed to do what it promised. *Parker v. Diamond Crystal Salt Co.*, 683 F. Supp. 168, 173 (W.D. Mich. 1988). Alternatively, to be excused from its contractual obligations the party needs to show that some exception applies, such as "frustration" or "impracticability." These doctrines relieve a party from its contractual duties where unforeseen circumstances make their performance impossible, pointless, or exorbitant, and where the contract does not itself allocate the risk of these circumstances coming to pass.[20]

Where the employer has an economic reason for the termination, courts treat the for-cause term differently. In these cases, nobody disputes that the employee performed the contract adequately; however, the court permits the employer to terminate the employee without liability, without requiring the employer to demonstrate one of these contractual exceptions.

Courts appeal to managerial prerogative to explain why. Their findings regarding what an employer and employee must have intended in agreeing to a for-cause limitation reflect the policy assumption that the economy works better where employers have near plenary flexibility in managing the enterprise. For instance, the Vermont Supreme Court argued:

> . . . "history is replete with examples of technological and business innovations which have created new markets and destroyed old ones, thereby necessitating changes and shifts in the work force." Attempting to second-guess these shifts would be self-defeating as well as an inappropriate interference in managerial discretion. *Taylor*, 161 Vt. at 467 (internal citations omitted).

Another court dramatizes the situation: "To hold otherwise would impose an unworkable economic burden upon employers to stay in business to the point of bankruptcy in order to satisfy employment contracts and related agreements terminable only for good or sufficient cause." *Friske*, 156 Mich.App. at 472.[21]

Above, we see courts treating employers differently than other parties to commercial contracts and justifying this disparate treatment based on the assumption of managerial prerogative. While addressing different issues, the cases share several motifs: The courts use speculative, overwrought language to describe the consequences of limiting managerial prerogative. They assume that the costs to the economy and employers of retaining employees under job security policies or for-cause provisions are formidably high and outweigh the costs of job losses. They assume that the employer's interest in flexibility, and the contribution of this flexibility to economic dynamism, outweigh the economic benefits of job security. Unlike in the case of other commercial parties who may have sound reasons for wanting out of their agreements, the courts do not require employers to renegotiate with the other party, to show that a contractual exception relieves them from their promises, or to pay damages.

---

[20] Restatement (Second) of Contracts §§261-64 (1981). An example of a contract becoming impracticable would be where someone books a concert hall to host performances, but the concert hall burns down before the performances take place. Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863).

[21] See *Parker*, 683 F. Supp. at 173 for a similar sentiment.

B. *Statutory Protections: The NLRA*

Several areas of NLRA law are based on Supreme Court interpretations that argue the necessity of managerial prerogative. The court often suggests that these interpretations are required by or at least consistent with legislative intent. This article does not take a position in the debate on the congressional intent behind certain NLRA provisions. The point is that, whether as a result of legislative intent or the Supreme Court's independent appraisal, the assumption drives much of labor law. The following discusses three areas of NLRA law where the Supreme Court has defended the necessity of managerial prerogative: (1) reserved authority, (2) mandatory bargaining subjects, and (3) interference and discrimination.

1. Reserved Authority

Arbitrators often treat the employer as possessing "reserved authority," meaning that the employer legally has default authority over the enterprise, even in the absence of contracting for such authority. Arbitrators assume that the employer "reserved" whatever prerogative the employer did not specifically contract away (Young 1963) and thus may take unilateral action in these domains without running afoul of the agreement. For instance, a text on how arbitrators should interpret collective bargaining agreements provides:

> It has been said that, unless restricted by contract, management has the right "to determine what is to be produced, when it is to be produced, and how it is to be produced." Again, unless restricted by the agreement, management has the right to determine what work shall be done; to determine what kinds of services and business activity to engage in; and to determine the techniques, tools, and equipment by which work on its behalf shall be performed. (Elkouri and Elkouri 2003, 664)

The idea of reserved authority sits uncomfortably with the notion that employment is a contract. In a contract, the parties' duties toward one another are for the parties to determine and exist only by virtue of the parties' agreement. This distinguishes a contract from a status relationship, where some external authority, like the state or custom, determines the existence and content of a social relationship. (Examples of status or quasi-status relationships include the obligations of parents to their minor children and the relationship between the military and a drafted soldier). The above excerpt on arbitration suggests that, even before entering an agreement, the employer has certain rights over the employee that it can bargain away if it pleases. This does not sound contractual. In fact, the National Labor Relations Board, the agency responsible for enforcing the NLRA, has ruled that employers cannot rely on "basic management prerogative" to make unilateral changes to the employment agreement where the employer did not secure a contractual provision allowing it this authority. *Columbian Chemicals Co.*, 307 N.L.R.B. 592 (1992).

2. Mandatory Bargaining Subjects

The Supreme Court has legitimated the employer's managerial prerogative with respect to the subjects over which the employer must bargain with a union. The NLRA provides that the employer must bargain with its employees' duly chosen representative "in good faith with respect to wages, hours, and other terms and conditions of employment." NLRA §8(d). If the employer refuses to bargain over these subjects, or makes a unilateral change regarding one of these subjects without bargaining, it breaches its duty under the NLRA.[22] Further, a union may deploy what

[22] NLRA §8(a)(5) (making it an unfair labor practice "to refuse to bargain collectively with the representatives of his employees").

economic leverage it can in negotiations over these subjects, and the employer likewise violates the NLRA if it retaliates against employees for exerting this pressure. For instance, the employer cannot terminate employees who strike to improve their leverage at the bargaining table with respect to these issues.[23] Thus, the NLRA expressly subjects employer prerogative to negotiation with the employees' union.

Nonetheless, the Supreme Court has ruled that some decisions are too much a matter of managerial prerogative to subject to negotiation, even if they significantly impact employment. In *First National Maintenance Corp. v. N.L.R.B. (FNM)*, 452 U.S. 666 (1981), the majority held that a building services company did not have to bargain over its decision to cancel its maintenance contract with a nursing home over a fee dispute and terminate the employees who worked on the contract. Ibid. at 679. The majority ruled that, "in view of an employer's need for unencumbered decisionmaking in the conduct of its business," the employer must bargain where the "benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." Ibid. The employer "must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." Ibid. at 678-79.

The *FNM* test assumes that the employer alone is capable of rationally assessing commercial conditions, requiring flexibility in managing the enterprise. The benefit for labor-management relations appears as a distinct objective (on the other side of the balance) and a "burden" on the "conduct of the business." Employee interests in job security do not appear in the balance at all.

Applying the test to the facts in *FNM*, the Court found that the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." Ibid. at 667. The most that the union could hope to achieve through bargaining was to "delay or halt the closing." Ibid. at 681. The Court dismissed the idea that bargaining could "augment [the] flow of information and suggestions" regarding alternatives, noting that the "employer also may have no feasible alternative to the closing. . . ." Ibid. at 683.

In sum, the majority assumed that the employees could not contribute anything helpful in managing the enterprise, an assumption that, as the dissent points out, is speculative at best. As the experience with codetermination shows (see Jäger, Noy, and Schoefer in this issue), allowing worker input into these decisions does not necessarily lead to adverse economic outcomes.

The Court distinguished *FNM* from *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964), where it ruled that an employer was required to bargain over a decision to outsource work. The court noted that the *Fibreboard* employer had not sought to alter its "basic operation" but simply to replace unionized employees with subcontracted workers who would produce the same services for less. Although *FNM* did not clearly articulate the distinction, Harper (1982) notes that one could differentiate *Fibreboard* and *FNM* on the principle that decisions about *what* to produce and market should be determined by consumer demand rather than employer-employee bargaining. This interpretation makes sense—the *FNM* majority suggested that its decision turned on characterizing the termination as an "economically motivated decision to shut down part of a business," i.e., to cease to offer certain services for sale. *FNM*, 452 U.S. at 677.[24] As explored below, Harper's insight is also consistent with NLRA jurisprudence suggesting that managerial

[23] Employers may, however, "permanently replace" employees who strike for this purpose. N.L.R.B. v. Mackay Radio & Telegraph, 304 U.S. 333 (1938).

[24] If the nursing home rather than FNM had cancelled the contract, the terminations would look less like the consequence of an entrepreneurial decision and more like a redundancy layoff due to a business downturn.

prerogative is most out of reach of the NLRA when dealing with decisions about allocating capital between employment and other uses.

3. Anti-Union Interference and Discrimination

Section 8(a)(1) of the NLRA makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." In Supreme Court jurisprudence, managerial prerogative defines the limits of this prohibition. Many employer activities that prima facie would seem to interfere with, restrain, or coerce employees with respect to their associational and organizational rights are not considered to be violations of 8(a)(1). For instance, the Supreme Court ruled in *N.L.R.B. v. Mackay Radio & Telegraph* that employers could hire permanent replacements for striking employees without violating the NLRA, based on the assumption, for which it did not offer analysis or evidence, that the employer had the "right to protect and continue his business," 304 U.S. 333, 345 (1938), outweighing any interest in resolving the conflict with its employees.

Likewise, if the employer decides to close its business or part of its business in response to a union drive, this is generally not a violation of the NLRA. The exception is where a closing is discriminatory under Section 8(a)(3), requiring proof that the employer's motive was to discourage its other workers from unionizing (for instance, at other establishments the employer owns). *Textile Union Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). As in the case where courts interpret contractual limits on an employer's termination authority, the commercial rationality of the employer's decision is not subject to scrutiny, because, "some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of §8(a)(1), whether or not they involved sound business judgment unless they also violated §8(a)(3)." Ibid. at 269.

While Section 8(a)(3) prohibits some employer decisions that Section 8(a)(1) would permit, the case law on Section 8(a)(3) is also limited by the assumption of managerial prerogative. Section 8(a)(3) of the NLRA prohibits employers from discriminating against workers with respect to their employment "to encourage or discourage membership in any labor organization." To find a violation of this section, courts generally require proof of employer motive, and they distinguish between a motive to discourage union activity for its own sake and a motive to pursue "economic" interests. For example, without showing some form of anti-union animus, it is generally not a violation of Section 8(a)(3) for the employer to close a plant or shift capital to nonunionized plants, even where the employer does so because of the higher labor costs accompanying unionization. *N.L.R.B. v. Adkins Transfer Co.*, 226 F.2d 324 (6th Cir. 1955). Where the employer claims it is acting in its economic interests, it is hard to prove discrimination (Estlund 1992). Further, in *Textile Workers Union of America v. Darlington Manufacturing*, 380 U.S. 263, the Supreme Court ruled that an employer may go out of business entirely even if its only motive is to discourage union activity. Making a conspicuous showing of "runaway capital" is within the employer's managerial prerogative.

In another line of Section 8(a)(1) decisions, the Supreme Court limited employee rights to receive, on employer property, information from union organizers, on the basis of the employer's right to control access to its property. Under *Lechmere v. N.L.R.B.*, 502 U.S. 527 (1992), an employer may usually prohibit union organizers who are not its own employees from entering the employer's property to provide information to its employees. The exception is the "rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,'" ibid. (internal citation omitted), such as a remote mining camp where employees reside on the premises. The court acknowledged that the

employees had a Section 7 right to learn about the advantages of unionization.[25] Nonetheless, it framed the issue as one about the rights of "non-employee union organizers," which it held had only derivative Section 7 rights.

In this line of cases, the court distinguishes between the rights of the employer's own employees and the rights of others: where the alleged interference with Section 7 rights involves the employer's own employees, the court has found that the employer's prerogative is limited by its interest in workplace "discipline." *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798 (1945). This means that some employer decisions, like implementing nonsolicitation policies that apply to its employees even during nonworking times, are presumptively violations of Section 8(a)(1). In cases involving union organizers, however, the court views managerial prerogative as more absolute—it issues not from the employer's interest in "discipline," or in running a productive establishment, but from "property" rights. *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992). As in *FNM* and *Darlington*, where the employer *qua* capital owner indicates it wants more license in the use of its capital than that necessary to manage a workforce, the court's solicitude toward managerial prerogative likewise seems to expand.

IV. The Status Quo Assumption

Even where courts are not convinced that employers must have broad managerial prerogative to promote efficiency or that the employee and employer enjoy relatively equal bargaining power, they tend to assume that the costs of disrupting the status quo outweigh the costs of maintaining it. The core claim is that altering the status quo of expansive managerial prerogative will destabilize the economy.

Courts frame this claim as a "judicial abstention" argument—that the courts should abstain from intervening in complex policy issues and leave these to the legislature to resolve. A New York court ruling to preserve the at-will rule argued, "We have noted that significant alteration of employment relationships, such as the plaintiff urges, is best left to the Legislature . . . because stability and predictability in contractual affairs is a highly desirable jurisprudential value." *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 336 (1987) (internal citation omitted). Criticizing the trend among states to recognize a public policy exception to the employer's at-will authority, a Pennsylvania court fretted:

> The at-will presumption, the citadel that once governed the field with such predictability, has been eroded of late by piecemeal attacks on both the contract and tort fronts and the entire field seems precariously perched on the brink of change. . . . Pennsylvania has thus far escaped the widescale turbulence so common to the field and still clings to the at-will presumption. . . . [W]e believe that if terminable at-will contracts are to be forbidden, the judicial process may be an inappropriate forum for such sweeping policy change." *Martin v. Cap. Cities Media, Inc.*, 354 Pa. Super. 199, 208 (1986).

In limiting terminated employees to contract remedies (rather than more generous tort remedies) for certain unlawful terminations, the California Supreme Court cited the need for "commercial stability," arguing that to rule otherwise "has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs," issues "arguably …

[25] Also, the NLRA states that it covers "any employee, and shall not be limited to the employees of a particular employer."

better suited for legislative decisionmaking." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 694 (1988).[26]

V. Conclusion

While the above survey illustrates that the assumptions of balanced power and managerial prerogative in the case law are pervasive, their hold is not absolute. There have been, and are, countertrends:

- In establishing exceptions to the employer's at-will authority for implied-in-fact contracts and discharges in violation of public policy, many courts recognized that the employee's freedom to quit was not equivalent to the employer's freedom to terminate, noting, for instance, that "this 'freedom' of the employee is largely illusory," *Berube*, 771 P.2d at 1045, or "assures equality to the employee as does the law which forbids the rich as well as the poor to sleep under bridges." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 221-222 (1985); see also *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311 (1981).

- Some courts rejected the alarm sounded by employers about enforcing job security policies, suggesting employers "may benefit from the increased loyalty and productivity that such agreements may inspire." *Foley*, 47 Cal.3d. at 681. Others criticized the origin myth that at-will employment sprung from the head of freedom of contract. *Woolley v. Hoffmann–La Roche, Inc.*, 99 N.J. 284 (1985).

- Much FLSA jurisprudence on waivers and settlements also rejects the balanced-power assumption. The Supreme Court has held that employees cannot waive their rights to liquidated damages under FLSA, Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), and many courts review proposed out-of-court settlements of FLSA claims to ensure that they are reasonable and fair to employees in light of the "often great inequalities in bargaining power between employers and employees." *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1307 (11th Cir. 2013) (quoting *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352 (11th Cir. 1982).

- Courts sometimes strike down arbitration and noncompete agreements applicable to employees under the doctrine of unconscionability, on the basis that provisions are too unfair and too much a product of unequal power to be enforced.

- Dissenting opinions in the Supreme Court's decisions on dispute resolution also reject the assumption of balanced power. Justice Ginsburg's dissent in *Epic Systems* observed that by permitting employers to force employees to resolve employment-related disputes as individuals, the majority "ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them." 138 S. Ct. 1612, 1640 (2018).[27]

- In deciding whether certain individuals are employees entitled to statutory protections or independent contractors excluded from these protections, some courts (but not all) ground

---

[26] See also the concurrences in Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 532 (1991) and Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1052 (Utah 1989).

[27] See also the dissenting opinions of Justice Stevens in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) and Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

their analysis on the underlying legislative premise that workers require protection due to their inferior bargaining power.[28]

- Despite many NLRA decisions deferring to managerial prerogative, the Supreme Court has recognized that the NLRA sanctions some broad encroachments on managerial prerogative, including employee rights to protect themselves via collective action on employer property even when no union formation is contemplated. *N.L.R.B. v. Washington Aluminum Co*., 370 U.S. 9 (1962).

Nonetheless, while not unqualified, this article shows that many rules and statutory interpretations in US work law rely on the assumptions that the employee and employer have relatively equal bargaining power, that employers must have near plenary control over the enterprise for the sake of efficiency, and that the costs of disrupting the status quo of expansive employer prerogative would be greater than that of maintaining it. These unproven assumptions underlie decisions that protect employer power over workers and deprive workers of economic security and autonomy. The decisions give employers broad rights to terminate employees, to force workers to arbitrate disputes as individuals, to renege on assurances of job security, to otherwise modify the terms of employment unilaterally, and to undermine workers' collective rights.

Behind the main assumptions and the economic claims that depend on them are additional ones that courts generally leave unarticulated—assumptions about information, rationality, externalities, organizational dynamics, and competitive strategies. For example, the claim that markets discipline employers not to mistreat employees assumes that employers seek to maximize profits through long-term, product market competition and not low-wage competition or short-term financial strategies like stock price inflation. The claim that requiring employers to abide by job security commitments would impose fearsome costs on the employer and economy assumes that the costs of the current regime are less economically destructive. It also assumes that the costs of job security policies to employers outweigh their potential benefits in the form of employee productivity, initiative, loyalty, and morale. The claim that only legislatures should alter the judge-made rules protecting managerial prerogative so as not to destabilize the economy assumes away the instability that workers face under the status quo—one characterized by unemployment, dependence on the employer for one's livelihood, and limited opportunities to make a living outside of labor markets.

By showing how much of US work law rests on unproven assumptions about how the economy works, this paper sets the stage for the companion papers in this issue. In these papers, social scientists interrogate the veracity of these assumptions, hopefully informing future court rulings and policy changes.

REFERENCES

Arnow-Richman, Rachel. 2016. "Modifying At-Will Employment Contracts." 57 *Boston College Law Review* 427.

Atleson, James B. 1983. *Values and Assumptions in American Labor Law*. University of Massachusetts Press.

[28] For example, see the California Supreme Court's decision, Dynamex Operations W. v. Superior Ct., 416 P.3d 1 (Cal. 2018), which the legislature has since codified.

Bagenstos, Samuel R. 2020. "Lochner Lives on: Lochner Presumption of Equal Power Lives in Labor Law and Undermines Constitutional, Statutory, and Common Law Workplace Protections." Economic Policy Institute, October 7, 2020. https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections.

Beermann, Jack M., and Joseph William Singer. 1988. "Baseline Questions in Legal Reasoning: The Example of Property in Jobs." 23 *Georgia Law Review* 911.

Cobble, Dorothy Sue. 2010. "The Intellectual Origins of an Institutional Revolution." 26 *ABA Journal of Labor & Employment Law* 201.

Colvin, Alexander 2017. "The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers." Economic Policy Institute, September 17, 2017. https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration.

Elkouri, Frank, and Edna Asper Elkouri. 2003. *How Arbitration Works*. Sixth edition. Bureau of National Affairs.

Estlund, Cynthia L. 1992. "Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act." 71 *Texas Law Review* 921.

Gross, James A. 1974. *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, Vol. 1, 1933-1937*. State University of New York Press.

Harper, Michael C. 1982. "Leveling the Road from *Borg-Warner* to *First National Maintenance*: The Scope of Mandatory Bargaining." 68 *Virginia Law Review* 1447.

Racabi, Gali. 2022. "Abolish the Employer Prerogative, Unleash Work Law." 43 *Berkeley Journal of Labor and Employment* Law 79.

Shierholz, Heidi. 2022. "Testimony before the House Committee on Economic Disparity and Fairness in Growth for a Hearing on the Impact of Corporate Power on Workers and Consumers," US House of Representatives, April 6, 2022.

Tomassetti, Julia. 2021. "Power in the Employment Relationship: Why Contract Law Should Not Govern At-Will Employment." Economic Policy Institute, November 29, 2020. https://www.epi.org/unequalpower/publications/the-legal-understanding-and-treatment-of-an-employment-relationship-versus-a-contract.

VanderVelde, Lea. 2020. "The Anti-Republican Origins of the At-Will Doctrine." 60 *American Journal of Legal History* 397.

Young, Stanley. 1963. "The Question of Managerial Prerogatives." 16 *ILR Review* 240.