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## Protecting Workers as a Matter Principle: A Latin American View of U.S. Work Law

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## PROTECTING WORKERS AS A MATTER PRINCIPLE: A LATIN AMERICAN VIEW OF U.S. WORK LAW<sup>†</sup>

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### ABSTRACT

*Scholars have noted that judicial conservatism has eroded labor and employment law (hereinafter referred to as “work law”) in the U.S. and elsewhere. The Roberts Court has maintained, and perhaps augmented, the Court’s conservative outlook, deciding a number of key work law cases in favor of employers. Moreover, the pro-employer judicial hue over recent work law cases comes on the heels of recent legal scholarship calling for a rethinking of the “idea of labor law,” the demise of the standard employment contract, and a surge in precarious jobs. Work law, which has always been under attack, has had better days in the U.S.; however, work law has experienced a rebirth in Latin America after years*

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<sup>†</sup> Authors are listed in alphabetical order. This Article has benefited from comments made at a seminar in Stockholm University’s Institute for Social Private Law (Nov. 2012), the Law and Society Annual Meetings (Boston, June 2013), the Labor Law Research Network’s First Meeting (Barcelona, June 2013), the 8th Annual Labor & Employment Law Colloquium held at the University of Las Vegas (Las Vegas, Sept. 2013), the LatCrit Annual Meetings (Chicago, Oct. 2013), the faculty workshop of the University of Minnesota Law School (Minneapolis, Oct. 2013), and the Chicago-Kent research slam (Chicago, Nov. 2013). The authors want to especially thank Pablo Arellano, Stephen F. Befort, Carol L. Chomsky, Howard Eglit, Henrique Hinz, Martin H. Malin, Jonathan Miller, Juan Pablo Mugnolo, Ann Numhauser-Henning, Marco Sepúlveda, Silvana Sciarra, Carolyn Shapiro, Patricia Spiwak, Joan Steinman, Marly Weiss, Barbara Welke, and Rebecca E. Zietlow. The authors also thank Laura Caringella, Patrick Ferrell, and Meron Kebede for editorial assistance. Any errors or omissions are solely the responsibility of the authors.

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*of neoliberalism and authoritarian rule. There may be lessons that can be drawn from the Latin American experience for the U.S. and other jurisdictions where work law has suffered setbacks.*

*One of the key institutionalized methodologies that has helped to reconstruct work law in Latin America has been the use of legal principles. This Article discusses the principle of protection, which is perhaps the central pillar of Latin American work law. Under this principle, one of work law's essential functions is to protect workers because they are "weaker parties" whose human dignity is at stake.*

*Jurists in Latin America operationalize the protective principle through the rule of in dubio pro operario, which essentially means that a judge or other adjudicator must rule in favor of the worker when confronted with hard cases. In dubio pro operario compels adjudicators to limit their discretion in a manner consistent with the protective principle.*

*After describing Latin American work law's protective principle, the authors turn to U.S. work law, namely scholarship, the Thirteenth Amendment of the U.S. Constitution, the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA) to explain how a Latin American labor judge would likely find and apply the protective principle in the U.S. The authors argue that a Latin American labor judge would first find a constitutional mandate to protect workers in the Thirteenth Amendment of the U.S. Constitution. The Thirteenth Amendment's ban against involuntary servitude stems from a larger constitutional goal of safeguarding human dignity. The protective principle also safeguards human dignity; therefore, the Latin American labor judge would feel compelled to interpret existing work law in a manner consistent with that constitutional mandate to safeguard human dignity. A Latin American labor judge would also recognize that the FLSA and the NLRA attempt to equalize bargaining power between workers and employers. Therefore, a labor judge would also find the protective principle in those two laws.*

*The authors further argue that Latin American labor jurists would recognize that a canon of statutory interpretation, such as in dubio pro operario, sometimes prevails in the U.S. under the common law maxim that "remedial statutes should be interpreted liberally." However, a Latin American jurist would recognize that work law deserves perhaps an even more "liberal" interpretation than other statutes because work law aims to safeguard human dignity and to equalize bargaining relationships—high-order goals which other statutes may not have.*

*The authors recognize that U.S. courts do not always interpret work law in the manner most favorable to the worker. Courts fail to protect*

workers because, among other reasons, common law judges are not trained to seek and understand the specific legal principles inherent in U.S. work law. Moreover, the unique American employment-at-will doctrine further weakens work law. Employment-at-will should be statutorily rescinded to provide a more clearly protective work law in the U.S.

The authors conclude by arguing that despite the legal-cultural differences between the U.S. and Latin America, a protective principle exists in the U.S.; however, it has been recognized in a spotty fashion by the courts.

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## INTRODUCTION

*“The Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must all concede that part of this egalitarianism in America has been more pretension than realized fact.”*

—Justice William J. Brennan, Jr.<sup>1</sup>

The Roberts Court<sup>2</sup> has asserted itself quite forcefully in recent labor and employment law (hereinafter referred to as “work law”)<sup>3</sup> cases. In one of its most controversial cases, *Wal-Mart v. Dukes*,<sup>4</sup> the Court struck down the largest sexual discrimination class action lawsuit in U.S. history when it decided that the plaintiffs’ alleged claims did not share sufficient “commonality” to survive class certification.<sup>5</sup> More recently, the Court increased the evidentiary threshold for employees to prove a retaliation claim under Title VII<sup>6</sup> and narrowed the concept of what is a “supervisor.”

1. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).

2. Refers to the Supreme Court of the United States since 2005, when John G. Roberts was appointed as Chief Justice of the Court. See The Supreme Court of the United States, available at <http://www.supremecourt.gov/about/biographies.aspx> (last visited on Mar. 21, 2014).

3. The term “work law,” “workplace law,” and the “the law of the workplace” have been increasingly adopted by American legal scholars who want to use a more encompassing term to refer to labor and employment law. See Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 166–67 (2007) (adopting the term “work law” to refer to labor and employment law); Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1026 (2010) (adopting the term “workplace law” to refer to labor and employment law); Cynthia Estlund, *Rebuilding the Law of The Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 320–21 (2005) (adopting the term “the law of the workplace” to refer to labor and employment law).

4. 131 S. Ct. 2541 (2011).

5. Commonality is the rule requiring a purported class to show that there are questions of law or fact common to the class. *Id.* at 2550–51 (internal citations omitted). The Supreme Court has specified that commonality requires that members of the purported plaintiff class suffered the same injury. *Id.* at 2551, citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982). In *Dukes*, Plaintiffs alleged that Wal-mart gave too much discretion to supervisors with gender biases, which affected the promotion of female employees in all of Wal-mart. However, the Court determined that plaintiffs could not specifically determine how gender bias “played a meaningful role in Wal-mart’s employment decisions.” Moreover, it noted that the firm had an anti-discrimination policy that covered all of its stores, curtailing the gender bias claim. *Id.* at 2553 (internal citations omitted). For a critique of the Court’s deference to company anti-discrimination policies, see Lauren Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AMER. J. OF SOCIOLOGY 888, 889 (2011).

6. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). In *Vance*, the Supreme Court’s majority ruled that employees who control the day-to-day activities of other employees would no longer be

making it more difficult for plaintiff-employees to prevail against employers and their agents.<sup>7</sup> Similarly, in *American Express v. Italian Colors*,<sup>8</sup> the Supreme Court validated class action waivers challenged by the plaintiffs even when the cost of individual arbitration for the plaintiffs exceeded the value of any potential remedy for the plaintiffs if they pursued individual claims through arbitration.<sup>9</sup> While *American Express* was concerned with commercial law and not a work law issue per se, experts have opined that the case could have a strong impact on the viability of employee waivers and could limit the capacity of workers to vindicate their rights.<sup>10</sup> Not only scholars, but also news outlets, such as

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classified as “supervisors” under Title VII, striking out existing Equal Employment Opportunity Office guidelines. As Justice Ruth Bader Ginsburg stated in her dissent:

The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of [prior Supreme Court decisions], ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces. I would follow the EEOC's Guidance and hold that the authority to direct an employee's daily activities establishes supervisory status under Title VII.

*Id.* at 2455. Justice Ginsburg also argued that Vance narrowed the concept of supervisor in relation to Supreme Court precedent. *Id.* Commentators have agreed with the dissenting Justice. See A. E. Dick Howard, *Ten Things the 2012–13 Term Tells Us About the Roberts Court*, 99 VA. L. REV. ONLINE 48, 53–54 (2013); Erwin Chemerinsky, *The Court Affects Each of Us*, 16 GREEN BAG 2d 361, 375 (2013) [hereinafter Chemerinsky, *The Court Affects Each of Us*].

7. Univ. of Tex. Sw. Med. Ctr v. Nassar, 133 S. Ct. 2517, 2533 (2013) (establishing a “but for” standard for retaliation claims under Title VII that is stricter than the “motivating factor” test generally required to prove discrimination claims under the same statute). See *Smith v. Xerox Corp.* 602 F.3d 320, 326 (5th Cir. 2010) (Fifth Circuit case abrogated by *Nassar*, which applied a motivating factor test). See also EEOC Comp. Man., Section 8: Retaliation § 8-16 (May 20, 1998) (emphasis added), available at <http://www.eeoc.gov/policy/docs/retal.html> (determining, prior to *Nassar*, that “[i]f there is credible direct evidence that retaliation was a motive for the challenged action, ‘cause’ should be found” for retaliation claims under Title VII. In her dissent of *Nassar*, Justice Ginsburg argued that the Court majority was narrowing the standard, making it more difficult for plaintiffs to prove retaliation. *Nassar*, 133 S. Ct. at 2535. In her view, retaliation was discrimination under Title VII. *Id.* at 2537, citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, (2006). The dissenting Justice argued that the standard to prove one or the other should be the same. *Id.* See also Chemerinsky, *The Court Affects Each of Us*, *supra* note 6, at 375.

8. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

9. *Id.* at 2312. See also *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (finding California law that invalidates class action waivers violates the Federal Arbitration Act).

10. See Carolyn Shapiro, *Arbitration Uber Alles in the Supreme Court*, IIT CHICAGO-KENT FACULTY BLOG (June 21, 2013), <http://blogs.kentlaw.iit.edu/faculty/2013/06/21/arbitration-uber-alles-in-the-supreme-court/>. Professor Harry Arthurs has also argued that work law is or should be part of a general law of “economic subordination and resistance” that protects economically subordinated groups. Harry W. Arthurs, *Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?*, 34 COMP. LAB. L. & POL’Y J. 585 (2013). Hence work law, consumer protection laws, and other laws that protect economically subordinated groups are linked.

*The New York Times*, have reported on what appears to be an especially pro-business bias in the Roberts Court.<sup>11</sup>

These recent judicial erosions of work law and other laws that protect economically subordinated groups are not new phenomena. Many scholars have previously denounced and lamented judicial inroads into work law that resulted in diminished worker protections.<sup>12</sup> For example the German-British scholar, Otto Kahn-Freund, advocated for government abstention from the workplace and the resolution of workplace problems through collective bargaining because judges systematically decided cases and controversies in favor of employers.<sup>13</sup>

11. Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013, available at [http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0) (citing Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013)); see also A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 80–81 (2013). “One way of posing the question about the Court and business is to ask how the United States Chamber of Commerce—an active participant on today’s legal scene—fared in the 2011–12 Term. The Chamber took a position in nine cases, and it was on the winning side of every case in which the Court addressed issues on which the Chamber had taken a position. Even more striking is the fact that, in every case in which the Chamber’s position diverged from that of the Solicitor General, the Court sided with the Chamber. Given the Solicitor General’s typically high success rate in the Court, this configuration is remarkable.” (internal citations omitted); Erwin Chemerinsky, *Justice for Big Business*, N.Y. TIMES, July 1, 2003, available at [http://www.nytimes.com/2013/07/02/opinion/justice-for-big-business.html?ref=opinion&\\_r=0](http://www.nytimes.com/2013/07/02/opinion/justice-for-big-business.html?ref=opinion&_r=0).

12. For the case of how courts have diminished worker protections in the NLRA, see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 291–92 (1977); JIM ATLESON, VALUES AND ASSUMPTIONS OF AMERICAN LABOR LAW Chapter 1 (1983); ELLEN DANNIN, TAKING BACK THE WORKERS’ LAW, HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 58–59 (2006); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003). For the case of how Title VII has been judicially revised from an “anti-subordination” statute aiming to remedy historical oppression of racial minorities and women to a mere anti-classification scheme where any individual can be protected regardless of the historical realities of subordination, see David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 657–59 (2000); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 102 (2010); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 412 (2012).

13. PAUL DAVIES AND MARK FREEDLAND, KAHN-FREUND’S LABOUR AND THE LAW 12–13 (3d ed. 1983); see also Alan Bogg and Keith Ewing, *A (Muted) Voice At Work? Collective Bargaining In The Supreme Court Of Canada*, 33 COMP. LAB. L. & POL’Y J. 379, 412–13 (2012) (“In one of Otto Kahn-Freund’s final published works he explored the potentials and the pitfalls of constitutionalizing labor rights. One possible effect of constitutionalization was that judges ‘and not the democratically elected legislatures . . . have the power to determine fundamental political policies. The scope of social legislation is a political question.’ Ultimately, Kahn-Freund took the view that the United Kingdom should not ‘imitate the experiment of entrusting the legal profession with this vast amount of power.’” (internal citations omitted)).

Moreover, the current pro-employer judicial hue in the U.S. over work law cases comes on the heels of legal scholarship calling for a rethinking of the “idea of labor law,”<sup>14</sup> lamenting the demise of the standard employment contract,<sup>15</sup> the upsurge in precarious jobs,<sup>16</sup> and the all but complete collapse of private sector union membership.<sup>17</sup> Work law, which seems perpetually destined to be on the defensive, has seen better days in the U.S.<sup>18</sup>

While work law seems to be in decline in the U.S., Latin America appears to be playing a different tune.<sup>19</sup> Seventy-five percent of developed

14. THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille, eds. 2011).

15. RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W. Stone & Harry Arthurs eds., 2013). *See also* DAVID WEIL, THE FISSURED WORKPLACE WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (describing how the quality of American jobs has deteriorated for most job seekers, why this trend has occurred, and policy suggestions to resolve the problem).

16. *See* Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIOLOGICAL REV. 1 (2009).

17. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 24, 2013, available at [http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?ref=stevengreenhouse&\\_r=0](http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?ref=stevengreenhouse&_r=0); For explanation of general downward trend, *see* Henry Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973–1998*, in THE FUTURE OF PRIVATE SECTOR UNIONS IN THE UNITED STATES 28 (James T. Bennett & Bruce E. Kaufman, eds., 2002).

18. The high point, if not golden era of U.S. work law were the 1950s–1970s, when the combination of work law and powerful unions provided for “wage structures, benefits, and work rules that rewarded long-term employment,” the main goal of modern work law. Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT, *supra* note 15, at 67. It was during this period that the standard contract of employment predominated in the U.S., or one characterized by “job security, longevity-based wages, employer-based health insurance, and employment-linked retirement security.” *Id.* The same period, or about the second third of the twentieth century, were also the better eras of European and Latin American labor law. *See* Niklas Bruun & Bob Hepple, *Economic Policy and Labour Law*, in THE TRANSFORMATION OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF 15 COUNTRIES 1945–2004 45 (Bob Hepple & Bruno Veneziani eds., 2009) (discussing how the 1980s marked a retreat for work law in Europe as a result of global crisis and the advent of market-friendly alternatives, or neoliberalism); Graciela Besunsán, *Labour Law in Latin America: The Gap Between Norms and Reality*, in LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES 137 (Tzehainesh Teklè, ed. 2010) (describing how Latin American countries enacted work law in the first half of the twentieth century but institutional supports for those laws, e.g., strong states, stable jobs for men without domestic responsibilities, strong unions, and wages protected from global competition unraveled in the 1980s as a result of the global crisis, dissolving much of the institutional base for effective work law in Latin America).

19. Graciela Besunsán, *Legislation and Labor Policy In Latin America: Crisis, Renovation, or Restoration?*, 34 COMP. LAB. L. & POL’Y J. 655 (2013) (Latin American work law provides for inclusive development, reduces poverty and inequality, and helped governments respond to the financial crisis of 2008–2009); César F. Rosado Marzán, *No More Solitude? Workers’ Conditions and Rights In Latin America During The Great Recession*, 17 EMP. RTS. & EMP. POL’Y J. 291 [hereinafter Rosado Marzán, *No More Solitude?*]; *See also* INT’L LABOUR ORG., WORLD OF WORK REPORT 2012: BETTER JOBS FOR A BETTER ECONOMY 39 (2012), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_179453.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_179453.pdf).



world economies relaxed labor protections during the economic crisis that ensued in 2008, whereas only half of Latin American countries did the same.<sup>20</sup> Moreover, to the extent that Latin American countries have relaxed workplace regulations, such changes have been very mild.<sup>21</sup> It is remarkable that Latin American countries have not massively relaxed labor protections because the region was a poster child for deregulation in 1990s.<sup>22</sup> Overall, the region has actually increased and strengthened labor protections since its return to democratic rule.<sup>23</sup> It has also been able to add fifty million individuals to the middle class, improve employment, and reduce poverty and child mortality.<sup>24</sup>

After decades of authoritarianism and neoliberal reform, scholars have had to revitalize legal principles.<sup>25</sup> The revitalizing scholars swam with the current because Latin American civil law institutions generally use legal principles.<sup>26</sup> In the civil law tradition, and contrary to common law

20. Rosado Marzán, *No More Solitude?*, *supra* note 19, at 296.

21. *Id.*

22. Tamara Lothian, *The Democratized Market Economy in Latin America (And Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L.J. 169, 175–76 (1995) (describing neoliberalism in Latin America). On deregulation in Latin America and its explanations, see generally MARÍA LORENA COOK, *THE POLITICS OF LABOR REFORM IN LATIN AMERICA, BETWEEN FLEXIBILITY AND RIGHTS* (2008); MARÍA VICTORIA MURILLO, *LABOR UNIONS, PARTISAN COALITIONS, AND MARKET REFORMS IN LATIN AMERICA* (2001).

23. On the current trend towards strengthening labor inspection systems in Latin America see Michael J. Piore & Andrew Schrank, *Toward a Managed Flexibility: The Revival of Labour Inspection in the Latin World*, 147 INT'L LAB. REV. 1, 23–25 (2008); Andrew Schrank & Michael Piore, *ECLAC/Mexico, Serie Estudios y Perspectivas: Norms, Regulations and Labor Standards in Central America* at 43–47, U.N. Doc. 77, U.N. Sales No. E.07.II.G.44 (2007) available at <http://www.cepal.org/publicaciones/xml/3/28113/Serie%2077.pdf>. For the case of Argentina, see Matthew Amengual, *Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina*, 67 IND. & LAB. REL. REV. 1 (forthcoming 2014). For the case of Brazil, see Roberto Pires, *Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil*, 147 INT'L LAB. REV. 199, 199–201 (2008). For the case of Chile, see César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (And What the United States can do to Help)*, 54 ST. LOUIS U. L.J. 497 (2010) [hereinafter Rosado Marzán, *Of Labor Inspectors and Judges*]; César F. Rosado Marzán, *Punishment and Work Law Compliance: Lessons from Chile*, 29 HOFSTRA LAB. & EMP. L.J. 343 (2012) [hereinafter Rosado Marzán, *Punishment and Work Law Compliance*]. For the case of the Dominican Republic, see Andrew Schrank, *Professionalization and Probity in the Patrimonial State: Labor Inspectors in the Dominican Republic*, 51 LATIN AM. POL. & SOC'Y. 91, 91 (2009).

24. Rosado Marzán, *No More Solitude?*, *supra* note 19, at 293–96.

25. See José Luis Ugarte Cataldo, *La Rehabilitación de los principios del derecho del trabajo y el concepto de derecho*, 1 REV. DER. LABORAL Y SEGURIDAD SOCIAL 31 (2013) [hereinafter Ugarte Cataldo, *La Rehabilitación de los principios del derecho del trabajo*] (explaining the need to reconstruct work law by interpreting, filling gaps, and resolving conflicts of laws with guiding principles).

26. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAWS: CASES AND MATERIALS* 288 (citing James F. Smith, *Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 88 (1993)).

systems where judges have more free rein to make law through interpretative, precedent-setting judgments, Latin American jurists must apply code provisions rather than interpret them.<sup>27</sup> In “hard cases,” or cases where the normative premises to answer the legal questions are in controversy, or where it is impossible to deduce an answer to a legal question by deducing logically from the black letter rules,<sup>28</sup> the Latin American jurist must reason from legal principles and consult legal scholarship.<sup>29</sup> In the same manner that principles give judges a tool to decide cases where rules do not provide a clear answer, principles also restrain judges from steering away from the values and purposes of the law.<sup>30</sup>

In Latin America, some scholars argue that principles guide judges by providing superior or parallel norms to the black letter rules.<sup>31</sup> These superior or parallel norms contain the rules’ cohesive and substantive content.<sup>32</sup> In this sense, principles act as the values and purposes of law.<sup>33</sup> Therefore, principles are law.<sup>34</sup> Other scholars take a softer approach and argue that principles are the inspiration behind the law.<sup>35</sup> Still other scholars of a more positivistic slant argue that principles are general and common ideas that surge from specific and authoritative legal texts.<sup>36</sup>

Without resolving these philosophical disputes on the nature of legal principles, which is beyond the scope of this Article, the authors take a more modest perspective here by, first, describing the principles as enunciated by scholars, as they emerge from the countries’ constitutions and statutes, and then by explaining how such principles are used by South American judges to interpret and fill in the gaps to decide particular cases.

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27. *Id.*

28. Ugarte Cataldo, *La Rehabilitación de los principios del derecho del trabajo*, *supra* note 25, at 31, citing Neil MacCormick, *La argumentación silogística: una defensa matizada*, 30 DOXA 332 (2007); see also Jorge Streeter Prieto, *Casos Difíciles*, 38 REVISTA DE CIENCIAS SOCIALES 197, 210–11 (1993). Compare with RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978) (hard cases are those where a lawsuit cannot be brought under a particular rule of law).

29. ROGER BLANPAIN ET AL., *supra* note 26, at 288 (citing James F. Smith, *Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 88 (1993)).

30. MARIO E. ACKERMAN, LOS PRINCIPIOS EN EL DERECHO DEL TRABAJO, TRATADO DE DERECHO DEL TRABAJO, TOMO I 323–24 (Mario E. Ackerman & Diego M. Tosca eds., 2005) (one of the functions of the protective principle is to limit the juridical, collective, judicial, administrative, and supranational, i.e., “technical,” means of implementing work law).

31. Ugarte Cataldo, *La Rehabilitación de los principios del derecho del trabajo*, *supra* note 25, at 29.

32. *Id.*

33. *Id.*

34. *Id.* at 27–30.

35. *Id.* at 26.

36. *Id.*

Latin American work law incorporates the following important principles: (1) protection (over individual freedom of contract); (2) dominance of reality (over legal formalism); (3) non-waiver of rights; (4) employment stability, or continuity of the employment relationship (over precarious employment); and (5) labor union autonomy (over employer and/or government domination of unions).<sup>37</sup>

For space limitations, here the authors only discuss the principle of protection, which the authors consider to be the pillar of Latin American work law, particularly in Argentina,<sup>38</sup> Brazil,<sup>39</sup> Chile,<sup>40</sup> and Uruguay.<sup>41</sup>

But the authors do not stop in Latin America. They argue that a Latin American labor jurist would find the principle of protection in U.S. legal scholarship, in the Thirteenth Amendment of the U.S. Constitution, in the black letter rules, and in the legislative purposes. U.S. work law protects workers. In fact, Latin American jurists would recognize something akin to the rule of *in dubio pro operario*, a Latin American canon of statutory interpretation that posits that hard cases must be resolved in favor of workers, in the Anglo-American legal maxim that states that remedial statutes must be interpreted liberally. The authors argue, however, that work law requires perhaps an even more “liberal” interpretation of the law than suggested by the legal maxim given the values and purposes of work law to guard the human dignity of the most vulnerable people, values of the highest order in the American republic, as Justice Warren once proclaimed.<sup>42</sup>

This Article, therefore, has two goals. The first is simply descriptive: to detail as faithfully as possible, and in a comprehensible manner, the principle of protection in Latin American work law. There is no scholarly

37. South American work law scholars have recognized various principles, sometimes up to ten of them. See ALBERTO J. RUPRECHT, *LOS PRINCIPIOS FORMATIVOS LABORALES Y SU PROYECCIÓN EN LA LEGISLACIÓN* 7 (1992). Even though scholars have not agreed on the total number and types of principles, there is significant consensus regarding the five principles enumerated in this Article. See AMÉRICO PLÁ RODRÍGUEZ, *LOS PRINCIPIOS DEL DERECHO DEL TRABAJO* 13 (3d ed. 1998); SERGIO GAMONAL C., *FUNDAMENTOS DE DERECHO LABORAL* 104–15 (2008) [hereinafter GAMONAL C., *FUNDAMENTOS*]; SERGIO GAMONAL C., *INTRODUCCIÓN AL DERECHO DEL TRABAJO* 132–48 (1998) [hereinafter GAMONAL C., *INTRODUCCIÓN AL DERECHO DEL TRABAJO*].

38. MARIO E. ACKERMAN, *LOS PRINCIPIOS EN EL DERECHO DEL TRABAJO*, *TRATADO DE DERECHO DEL TRABAJO*, TOMO I 307 (Mario E. Ackerman & Diego M. Tosca eds., 2005).

39. AMAURI MASCARO NASCIMENTO, *INICIAÇÃO AO DIREITO DO TRABALHO* 118–19 (23d ed. 1997).

40. GAMONAL C., *FUNDAMENTOS*, *supra* note 37, at 104.

41. PLÁ RODRÍGUEZ, *supra* note 37, at 61.

42. See Brennan, *supra* note 1, at 433 (the constitution aspires social justice, brotherhood, and human dignity, goals that brought the U.S. into being); see also Bruce Ackerman, *Dignity is a Constitutional Principle*, *THE N.Y. TIMES*, Mar. 29, 2014, available at <http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?hp&rref=opinion&r=1>.

work, to the authors' knowledge, which has attempted to explain Latin American work law principles to an international, English-speaking audience.<sup>43</sup> As Latin America plays a more central role in international trade and foreign relations, learning more about its law, including work law and its principles, matters for global lawyers.<sup>44</sup>

The authors' second goal is to consider U.S. work law from a Latin American perspective. In this manner, the authors reinterpret one of the developed world's allegedly least protective work law regimes, in a manner that supports the protection of weak parties, and more specifically, workers.<sup>45</sup>

This Article is divided into six parts. Part I is this introduction. Part II describes the Latin American principle of protection in Argentina, Brazil, Chile and Uruguay. Part III describes the rule of *in dubio pro operario* which follows from the principle of protection. Part IV describes how a Latin American labor judge would find the protective principle in the U.S. In Part V, the authors contest two arguments for why U.S. work law would not support a protective principle: first, the employment-at-will doctrine weakens work law; and second, the notion that remedial statutes, such as work law statutes, deserve a more "liberal" interpretation has been rendered superfluous or incoherent by important American jurists. Part VI is the conclusion of the Article.

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43. However, the current global crisis seems to be forcing a reawakening of work law principles, which then surface in English-language publications. See Inmaculada Baviera, *Employment Stability in Spanish Labor Law: Between Regulatory Tradition and Social Reality*, 34 COMP. LAB. L. & POL'Y J. 677 (2013) (explaining how current Spanish labor policy is at odds with the traditional work law principle of employment stability). Also, at least one major English Language treatise names the principles of work law in Argentina. WILLIAM L. KELLER & TIMOTHY J. DARBY, IIB INT'L LAB. & EMPL. LAWS 76-4 (4th ed. 2012) (citing Law 20,744, as amended (Arg.)). For a discussion of how some countries and scholars may recognize a different number of principles than others. See GAMONAL C., FUNDAMENTOS, *supra* note 37, at 104-15; GAMONAL C., INTRODUCCIÓN AL DERECHO DEL TRABAJO, *supra* note 37, at 132-48.

44. Brazil, Argentina and Chile are among the world's top 30 net exporting countries, making them global leaders in international trade. *List of countries by net exports*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_net\\_exports](http://en.wikipedia.org/wiki/List_of_countries_by_net_exports) (last visited Jan 28, 2014) (citing *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/>).

45. See THOMAS GEOGHEGAN, WERE YOU BORN ON THE WRONG CONTINENT?: HOW THE EUROPEAN MODEL CAN HELP YOU GET A LIFE (2011) (explaining how Western European countries generally provide better quality jobs, pensions, free or inexpensive college, child care, and parental care than the U.S. as a matter of law and policy); JONAS PONTUSSON, INEQUALITY AND PROSPERITY: SOCIAL EUROPE VS. LIBERAL AMERICA 26 (2005) (describing how social Europe outpaces liberal U.S. on labor market regulatory measures such as union density, coverage of collective bargaining agreements, social spending, and social protection).

## I. THE PROTECTIVE PRINCIPLE

In the words of Uruguayan work law scholar, Professor Oscar Ermida, protection is work law's *raison d'être*.<sup>46</sup> Professor Ermida professed such words because Latin American work law starts with the claim that power underpins all social relations, particularly employment relations where workers are subordinated to the employer and are dependent on it.<sup>47</sup> If society leaves workers subject to individual freedom of contract and the market, workers' labor is turned into a commodity. Latin American work law understands that when labor is treated as a commodity, workers' subsistence and moral interests are compromised. The law must restore the power imbalance in employment relations to safeguard workers'—and society's—moral interests.<sup>48</sup>

In this section, the authors illustrate how the protective principle of work law manifests in Argentina, Brazil, Chile, and Uruguay. The authors chose these countries due to their importance in Latin America. While Brazil and Argentina are two of the three largest Latin American

46. Oscar Ermida Uriarte, *Protección, Igualdad, Dignidad, Libertad y No Discriminación*, 15 CADERNOS DE AMATRA IV 11 (2011).

47. For Argentinian scholars, see ADRIÁN GOLDIN & ALIMENTI J., CURSO DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL 3 (2009). For Brazilian scholars, see MAURICIO GODINHO DELGADO, PRINCÍPIOS DE DIREITO INDIVIDUAL E COLETIVO DO TRABALHO 33 (2d ed. 2004) and JOSÉ MARTINS CATHARINO, DIREITO DO TRABALHO 12 (2d ed. 1976). For Chilean scholars, see SERGIO GAMONAL C., FUNDAMENTOS, *supra* note 37, at 4 and JOSÉ LUIS UGARTE C., LA SUBORDINACIÓN EN EL DERECHO LABORAL CHILENO 1–9 (2008). For Uruguayan scholars, see PLÁ RODRÍGUEZ, *supra* note 37, at 63, MARIO GARMENDIA ARIGÓN, ORDEN PÚBLICO Y DERECHO DEL TRABAJO 68 (2001), and Oscar Ermida Uriarte, *Crítica de la Libertad Sindical*, 242 REVISTA DERECHO LABORAL 226 (2011).

South American work law scholars will regularly cite comparative sources to buttress their arguments. On the particular point of worker subordination and the need for work law they commonly cite OTTO KAHN-FREUND, TRABAJO Y DERECHO 48, 133 (1987) (German-Briton scholar who argued that work law serves as a counterweight to employer power in the employment relationship), MANUEL CAMPOS PALOMEQUE, EL DERECHO DEL TRABAJO E IDEOLOGIA 17 (1985) (Spanish work law scholar who argued that work law stabilizes the employer-worker relationship), Bruno Veneziani, *Tre Commentii alla Critique du Droit du Travail de Supiot*, 67 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 3 (1995) (Italian work law scholar describes the subordination of the worker to the employer and argues for the need to protect), ALAIN SUPLOT, CRÍTICA DEL DERECHO DEL TRABAJO 133–34 (Ministerio del Trabajo y Asuntos Sociales de España 1996) (French work law scholar who argued that in employment relations the employer commands the worker and the worker must obey, raising the need for a protective work law), among many others.

48. Ermida Uriarte, *supra* note 46, at 11. Note, however, that South American work law also cognizes that work law principles are the product of a political compromise at the legislative level and are not absolute. Work law presumes that the employer must remain economically viable if the worker is to keep a job. In this regard, work law also safeguards employers' rights in addition to protecting the worker. The protective principle contains an implicit presumption of flexible protection of the worker. On this point, South American work law scholars cite French professor Gérard Lyon-Caen, LE DROIT DU TRAVAIL, UNE TECHNIQUE RÉVERSIBLE 6 (1995).

economies,<sup>49</sup> Uruguay and Chile are the best economically performing economies in the region.<sup>50</sup>

A. *Argentina*<sup>51</sup>

The protective principle in Argentina stems from the Constitution, which provides that work, or labor, shall be protected.<sup>52</sup> It provides specific workers' rights, including individual and collective rights, and rights pertaining to social security.<sup>53</sup> The list of enumerated rights in the Constitution is so extensive that it is better to look at its text. It states:

*Labor in its several forms shall be protected by law, which shall ensure to workers: dignified and equitable working conditions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work; participation in the profits of enterprises, with control of production and collaboration in the management; protection against arbitrary dismissal; stability of the civil servant; free and democratic labor union organizations recognized by the mere registration in a special record.*

Trade unions are hereby guaranteed: the right to enter into collective labor bargains; to resort to conciliation and arbitration; the right to strike. Union representatives shall have the guarantees necessary for carrying out their union tasks and those related to the stability of their employment.

The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: compulsory social insurance, which shall be in charge of national or provincial entities with financial and economic autonomy, administered by the interested parties with State participation, with no overlapping of contributions; adjustable

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49. World Bank, *Gross Domestic Product 2012*, <http://databank.worldbank.org/data/download/GDP.pdf> (last visited July 2, 2013).

50. For the case of Chile, see SEBASTIÁN EDWARDS, *LEFT BEHIND: LATIN AMERICA AND THE FALSE PROMISE OF POPULISM* 101–21 (2010). For Uruguay, see International Finance Corporation and World Bank, *Doing Business*, <http://www.doingbusiness.org/data/exploreeconomies/uruguay/> (last visited July 2, 2013).

51. This section benefitted from the review of Argentinean Professor Juan Pablo Mugnolo.

52. Sec.14bis, [Const. Nac.] (Arg). (official translation), *available at* <http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf> (last visited on Mar. 22, 2014).

53. *Id.*

retirements and pensions; full family protection; protection of homestead; family allowances and access to a worthy housing.<sup>54</sup>

Therefore, given the general statement that work must be protected, and the detailed list of individual, collective and social security rights granted by the Constitution of the Republic of Argentina, legal scholars have stated that Argentina explicitly recognizes the principle of protection.<sup>55</sup>

The protective principle is also explicitly stated in the work law statute. The Employment Contract Law specifically mentions the protective principle.<sup>56</sup> It includes the requirement to rule in favor of the employee when the rules are inconclusive or when there is a conflict of normative sources to apply to a case.<sup>57</sup>

Argentinean courts readily invoke the protective principle when deciding hard cases. For example, an Argentinean appellate court held that university medical professionals could not be excluded from the legal regulations of the employment contract even if the law did not explicitly include them as covered employees.<sup>58</sup> According to the court, such exclusions would violate the protective principle. Therefore, the court

54. *Id.* The original Spanish reads:

El trabajo en sus diversas formas gozará de la protección de las leyes, las que asegurarán al trabajador: condiciones dignas y equitativas de labor; jornada limitada; descanso y vacaciones pagados; retribución justa; salario mínimo vital móvil; igual remuneración por igual tarea; participación en las ganancias de las empresas, con control de la producción y colaboración en la dirección; protección contra el despido arbitrario; estabilidad del empleado público; organización sindical libre y democrática, reconocida por la simple inscripción en un registro especial.

Queda garantizado a los gremios: concertar convenios colectivos de trabajo; recurrir a la conciliación y al arbitraje; el derecho de huelga. Los representantes gremiales gozarán de las garantías necesarias para el cumplimiento de su gestión sindical y las relacionadas con la estabilidad de su empleo.

El Estado otorgará los beneficios de la seguridad social, que tendrá carácter de integral e irrenunciable. En especial, la ley establecerá: el seguro social obligatorio, que estará a cargo de entidades nacionales o provinciales con autonomía financiera y económica, administradas por los interesados con participación del Estado, sin que pueda existir superposición de aportes; jubilaciones y pensiones móviles; la protección integral de la familia; la defensa del bien de familia; la compensación económica familiar y el acceso a una vivienda digna.

Sec.14 bis, [Const. Nac.] (Arg). available at <http://www1.hcdn.gov.ar/dependencias/dip/congreso/Constitucion%20sola.pdf>.

55. The Supreme Court of Argentina readily invokes the protective principle. See *infra* note 61.

56. KELLER & DARBY, *supra* note 43, at 76-4 (citing Law 20.744, as amended (Arg.)).

57. *Id.*

58. MARÍA DEL CARMEN PIÑA, LA CONDICIÓN LABORAL Y EL PRINCIPIO PROTECTORIO 201-02 (2007) (citing Cámara Nacional de Apelaciones del Trabajo, Sala 1 [National Chamber for Labor Appeals, Room 1], 02/28/1989, Susana Sassi E.C. / Sadaic, (Arg)).

declared that the country's work laws covered the university medical professionals.<sup>59</sup>

In a different case, a labor court, facing contradictory laws and normative sources, decided to choose the result most favorable to the worker, noting that “the most favorable outcome should be adopted based on the principle of protection. . . .”<sup>60</sup>

The protective principle has even been used to declare aspects of statutory law unconstitutional. For example, in *Aníbal c/ Disco, S.A.*,<sup>61</sup> the Supreme Court of Argentina declared article 103 bis (c) of the Employment Contract Law<sup>62</sup> unconstitutional for excluding as legal compensation any food stamps provided by the employer to the employee as consideration for work.<sup>63</sup> The challenged law considered food stamps “social benefits that are not compensation, not fungible, which cannot be accrued or substituted by money.”<sup>64</sup> Because the text of the law made it clear that food stamps were not compensation, the employees could not include the food stamps' value into a back-pay award.<sup>65</sup> The law raised a constitutional issue because it regulated employees' pay, which is constitutionally protected. Based on the protective principle, which is also of constitutional character in Argentina, the Court declared Argentina Law 24.700 of 1996, excluding as compensation any food stamps provided by employers as consideration for work, unconstitutional. The ruling allowed

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59. *Id.*

60. *Id.* at 207 (original translation by authors), citing Tribunal del Trabajo No. 3 de Lomas de Zamora [Labor Court No. 3 of Lomas de Zamora], 11/3/1991, Pedro Benítez C. C. / Hidroconst S.A. (Arg.). The original reference in Spanish reads: Las veces que la ley de contrato de trabajo . . . trae normas de colisión entre fuentes, debe adoptarse el principio de régimen más favorable con fundamento en el principio protectorio del derecho individual del trabajo, por lo que la aplicación del régimen más favorable se impone como función integradora de los principios generales de derecho del trabajo. *Id.*

61. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/9/2009, “Pérez, Aníbal Raúl c/ Disco S.A.” (on file with author).

62. According to the text at the time the cause of action was filed by the plaintiff, per Law 24.700 of 1996. Article 103 bis (c) stated:

[s]e denominan beneficios sociales a las prestaciones de naturaleza jurídica de seguridad social, no remunerativas, no dineradas, no acumulables ni sustituibles en dinero, que brinda el empleador al trabajador por sí o por medio de terceros, que tiene como objeto mejorar la calidad de vida del dependiente o de su familia a cargo. Son beneficios sociales las siguientes prestaciones: [. . .] c) Los vales alimentarios [. . .] otorgados a través de empresas habilitadas por la autoridad de aplicación. . . .

*Id.* ¶ 2, citing Law No. 24.700 (1996).

63. Pérez, Aníbal Raúl c/ Disco S.A. ¶ 9.

64. *Id.* ¶ 9.

65. *Id.* ¶ 1.



employees to request the value of food stamps not provided by the employer as back-pay.<sup>66</sup>

To summarize, Argentina recognizes the protective principle. Scholars and judges derive the principle from the country's Constitution and statutes.<sup>67</sup>

### B. Brazil<sup>68</sup>

Brazil's Constitution, like Argentina's, contains a detailed and exhaustive list of labor and social security rights.<sup>69</sup> Brazilian Professor

66. *Id.* at ¶ 2.

67. The protective principle is considered by Argentinean courts even when workers lose cases. For example, in *Murillo with Compibal S.R.L.*, the Supreme Court of Argentina granted a petition by a corporation, a pharmaceutical company [hereinafter referred to as "principal"] that had contracted with a third party to provide meals to the principal's employees (hereinafter referred to as "contractor"). Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 9/30/2008, "Hector Octavio Murillo c/ Compival S.R.L. y otro / recurso de hecho," available at <http://www.csjin.gov.ar> (Arg.). The Supreme Court reversed a decision by the intermediate (appellate) court declaring that the principal was jointly liable to the employees of the contractor. The Supreme Court stated that joint liability was triggered only when the principal contracted for functions that were normal, specific, and inherent to the productive process of the principal. In this case, the employer was a producer of pharmaceuticals. It had contracted with a third party to provide meals to the employees making the pharmaceuticals. Meal preparation was, according to the employer and the Supreme Court of Argentina, not normal, specific, and inherent to the production process of the principal. Therefore, the food service workers could not hold the principal liable for the debts arising out of their employment contract with the contractor.

In reaching its conclusion, the Supreme Court of Argentina considered that the Court should protect workers but only when the facts so justify it. The Court stated:

[T]he foundation of art. 30 of the Law of Employment Contracts ["Ley de Contrato de Trabajo"] is the protective principle of the rights of the worker, which the National Constitution prescribes and has been applied repeatedly by this Court (Decisions: 315: 1059, 126; 319: 3040; 327: 3677, 3753, 4607, among many others). The protection referred to is made concrete, in this case, by a legal rule that establishes [joint liability] with the goal of broadening the dependent's [the worker's] credit guarantee. (Emphasis added).

The Court recognized the important, Constitutional duty to protect the worker by giving him or her special rights to seek relief from principals who contract with his or her direct employer. However, protection was not justified because the services rendered by the complaining employees were not normal, specific, and inherent to what the principal produced, but the protective principle nevertheless had to be assessed. In other words, the Court felt compelled to address the protective principle even when, or perhaps even especially because, it was going to hold against the workers in that particular case. In our view, the Court had to make it clear that it was not violating the protective principle. *See Id.*

68. This section benefitted from the review of Brazilian Professor and labor judge Henrique M. Hinz.

69. The Constitution enumerates a number of rights:

- protections against arbitrary dismissal without just cause;
- unemployment insurance;
- minimum wage;
- worker participation in company profits;

Mauricio Godinho has thus stated that principle of protection exists in Brazil; as he has stated, “[t]he principles and rules that protect the person and her labor constitutes a structural part of the Constitution of the Brazilian Republic. Wisely, the Constitution realized that esteeming work is one of the most important conduits for respecting the human being.”<sup>70</sup> As in Argentina, the principle of protection has a constitutional foundation in Brazil.<sup>71</sup>

The Superior Labour Court of Brazil, the highest court in Brazil with competence over work law cases, normally applies the principle of protection when facing hard cases. For example, in one case, an employee filed a complaint against an employer who failed to pay the employee her accrued vacation time after the employment contract was terminated.<sup>72</sup> The law stated that holidays needed to be “enjoyed” by the workers.<sup>73</sup> The law was silent as to whether employers had to pay holiday time accrued but not enjoyed by the worker when the parties terminated the contract.<sup>74</sup> The Court held that the employer was required to compensate the worker for his or her vacation time, regardless of the law’s silence or ambiguity concerning holiday pay.<sup>75</sup> The Court noted that the law was “established

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- a regular working day not exceeding eight hours and forty-four hours weekly;
  - paid weekly rest, preferably on Sundays;
  - overtime pay of at least fifty percent of normal pay;
  - paid vacations;
  - paid maternity leave;
  - paternity leave;
  - prohibitions against discrimination at work;
  - the prohibition of night, hazardous or unhealthy work for children under eighteen and any work to under fourteen, except as an apprentice.

Constituição Federal [C.F.] [Constitution] art. 7 (Braz.).

70. The original Portuguese text states:

Os princípios e regras de proteção á pessoa humana e ao trabalho constituem parte estrutural da Constituição da República brasileira. Sabiamente, a Carta Magna percebeu que a valorização do trabalho é um dos mais relevantes veículos de valorização do próprio ser humano[.]

GODINHO DELGADO, *supra* note 47, at 32.

71. Brazilian scholarship has also highlighted how “the protective principle that guides and justifies the existence of labor law as a specialized branch of law is necessary to place the principle of human dignity in the field of labor relations.” See Valdete Severo, *A Força de um Paradigma e a Interpretação dos Artigos 60 e 62 da CLT*, 2 CADERNOS DA AMATRA IV 11 (2007).

72. ARION SAYAO ROMITA, DIREITOS FUNDAMENTAIS NAS RELAÇÕES DE TRABALHO 373–74 (2005) citing Proc. No. 55.55396/92.4 E RR, 11.06.1995 (Braz.).

73. *Id.* See also Brazil Consolidated Labor Laws art. 129, which states: “Todo empregado terá direito anualmente ao gozo de um período de férias, sem prejuízo da remuneração”. C.L.T. arts. 129–152 (Braz.).

74. SAYAO ROMITA, *supra* note 72, at 373–74.

75. *Id.*

with the objective of *protecting the health of workers*, and it would be inconsistent if the legislator allowed situations where no one could benefit from them. Based on this premise, the judge must address situations where the enjoyment of the holiday is materially impossible, which could happen when the employment contract becomes extinct. Under these assumptions, we ought to apply the legal maxim that says: “[t]he judge must serve the social goals and the common good pursued in the application of the law.”<sup>76</sup> Hence, the Court decided that the worker’s accrued vacation time had to be paid, based on the principle of protection, regardless of whether the law was silent on the particular issue.

The above-stated case is one of many. One can find thousands of results when searching the phrase “*princípio da proteção*” (principle of protection) on the search engine of the Superior Labor Court of Brazil.<sup>77</sup>

To summarize, Brazil, like Argentina, recognizes the protective principle of work law in its constitution, jurisprudence, and case law.

### C. Chile

Chile has also recognized a principle of protection that, as in Argentina and Brazil, stems from the country’s Constitution, even though the Chilean Constitution does not have the type of highly detailed social rights that Argentina and Brazil have. The 1980 Chilean Constitution simply states: “Freedom to work and its protection. Everyone has the right to self-

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76. *Id.* at 373, citing Proc. No. 55.55396/92.4 E RR, 11.06.1995 (Braz.) (emphasis added). The original Portuguese text reads:

*Assim, instituída com o objetivo de proteger a saúde do trabalhador, seria um contra-senso o próprio legislador normalizar possibilidades em que tal gozo não ocorresse. Amparado nessa premissa, compete ao intérprete solucionar as situações em que o gozo das férias não pode ser fixado por impossibilidade material, mormente quando já extinto o contrato de trabalho. E, nessas hipóteses, há de imperar a máxima de hermenêutica, que prediz: “Na aplicação da lei, o juiz atenderá aos fins sociais a que ela se dirige e às exigências do bem comum.”*

77. *See, e.g.*, José Carlos Vaz Da Silva Filho, and Atento Brasil S.A., Vivo S.A., TST -RR 161600-17.2008.5.18.0004 (T.S.T.) (Braz.) (the rule of the most favorable norm stems from the protective principle of work law contained in Brazil’s constitution); Viação Santa Brígida Ltda., and Egberto Gonçalves De Lima, Central Sistema De Limpeza Ltda., Cimplast Embalagens—Importação, Exportação e Comércio Ltda, TST-AIRR 217940-63.2004.5.02.0069 (T.S.T.) (Braz.) (based on the principle of protection, a principal was jointly liable with its contractor towards the employees of its contractor when the principal was negligent in supervising the contractor); *In re Banco Nossa Caixa*, TST-RR 93800-25.2005.5.15.0015 (T.S.T.) (Braz.) (rejecting motion to dismiss filed by employer on the grounds that the pleading requirements for workers filing suit in the labor courts are less rigorous than in ordinary civil trials, given the work law and the need to equalize power relations between employers and workers). *See also* Tribunal Superior do Trabalho, <http://www.tst.jus.br/consulta-unificada> (last visited Apr. 11, 2014).

employment and free choice of employment with just remuneration.”<sup>78</sup> Interpreting those parsimonious words, the Chilean Constitutional Court has noted:

Indeed, the constitutional protection . . . is not limited to guarantee[ing] freedom of choice and hiring, but . . . [is a] protection of work itself, in response to the inalienable commitment to respect the worker in the manner in which he or she performs his or her labor and the inescapable social role that work provides.<sup>79</sup>

Legal scholars have also supported this broad construction of the constitution’s labor protections.<sup>80</sup>

The Chilean labor judges use the protective principle regularly to interpret the law.<sup>81</sup> For example, in the case *Opazo con Lan-Chile*,<sup>82</sup> a worker sued for severance pay,<sup>83</sup> in lieu of the statutorily mandated 30-day termination notice,<sup>84</sup> and for other penalties. The employer argued that it was not liable for the penalties because, according to the employer’s interpretation of the labor code, the penalties applied only when the parties agreed to make payments in installments and not when they were owed in their entirety. On the other hand, the Labor Code stated, in relevant part, that when the employer terminates the employee for allegedly breaching

78. CONSTITUCIÓN [CONSTITUTION] POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19 ¶ 1–2.

79. Tribunal Constitucional [T.C.] [Constitutional Court], 26 julio 2011 Rol de la causa:1852-10 (Chile), citing Luz Bulnes, *La libertad de trabajo y su protección en la Constitución de 1980*, 28 REVISTA DE DERECHO PÚBLICO U. CHILE 207, 215 (1980) and JOSÉ LUIS CEA, DERECHO CONSTITUCIONAL CHILENO, TOMO II 427 (2004).

80. Bulnes, *supra* note 79, at 209–10; HUMBERTO NOGUEIRA ALCALÁ ET AL., DERECHO CONSTITUCIONAL TOMO I 281 (1994); GUIDO MACCHIAVELLO CONTRERAS, DERECHO DEL TRABAJO 36 (1986); ALEJANDRO SILVA BASCUÑÁN & MARÍA PÍA SILVA GALLINATO, TRATADO DE DERECHO CONSTITUCIONAL TOMO 13, 222 (Tomo 13 2010); ALAN BRONFMAN VARGAS ET AL., CONSTITUCIÓN POLÍTICA COMENTADA, 336 (2012); PEDRO IRURETA URIARTE, CONSTITUCIÓN Y ORDEN PÚBLICO LABORAL: UN ANÁLISIS DEL ART. 19 NO. 16 DE LA CONSTITUCIÓN CHILENA, 52–57 (2006); SERGIO GAMONAL C., INTRODUCCIÓN AL DERECHO DEL TRABAJO, *supra* note 37, at 53.

81. However, between 2003 and 2014 the Chilean Supreme Court’s 4th Chamber, where labor cases and controversies are normally referred to, was less protective than other chambers and courts of the country. See *infra* note 89.

82. Corte Suprema de Justicia [C.S.J.] [Supreme Court] Rol de la causa: 5058-03, cited in SERGIO GAMONAL C., LINEAMIENTOS DE DERECHO DEL TRABAJO 15 (2006) [hereinafter GAMONAL C., LINEAMIENTOS].

83. Once an employment contract is terminated for economic reasons (employer needs), Chilean law provides that the employer must pay the worker severance based on time of employment, which is approximately one month’s salary per year of employment, limited to a total of eleven years. CÓDIGO DEL TRABAJO [CÓD. TRAB.] [LABOR CODE] art. 163.

84. Employers must also give 30 days advance notice before terminating an employee for economic reasons. Otherwise, the worker must be paid an indemnity substituting for prior notice, equal to one month’s salary. CÓDIGO DEL TRABAJO [CÓD. TRAB.] [LABOR CODE] art. 162.

his or her duties, or for disciplinary reasons, and the employer fails to prove its case, and then:

The termination notice [becomes] . . . an irrevocable offer to pay compensation for years of service . . . . The employer is obligated to pay the compensation referred to in the preceding paragraph in a lump sum. . . .

Without prejudice to the foregoing paragraph, the parties may agree to make payments in installments, in which case the amounts owed shall include interest and adjustments. The settlement agreement must be ratified by the Labor Inspectorate. Breach of the settlement will accelerate payment of the total debt and shall be punished with an administrative fine.

If such compensation is not to be payable to the employee, the employee may request enforcement proceedings to the appropriate court . . . and the judge . . . may increase the amounts owed by up to 150% . . .<sup>85</sup>

Because the paragraph providing for the 150% penalty was placed by the legislature after the paragraph regarding installment payments, the employer argued that the 150% increase applied only when the parties had agreed on a payment plan.<sup>86</sup> The Chilean Labor Court and the Court of Appeals disagreed with the employer and held in favor of the worker.<sup>87</sup> Even in the absence of a payment plan the employer could still be

85. CÓDIGO DEL TRABAJO [CÓD. TRAB.] [LABOR CODE] art. 169(a) (translation by authors). The Spanish, unedited original reads:

La comunicación que el empleador dirija al trabajador de acuerdo al inciso cuarto del artículo 162, supondrá una oferta irrevocable de pago de la indemnización por años de servicios y de la sustitutiva de aviso previo, en caso de que éste no se haya dado, previstas en los artículos 162, inciso cuarto, y 163, incisos primero o segundo, según corresponda.

El empleador estará obligado a pagar las indemnizaciones a que se refiere el inciso anterior en un solo acto al momento de extender el finiquito.

Sin perjuicio de lo establecido en el inciso anterior, las partes podrán acordar el fraccionamiento del pago de las indemnizaciones; en este caso, las cuotas deberán consignar los intereses y reajustes del período. Dicho pacto deberá ser ratificado ante la Inspección del Trabajo. El simple incumplimiento del pacto hará inmediatamente exigible el total de la deuda y será sancionado con multa administrativa.

Si tales indemnizaciones no se pagaren al trabajador, éste podrá recurrir al tribunal que corresponda, para que en procedimiento ejecutivo se cumpla dicho pago, pudiendo el juez en este caso incrementarlas hasta en un 150% . . . .

*Id.*

86. Corte Suprema de Justicia [C.S.J.] [Supreme Court] Rol de la causa: 5058-03, cited in GAMONAL C., LINEAMIENTOS, *supra* note 8, at 15.

87. *Id.*

penalized with 150% of the total money owed to the worker, as argued by the Chilean Supreme Court:

[T]here is no reason to conclude that the increase of 150% . . . applies only if the parties agree on installment payments. . . . [T]he legislature made no distinction as to whether these were indemnities that the employer had to pay in one lump sum . . . or [in installments]. Therefore, it is necessary to conclude that the sanction for failure to pay the indemnities offered refers to both situations. This criterion is corroborated if one also takes into account that the objective of the rule is none other than to establish a minimum mechanism of *protection of the worker*. Accordingly, considering the protective principle that inspires work law, there is no legal reason to discriminate between two cases that are both harmful to the worker.<sup>88</sup>

Hence, the Supreme Court of Chile used the principle of protection to buttress its construction of the Labor Code.<sup>89</sup> The protective principle is recognized in Chile, as we saw in Argentina and Brazil.

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88. Corte Suprema de Justicia [C.S.J.] [Supreme Court] Rol de la causa: 5058-03, cited in GAMONAL C., LINEAMIENTOS, *supra* note 82, at 20 (emphasis added).

The non-edited Spanish original reads:

Que a diferencia de lo afirmado por el recurrente, no existe justificación para concluir que el incremento de hasta el 150% del monto de las indemnizaciones ofrecidas, se aplique sólo si las partes acordaron un plazo para su pago. En efecto, la norma transcrita se consigna al final de la letra a) del citado precepto y el legislador no distinguió si se trataba de aquellas indemnizaciones que el empleador debía pagar en un solo acto al momento de extenderse el finiquito o en los términos del pacto que celebren las partes al efecto, por ello forzoso es concluir, que la sanción por el no pago de las indemnizaciones ofrecidas se refiere a ambas situaciones. Este criterio se corrobora si se tiene presente, además, que el objetivo de la regla no es otro que establecer un mecanismo mínimo de resguardo para el trabajador. Por consiguiente, considerando el principio protector que inspira el derecho del trabajo, no existe razón jurídica para discriminar entre dos hipótesis que igualmente perjudican al dependiente.

*Id.*

89. In recent years (2003–2014) the Fourth Chamber of the Chilean Supreme Court, which has the administrative duty of handling most work law cases and controversies, has adopted a stance less protective of workers. This less protective stance, unlike the one taken by the Constitutional Court, has been heavily criticized by scholars. See Eduardo Caamaño, *Otra vuelta de tuerca a la Jurisprudencia de la Corte Suprema sobre la Doctrina de los Actos Propios en materia laboral*, 4 ESTUDIOS LABORALES 34 (2009); José Luis Ugarte, *La Corte Suprema y el Derecho de Huelga: Aquí no, por favor*, 4 ESTUDIOS LABORALES 89 (2009); Sergio Gamonal C., *La Jurisprudencia Laboral de la Corte Suprema: Un análisis crítico*, 4 ESTUDIOS LABORALES 97 (2009). Since March of 2014, however, the members of the Fourth Chamber were replaced with different members. A legal blog shows that over twenty-six Fourth Chamber –the “New Labor Chamber” (“*Nueva Sala Laboral*”)—decisions are clearly based on the protective principle. See Sergio Gamonal C., *Glosa Laboral*, [http://www.glosalaboral.cl/?page\\_id=206](http://www.glosalaboral.cl/?page_id=206) (last visited Feb. 14, 2015).

*D. Uruguay*<sup>90</sup>

Uruguay also recognizes the protective principle as part of its constitutional ordering, as provided by Article 53 of the Uruguayan Constitution:

Work is under the special protection of the law. Every inhabitant of the Republic, without prejudice to their freedom, has a duty to apply their intellectual or physical energy in a way that benefits the community, which will seek to offer, giving preference to citizens, the ability to earn a livelihood through the development of an economic activity.<sup>91</sup>

The Uruguayan Constitution recognizes that work is protected. The Uruguayan courts, similar to the other countries' courts discussed, have extended work protections beyond a mere recognition of individual freedom of contract. As the Labor Court of Appeals has stated:

When in doubt, the judge should keep with the general principles of work law . . . and take into consideration the *special protective principle*, this last one which is the fundamental backbone of work law, which aims to restore balance to the unequal relationship between employer and employee.<sup>92</sup>

The Uruguayan labor courts are clear about their adherence to principles to resolve legal controversies, particularly the “special protective principle,” considered to be the backbone of work law.

Other chambers of the Supreme Court (civil, criminal and constitutional) apply the principle of protection when work law cases and controversies land there. Sergio Gamonal C., *El daño moral por término del contrato de Trabajo*, 1 REVISTA DE DERECHO LABORAL Y SEGURIDAD SOCIAL 124 (2013).

90. This section has benefitted from the comments of Uruguayan law professor Patricia Spiwak.

91. Uruguay Constitution, Art. 53. The Spanish original text states:

El trabajo está bajo la protección especial de la ley. Todo habitante de la República, sin perjuicio de su libertad, tiene el deber de aplicar sus energías intelectuales o corporales en la forma que redunde en beneficio de la colectividad, la que procurará ofrecer con preferencia a los ciudadanos, la posibilidad de ganar su sustento mediante desarrollo de una actividad económica.

*Id.*

92. The Spanish original source reads:

[E]n caso de duda, tal decisión llevará al Juez a acudir a los principios generales del derecho del trabajo . . . y tener en especial consideración el principio protector que constituye el pilar fundamental del derecho laboral, cuya finalidad es restablecer el equilibrio en la desigual relación entre patrono y trabajador.

PLÁ RODRIGUEZ, *supra* note 37, at 89 (citing Anuario de Jurisprudencia Laboral, Caso 481 (1984–1985)).

Similarly, the Court of Appeals of Montevideo has used the principle of protection to decide hard cases. It recently held that a company that hired a contractor, which in turn hired its own employees, could be found liable for the debts of the contractor towards its employees; the principal who hired the contractor could be considered a so-called “complex employer” even if the positive law did not mention a “complex employer” or that principals could be liable for the debts of their agents towards the agents’ employees.<sup>93</sup> The facts showed that a principal had hired contractors. Those contractors owed wages to their workers, so the workers sued the contractors and the principal for nonpayment of wages. The principal refused to accept liability towards the employees of its contractors; however, the court found that both the principal and the contractors were liable, as a joint entity, a so-called “complex employer.” As the court stated:

If we pretend to ignore the legal category of the complex employer merely because there is no rule establishing such legal category, we would introduce an extreme and outmoded positivist paradigm into our court and would show a *want of protective constitutional foundation . . .* which served as the foundation of Work Law doctrine and jurisprudence. This is for two reasons. First, *principles inform the entire legal system. . .* Second, because the mandate of article 53 of the constitution is directed not only at the legislator but also at [the judges].<sup>94</sup>

Hence, the Uruguayan Court of Appeals established that because higher ordered principles informed the law, a so-called “complex employer”—a

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93. Uruguay Court of Appeals, Montevideo, Primer Turno, Case No. 171 (2008), cited in 233 DERECHO LABORAL: REVISTA DE DOCTRINA, JURISPRUDENCIA E INFORMACIONES SOCIALES 120 (2009) [hereinafter Uruguay Court of Appeals].

94. The full Spanish original reference says:

[p]retender desconocer la figura del empleador complejo bajo el expediente de la inexistencia de norma alguna que lo consagre, importa, una postura positivista a ultranza paradigma de tiempos perimidos y el desconocimiento de las bases constitucionales protectoras que han dado origen y desarrollo a la disciplina Derecho del Trabajo y a la labor creativa con el mismo designio, de la doctrina y de la jurisprudencia. Ello por dos razones. La primera, porque los principios cumplen un papel informador de todo el ordenamiento jurídico, en tanto expresan los postulados, valores y principios éticos arraigados en la conciencia social cuya vigencia el juez puede constatar mediante mecanismos técnicos que evitan el puro subjetivismo o la arbitrariedad de la decisión. La segunda, porque el mandato constitucional protector del trabajo –arts. 53 y sgtes.- no solo va dirigido al legislador, sino también a los operadores jurídicos. Entre ellos, sin duda al juez en la labor de solución de conflictos a través de la aplicación de las reglas del universo jurídico.

*Id.* (internal citations omitted).



combination of the principal and the contractors—could be held jointly liable for the nonpayment of wages of the contractors' employees. There was a mandate of constitutional scope to uphold the protective principle of work law. In this case, even though the law was silent regarding the liability of principals towards the employees of its subcontractors, the principle of protection compelled the court to find the principal liable. Otherwise, the workers in the case would have been left unprotected and unpaid, despite the constitutional and legislative intent to protect workers from wage theft and similar abuse.

Uruguay, like Argentina, Brazil, and Chile, recognizes a work law protective principle through a combination of its Constitution, jurisprudence, and case law.

#### *E. Europe*

The protective principle is not a Latin American invention. It exists in one way or another in European work law. In Italy, traditional work law doctrine has emphasized the need to protect the worker because of his or her weaker bargaining position and subordination to the employer and the moral implications surrounding commodification. For example, renowned Italian Professor Gino Giugni argued that social and protective legislation, including work law, limited individual autonomy in order to restrict the more extreme forms of exploitation, such as that of children.<sup>95</sup> Another Italian Professor, Luisa Riva Sanseverino, argued that the employment contract touched upon an individual's personhood and humanity, which made the employment contract different from any other type of contracts, requiring special protections for workers.<sup>96</sup> More recently, professors Mattia Persiani and Giampiero Proia argued that work law balances worker protection and employer requirements for productivity and efficiency.<sup>97</sup> Despite the competing interests of workers and employers, Persiani and Proia emphasized that the protection of workers is an essential foundation of any society that wishes to respect human values.<sup>98</sup>

In France, traditional work law doctrine also has emphasized the protective nature of work law. French professor Jean-Claude Javillier, for example, has argued that work law historically has been oriented towards

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95. G. GIUGNI, *LAVORO LEGGE CONTRATTI* 252 (1989).

96. L. RIVA SANSEVERINO, *ELEMENTI DI DIRITTO SINDACALE E DEL LAVORO* 78 (1980).

97. PROIA GIAMPIERO & PERSIANI MATTIA, *DIRITTO DEL LAVORO* 126–27 (2008).

98. *Id.*

protecting workers from all forms of social exploitation, particularly given workers' subordination to employers.<sup>99</sup>

Even in Great Britain, where Anglo-American liberalism has traditionally taken root, scholars have also made reference to protection of the weak. Professor Hugh Collins argues that British work law has been influenced by the European social model, which is based on social inclusion, competitiveness, and citizenry.<sup>100</sup> As a result, British work law accepts the precept that labor is not a commodity.<sup>101</sup> As Professor Collins wrote: "This concept of employment law suggests that at the beginning of the twenty-first century these three themes [social inclusion, competitiveness, and citizenry] provide the core of a distinctive European response to the puzzles presented by the cry that labour is not a commodity."<sup>102</sup> These examples indicate European countries also recognize something akin to the protective principle to which Latin American scholars explicitly make reference.

## II. WHEN IN DOUBT, RULE IN FAVOR OF THE WEAKER PARTY: THE RULE OF *IN DUBIO PRO OPERARIO*

Latin American labor judges and scholars commonly apply the rule of *in dubio pro operario*—when in doubt, decide in favor of the worker—as a fundamental manifestation of the principle of protection.<sup>103</sup> In essence, the rule states that the judge should rule in favor of the employee in hard cases. Doubts that may trigger the rule of *in dubio pro operario* are those that occur when the relevant legal rule, contract or internal rule is (1) ambiguous or vague, (2) when there is a “gap” because the facts are so

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99. JEAN-CLAUDE JAVILLIER, *DROIT DU TRAVAIL* 51–53 (5th ed. 1996). French professor Nadège Meyer also explains that the notion of “social public order” inherent to work law which seeks protection of the weaker party, in this case the worker. NADEGE MEYER, *L'ORDRE PUBLIC EN DROIT DU TRAVAIL* 99 (2006). See also Gerard Vachet, *Le principe de faveur dans les rapports entre sources de droit*, *LES PRINCIPES DANS LA JURISPRUDENCE DE LA CHAMBRE SOCIALE DE LA COUR DE CASSATION*, 79 (2008) (explaining the application of the principle of favor in French jurisprudence). See also *infra* notes 124–25 and accompanying text (explaining the principle of favor)

100. HUGH COLLINS, *EMPLOYMENT LAW* 25–26 (2d ed. 2010).

101. *Id.*

102. *Id.*

103. Contrary to stylized view that in civil code countries judges do not make law or interpret law, but only “apply” the law, in South American law there is a general “principle of no excuse.” MARIO VERDUGO MARINKOVIC ET AL., *DERECHO CONSTITUCIONAL* 209–10 (1999). The principle of no excuse essentially means that the judge, if competent, must decide a case or controversy even when there is no specific rule resolving the dispute. *Id.* The only exception occurs in penal law, in which the law must establish the criminal conduct be sanctioned. ALAN BRONFMAN VARGAS ET AL., *CONSTITUCIÓN POLÍTICA COMENTADA* 116 (2012).

novel and unforeseeable that no rules are deemed to apply, or (3) when the strict application of the rule appears to be iniquitous.<sup>104</sup>

The application of the rule of *in dubio pro operario* is debatable in the ambit of collective bargaining because some scholars have argued there is no significant imbalance of bargaining power between labor and capital in collective labor relations.<sup>105</sup> Labor unions bargain with employers at a relatively more equal level than that of the individual employee.<sup>106</sup> Therefore, most scholars have argued that civil contract interpretation rules are adequate in the collective bargaining context.<sup>107</sup>

The *in dubio pro operario* rule is mainly used to give meaning to the law, individual contract or company rule and not to interpret the facts of cases.<sup>108</sup> The function of the rule *in dubio pro operario* is not to modify or amend a rule, but rather to determine its best meaning among several possible ones. Moreover, *in dubio pro operario* is often used by judges not as a final decisive criterion in litigation, but merely as a supporting argument;<sup>109</sup> however, some judges in Latin America may decide cases inapposite to the black letter, bright-line rules when strict abidance with such rules would issue an unfair outcome.<sup>110</sup> While scholars generally disapprove of decisions stemming only from judges' justice concerns, some posit that in those situations the judge or other adjudicator should at least not lose sight of the protective nature of work law.<sup>111</sup> The *pro operario* criterion, or simply, a motivation to protect the worker, should govern the rationale of the judge when acting in equity to establish a rule for the case.<sup>112</sup>

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104. Enrique Barros, *Reglas y Principios en el Derecho*, 2 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 276 (1984).

105. PLÁ RODRIGUEZ, *supra* note 37, at 96–97.

106. *Id.*

107. *Id.* However, for a dissident view, see SERGIO GAMONAL C., DERECHO COLECTIVO DEL TRABAJO 448 (2d ed. 2011) (because collective bargaining agreements have ergo omnes effects and may apply to all workers, including non-members of the union, the rule of *in dubio pro operario* should apply when there is an interpretative question of the collective agreement).

108. The main exception to this view of the rule is Argentina. Article 9 of the Employment Contract Law, which provides that the legal interpretation most favorable to the worker must be preferred when in doubt of the facts in concrete cases. Diego Tosca, *Aplicación del Principio 'Pro Operario' en la Valoración de la Prueba en caso de Duda*, LA RELACIÓN DE TRABAJO 210–11 (Mario E. Ackerman & Alejandro Sudera eds., 2009).

109. Aurelio Desdentado Bonete, *El Principio Pro Operario*, LOS PRINCIPIOS DEL DERECHO DEL TRABAJO 73 (Luis Enrique de la Villa Gil & Lourdes López eds., 2003).

110. GAMONAL C., FUNDAMENTOS, *supra* note 37, at 107.

111. *Id.*

112. *Id.*

In Chile, the rule of *in dubio pro operario* has been discussed most often by scholars.<sup>113</sup> As previously discussed, in Argentina the Employment Contract Law has established the rule:

If the question depends on the interpretation or scope of the law, or on the appreciation of the concrete facts, the judges or other persons charged with applying the law must decide in the manner most favorable to the worker.<sup>114</sup>

Although Uruguay has not established *in dubio pro operario* by statute, the rule has been widely disseminated by scholars<sup>115</sup> and has been applied by the courts.<sup>116</sup>

In Brazil, the Labor Court has used the rule extensively. For example, in *Sindicato dos Trabalhadores em Empresas Ferroviárias dos Estados do Espírito Santo e Minas Gerais*, the Court had to decide whether an employer was required to continue providing performance pay to its workers after having provided it voluntarily.<sup>117</sup> The internal regulations of the employer stated that it would provide performance pay.<sup>118</sup> The employer argued that it did not have to continue giving performance pay to its workers because the law did not mandate performance pay; the employer had voluntarily granted performance pay to its workers and could stop providing it at will.<sup>119</sup> The employer rested its argument on language in the *civil* law, which stated, “donations and waivers are to be

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113. *Id.* at 106–09.

114. Labor Contract Law [L.C.L.], art. 9, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/25000-29999/25552/texact.htm>, (Arg.). The text of the statute reads:

Art. 9°—El principio de la norma más favorable para el trabajador.

En caso de duda sobre la aplicación de normas legales o convencionales prevalecerá la más favorable al trabajador, considerándose la norma o conjuntos de normas que rijan cada una de las instituciones del derecho del trabajo.

Si la duda recayese en la interpretación o alcance de la ley, o en apreciación de la prueba en los casos concretos, los jueces o encargados de aplicarla se decidirán en el sentido más favorable al trabajador.

L.C.L., art. 9 (Arg.).

115. See PLÁ RODRIGUEZ, *supra* note 37, at 84.

116. As the Juzgado de Letras del Trabajo del Tercer Turno stated, “. . . the rule of *in dubio pro operario* is applicable, which means that in case of doubt we should decide in favor of the worker’s situation”. *Id.* at 99, citing Anuario de Jurisprudencia Laboral, Caso 1032 (1994–1995) (Uru.). See also Anuario de Jurisprudencia Laboral, Caso 1032 (1994–1995), 1034 (1994–1995), 1035 (1994–1995), 1031 (1994–1995) (Uru.), as cited in PLÁ RODRIGUEZ, *supra* note 37, at 84.

117. TRIBUNAL SUPERIOR DO TRABALHO [T.S.T.] [LABOR COURT], No. 127200-25.2007.5.03.0102 (Braz.) \*6-7 (emphasis added).

118. *Id.*

119. *Id.*

interpreted restrictively.”<sup>120</sup> It argued that as a voluntary payment that resembled a donation, the Court could not presuppose that the employer would indefinitely grant performance pay to all workers.<sup>121</sup> The Labor Court rejected the employer’s argument and held in favor of the workers:

[Civil law] could not be transposed uncritically into work law, [because work law] is ruled, inter alia, by the principles of protection and *in dubio pro operario*. Thus, if a particular standard—and the internal rules of the company are such—provides a particular benefit [to the workers], it is not a *prima facie* hindrance to provide the benefit [to the workers] in situations unforeseen by the [employer].<sup>122</sup>

The Brazilian labor court clearly differentiated the principles of work law and civil law. It preferentially recognized the protective principle and the rule of *in dubio pro operario*.<sup>123</sup>

Pro-worker rules also exist outside of Latin America. Germany and France also have somewhat similar rules that favor employees. While not a rule regarding interpretation of legal norms, the German “principle of favorability” is used by German courts to determine which contractual terms operate, those in a collective agreement or those in an individual employment contract, when they are in conflict. According to the German rule, the judge must choose the term most favorable to the worker when there are conflicting terms.<sup>124</sup>

The French also have a “rule of favor,” which implies that the conditions most favorable to the worker must be preferred when there is a conflict of laws. The rule of favor becomes most relevant when work laws stipulate minima and the parties have modified those minima by contract. The rule implies that minima can be repealed only in favor of the worker; modified rules can only improve the minimum benefits granted by the law.<sup>125</sup>

120. CODIGO CIVIL [C.C.] [CIVIL CODE] art. 114 (Braz.) (“Os negócios jurídicos benéficos e a renúncia interpretam-se estritamente.”).

121. *Id.*

122. TRIBUNAL SUPERIOR DO TRABALHO [T.S.T.] [LABOR COURT], No. 127200-25.2007.5.03.0102 (Braz.) (emphasis added).

123. Other Latin American countries including Paraguay, Peru, Ecuador, Colombia, El Salvador and Guatemala, have incorporated the rule of *in dubio pro operario*. PLÁ RODRÍGUEZ, *supra* note 37, at 98.

124. MANFRED WEISS & MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* § 446 (4th ed. 2008). See also ROGER BLANPAIN, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW CASES AND MATERIALS* 587 (2d ed. 2012).

125. JEAN PELISSIER ET AL., *DROIT DU TRAVAIL* 133–35 (24th ed. 2008).

### III. VIEWING THE U.S. FROM THE SOUTH AND FINDING THE PROTECTIVE PRINCIPLE

The authors acknowledge that existing U.S. case law is inconsistent when it comes to worker protection. In fact, many times it simply does not protect workers, but rather favors employer interests; however, we can find a principle of protection and use it to prospectively reconstruct the law. The authors limit their analysis, for reasons of time and space, to the Thirteenth Amendment of the U.S. Constitution, the NLRA, the FLSA, and relevant scholarship. In their future scholarship, the authors expect to show how the principle of protection can be found in other work law statutes such as Title VII of the Civil Rights Act of 1964,<sup>126</sup> and the Occupational Safety and Health Act,<sup>127</sup> among others.

#### A. *The Protective Principle in the Thirteenth Amendment of the U.S. Constitution*

The great bulk of American work law statutes have found constitutional validity in the Commerce Clause of the U.S. Constitution.<sup>128</sup> However, commercial bias inherent in such a clause enabled or motivated U.S. courts to interpret some aspects of statutory work law in favor of employers.<sup>129</sup> Given the weaker constitutional basis for worker protection found in the Commerce Clause, leading American constitutional law scholars have argued that constitutional validity of labor protections should rest on the Thirteenth Amendment of the U.S. Constitution.<sup>130</sup> The Thirteenth Amendment provides the basis for worker protective legislation

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126. Civil Rights Act of 1964, Title VII, Pub.L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended 42 U.S.C. §§ 2000e to 2000e-17)).

127. Occupational Safety and Health Act (OSHA) of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 651 *et seq.* (2012)).

128. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (upholding the constitutionality of the NLRA under the Commerce Clause of the U.S. Constitution); *U.S. v. Darby*, 312 U.S. 100, 115 (1941) (upholding the constitutionality of the FLSA under the Commerce Clause of the U.S. Constitution); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (Upholding the constitutionality of Title VII under the Commerce Clause of the U.S. Constitution).

129. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of Involuntary Servitude*, 119 YALE L.J. 1474, 1541 (2010) [hereinafter Pope, *Contract, Race and Freedom of Labor*]; William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 174 (2001).

130. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1541; Forbath, *supra* note 129, at 174; María Linda Ontiveros, *NonCitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007) (arguing that guest worker programs violate the Thirteenth Amendment).

through the ban of involuntary servitude.<sup>131</sup> It gives Congress the power to enact legislation to give effect to that constitutional ban. As Professor Rebecca Zietlow explains, the ban on involuntary servitude was aimed not just at coerced forms of compulsory labor, but “protects a broad spectrum of workers’ rights and civil rights, and gives Congress broad authority to enforce those rights.”<sup>132</sup>

Indeed, workers have attempted, albeit not always successfully, to secure an amalgam of rights under the Thirteenth Amendment, including the right to change employers, the right to set wages, the right to refrain from work, the right to practice one’s trade, the right to receive fair wages and the right to strike, all giving credence to claim that the ban against involuntary servitude was, at least popularly and historically, meaningful beyond mere chattel slavery.<sup>133</sup>

The notion that ordinary employees were subject to “slavery” was a response to nothing other than the common law.<sup>134</sup> Common law judges would normally hold that workers’ collective actions, attempts to unionize, strike and bargain collectively violated employers’ property rights, acquired through contract.<sup>135</sup> As Professor William Forbath explained:

Not liberty of contract alone, but also the legacy of the antislavery movement and the Thirteenth Amendment lent constitutional heft to labor’s blows against its court-forged manacles. According to this legacy, the dignity and independence of free labor were inscribed in the Constitution. It smacked of slavery, trade unionists complained, or of feudalism, at best, when courts routinely held that employers had a property right in their workers’ returning each day to toil in the employers’ plants, or a property right in their workers’ non-union status, or a property right in their authority to run the plant

131. James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 944 (1997) [hereinafter Pope, *Labor’s Constitution of Freedom*]; Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1541; Forbath, *supra* note 129, at 174; Ontiveros, *supra* note 129, at 924–25; Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 441–45 (1989).

132. Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 448 (2012) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968)).

133. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1478 n.4. See also WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 1102–65, 1294 (1991) (Kindle Edition) (providing a historical account of how labor framed its defense of strikes and other concerted activities under the Thirteenth Amendment).

134. Forbath, *supra* note 129, at 186.

135. *Id.*

without contending with workers seeking to negotiate over union work rules.<sup>136</sup>

Some workers thus attempted to gain a foothold for their rights of association in the Thirteenth Amendment.

While the Supreme Court initially rejected a broader reading of the Thirteenth Amendment, later case law gave a more expansive view of the Thirteenth Amendment. Workers found constitutional bases for the fundamental labor rights to quit working under the Thirteenth Amendment.<sup>137</sup> The constitutionality of Section 1982 of the Civil Rights Act of 1866,<sup>138</sup> which forbids race discrimination in inheritance, purchase, lease, sale, holding, and conveyance of personal and real property, also found an anchor on the Thirteenth Amendment.<sup>139</sup>

The reasons why twentieth century labor and employment laws were not based on the Thirteenth Amendment are complex and contested in the legal-historical literature. Professor James Pope argued that New Dealers were interested in securing the rights of government technocrats and regulators to manage the American economy, rather than to give that authority to workers.<sup>140</sup> Professor William Forbath disagrees with Pope, arguing that the New Dealers were clinging onto a social citizenship constitutionalism where citizens had constitutional economic and social rights and Congress had “the duty to exercise its power to govern economic and social life in a way that sought to secure those rights.”<sup>141</sup> New Dealers sought to constitutionalize labor law on the will of the people who want to protect constitutionally given social and economic rights, channeled through Congress.

Regardless of the historical origins for the constitutionalizing of work laws through the Commerce Clause, and not the Thirteenth Amendment,

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136. *Id.*

137. *Clyatt v. United States*, 197 U.S. 207, 215 (1905); *Bailey v. Alabama*, 219 U.S. 219 (1911).

138. 42 U.S.C. § 1982 (2006).

139. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1519; Zietlow, *supra* note 132, at 451.

140. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 84–85 (2002).

141. Forbath, *supra* note 129, at 176. Certainly, the New Dealers were attempting to find a constitutional anchor to their legislation in light of *Lochner v. New York*, 198 U.S. 45 (1905). Early labor protective legislation favoring women and children, among others, took an explicit protective tone to safeguard the “health, safety and morals” put in danger by contracts made by parties with differing degrees of bargaining power. See Claudio Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 L. & HIST. REV. 275, 280, 294, 323 (2013). However, after *Lochner v. New York*, where a New York statute regulating the hours of bakers was held unconstitutional for violating freedom of contract, federal work laws such as the FLSA and the NLRA were defended constitutionally as part of congressional regulation of interstate commerce.



some contemporary U.S. scholars have been arguing that work law should find a constitutional anchor in the Thirteenth Amendment.<sup>142</sup> The argument is straightforward: the Thirteenth Amendment supports protective labor legislation because workers who are forced to work by conditions that they cannot control, including, for example, when they cannot strike, only makes their working conditions more onerous, exploitative, and necessarily un-free.<sup>143</sup> Therefore, Congress should legislate to protect workers and, in this manner, protect their freedom.

In *Pollock v. Williams*, the U.S. Supreme Court recognized that that Thirteenth Amendment can serve as basis to protect ordinary workers and not just chattel slaves.<sup>144</sup> Compulsory labor is detrimental to workers because it makes it impossible for them to fight long hours, low wages, and other oppressive terms and conditions of employment.<sup>145</sup> When they cannot change those circumstances, workers become even more un-free.<sup>146</sup> Moreover, even when only some groups of workers toil under unwanted conditions, other workers' conditions may also suffer, bringing all workers' conditions down and limiting freedom to all.<sup>147</sup> As the Court stated:

[T]he defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.<sup>148</sup>

In other words, and as Professor Archibald Cox long argued, when workers have “no power below” and employers “the incentive above” to prevent “a harsh overlordship or unwholesome conditions of work” workers are un-free and Congress should legislate under the Thirteenth

142. Pope, *Contract, Race, and Freedom of Labor*, *supra* note 129, at 1541; Forbath, *supra* note 129, at 174; Ontiveros, *supra* note 130 (arguing that guest worker programs violate the Thirteenth Amendment).

143. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1552.

144. 322 U.S. 4 (1944).

145. *Id.* at 18.

146. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1479, citing Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576–77 (1951).

147. *Pollock v. Williams*, 322 U.S. at 18.

148. *Id.*

Amendment to redress that problem.<sup>149</sup> The Constitutional ban on compulsory labor would thus justify labor protective legislation.

A constitutional right in favor of labor protection would buttress workers' rights by, for example, extending associational rights to domestic, agricultural, and other workers not currently covered by the NLRA, and could serve to reverse the practice of permanent strike replacements, as well as other rules that currently limit workers' protections in the U.S.<sup>150</sup> Therefore, the Thirteenth Amendment fits hand-in-glove for worker protection.

A Latin American jurist would likely agree with the view that a constitutional protection against involuntary servitude provides a basis to constitutionally legitimize labor protective legislation. In fact, the Thirteenth Amendment would essentially mandate such legislation from Congress and all federal laws must be read with that mandate in mind.

The Latin American jurist would also likely see the inherent protective principle in the Thirteenth Amendment. As we read above, unregulated and legally unprotected work is understood in the Latin America as a condition that easily lends itself to the commodification of labor—to the buying and selling of labor as a chattel or an article of trade. The authors would add that commoditized workers compete with each other to sell their labor, driving down their wages and accepting increasingly onerous terms, enabling exploitation, and adopting even slave-like working conditions, demonstrating the need for legal protection of work. The Thirteenth Amendment also protects human dignity, a concern equally important in Latin American work law.<sup>151</sup> In this fashion, a Latin American labor judge would naturally read a constitutional mandate for labor protections under the Thirteenth Amendment. With such a constitutional basis for work laws, interpretation of legal texts would find a much more solid footing in favor of workers.

But even without such a robust, constitutionalized reading of protection, as we will see below, U.S. work law statutes provide language in favor of worker protection. The constitutional anchor would lodge those protections more solidly in the U.S. legal landscape, but the statutes themselves also reflect a protective principle.

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149. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1479.

150. *Id.* at 1541; On permanent strike replacements under U.S. labor law *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

151. *See* Forbath, *supra* note 129, at 186, 192.

### B. *The Protective Principle in the FLSA*

The FLSA is perhaps the federal work law statute that comes closer to reflect a protective principle in its plain text. Section 2 of the FLSA states that the main goal of the FLSA is to correct and eliminate commercial practices that perpetuate workers' substandard living conditions.<sup>152</sup> The purpose of said protections are to safeguard commerce from disruptions, obstructions and similar problems.<sup>153</sup> The FLSA attempts to fix these market failures by protecting workers. In fact, market failures are generally understood as necessary to justify labor market regulations in Anglo-American jurisdictions. Unequal bargaining power is insufficient.<sup>154</sup>

Resting on Section 2 of the FLSA and its legislative history, the Supreme Court has sustained that the FLSA protects workers to defend the national economy. In one of the key FLSA cases, *Brooklyn Savings Bank v. O'Neil*,<sup>155</sup> the Supreme Court declared that:

The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress *to protect* certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between the employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To

152. As the FLSA states in Section 2:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . .

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202.

153. *Id.*

154. See Lord Wedderburn, *Common Law, Labour Law, Global Law*, SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 27 (Bob Hepple ed., 2002).

155. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945).

accomplish this purpose [,] standards of minimum wages and maximum hours were provided.<sup>156</sup>

Minimum wage standards, maximum hours, bars against child labor, all of which are practices regulated by the FLSA are geared towards protecting workers. In this fashion, and as in Latin America, the FLSA protects workers.

The Supreme Court has also recognized something like the rule of *in dubio pro operario* when interpreting the FLSA. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local 123*<sup>157</sup> the Court ruled in favor of workers in a hard case given the “remedial” and “humanitarian” purposes of the FLSA.<sup>158</sup> The Court determined that the time spent by miners traveling underground in mines to and from the “working face”, i.e., the place in the mine where miners drill and load ore, constituted compensable “work” or “employment” under the FLSA.<sup>159</sup> The legal question was hard because, as the Court determined, the statute failed to define “work” or “employment”.<sup>160</sup> A definition was necessary to understand if time spent by workers trying to get to the working face of the mine was compensable under the law. The Court decided that a broad interpretation of those terms —“work” and “employment”—favoring workers was required; the Court stated:

But these provisions, like the other portions of the Fair Labor Standards Act, are *remedial and humanitarian in purpose*. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.<sup>161</sup>

The Court determined that workers were not chattels or articles of trade under the “remedial and humanitarian” purposes of the law. Hence, the

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156. *Id.* at 706–07 (emphasis added) (internal citations omitted). As the Court further substantiated, “The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.” *Id.* at 707 n.81 (internal citations omitted).

157. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

158. *Id.* at 597–98.

159. *Id.* at 598.

160. *Id.* at 597.

161. *Id.* (emphasis added).

FLSA required compensation for all actual work performed by covered employees, including traveling inside the mines to the working face.<sup>162</sup> The Court decided the legal question in the light most favorable to worker, as a Latin American labor judge would have done adjudicating under the rule of *in dubio pro operario*.

*Tennessee Coal* has been cited more recently by the Supreme Court precisely to underline why the FLSA's protections deserve a broad interpretation in favor of workers. In *IBP, Inc. v. Alvarez*<sup>163</sup> the Supreme Court stated:

*In Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123 . . . we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."*<sup>164</sup>

A broad interpretation of the FLSA was thus warranted given its "remedial" purpose. In this fashion, today's Supreme Court validated something akin to *in dubio pro operario*.

We should underline that today's Supreme Court focuses on the legislative purposes of the FLSA to fill in the gaps or give meaning to vague language. The legal controversy in *IBP* was somewhat similar to the one decided decades earlier in *Tennessee Coal*. The employer in *IBP* argued that under the so-called Portal-to-Portal amendments made to the FLSA by Congress in 1948,<sup>165</sup> walking time on the premises of the employer to the actual place of performance of the "principal activity" of the employee was not compensable. Therefore, the employer argued that the time spent by its employees walking between locker rooms and the

162. The Court held:

Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

*Id.* at 598.

163. *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

164. *Id.* at 25 (emphasis added).

165. *See* 29 U.S.C. § 251.

work area after donning and before doffing was not compensable under the FLSA. The reason why such walking was not compensable was because it was “preliminary or postliminary” to the “principal activity” performed by the workers.<sup>166</sup>

The Court noted that the Portal-to-Portal Act had indeed narrowed the FLSA. It established that travel time to and from work was not compensable under the FLSA. However, the Supreme Court determined the activities in question in *IBP* were compensable. It held that workers’ donning protective clothes was indispensable to a principal activity that started the workday. Therefore, walking to the actual place where the employee had to work after donning was compensable. Walking from the place of actual work to where he or she had to doff was also compensable. The Court reached this conclusion by adding Congressional intent to its analysis. According to the Court, Congress could have not “intended to create an intermediate category of activities that would be sufficiently ‘principal’ to be compensable, but not sufficiently principal to commence the workday.”<sup>167</sup>

In another recent case, *Kasten v. Saint-Gobain Performance Plastics Corporation*,<sup>168</sup> the Supreme Court also interpreted the FLSA broadly, this time to determine that a worker who orally complained to the employer about FLSA violations was protected by the anti-retaliatory provisions of the Act, even though the FLSA did not clearly state that oral complaints were protected by it. As in *IBP*, the Court reached its conclusion based on the protective purposes of the FLSA.<sup>169</sup>

In his complaint, the plaintiff-employee alleged that he orally complained to the employer about certain “time locks” put by the employer, which made it impossible for workers to charge the company for donning and doffing, activities that are compensable under the FLSA if they are part of a “principal activity.”<sup>170</sup> The plaintiff alleged that he was fired shortly after making his complaint to the employer. The employer argued that the anti-retaliation provision did not apply to the plaintiff because an oral complaint to the employer did not rise to the level of “filing a complaint,” to trigger protection under the statute.<sup>171</sup>

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166. *IBP*, 546 U.S. at 27.

167. *Id.* at 35.

168. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1329 (2011) (citing 29 U.S.C.A. § 215(a)(3) (West)).

169. *Id.* at 1333.

170. *Id.* at 1329–30; ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE FAIR LABOR STANDARDS ACT 8-50 to 8-52 (Ellen C. Kearns ed., 2010 & 2012 Suppl.).

171. *Kasten*, 131 S. Ct. at 1330.

Both the trial court and the court of appeals agreed with the employer. The Supreme Court, after granting certiorari, reversed the courts below. According to the Court, the FLSA forbids employers from retaliating against employees who have filed *any* complaint alleging a violation of the FLSA. According to the FLSA, an employer may not,

discharge or in any other way discriminate against any employee because such employee *has filed any complaint* or instituted or caused to be instituted any proceeding under or related to [the Act] or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee.<sup>172</sup>

In reversing the courts below, Justice Breyer, writing on behalf of the majority, emphasized that the statute “protects employees who have ‘filed any complaint.’”<sup>173</sup> After looking at dictionary definitions of the word “filed,” the Court determined that a textual reading of the statutory provision could not settle the question of whether any filed complaint included written and oral complaints.<sup>174</sup> The anti-retaliation provision was open to competing interpretations.<sup>175</sup> To better interpret the statute, the Court’s majority turned to the expressed intentions of the law, which were, under Section 202 of the FLSA, to “prohibit ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.’”<sup>176</sup> According to the Court, the FLSA protects workers by creating specific labor standards and by seeking enforcement of those standards through direct complaints

172. *Id.* at 1329 (citing 29 U.S.C.A. § 215(a)(3) (West)) (emphasis added).

173. *Id.* at 1330 (citing 29 U.S.C.A. § 215(a)(3) (West)).

174. *Id.* at 1333.

175. Justice Breyer started his analysis by first using dictionary definitions of the word “file” to determine if regular usage of the word was definite enough to make a determination about the matter. After looking at various dictionary definitions, he determined that some dictionary definitions would not limit the scope of “filing” to written communications. Finding no consensus in dictionary definitions which can determine the common usage of the word “file” and whether its scope includes oral communications or not, Justice Breyer turned to the manner in which legislators, administrators, and judges use the term. Here he found that these institutional actors used the terms in ways that sometimes included oral communications.

The Justice then remarked that while the law states “filing any complaint,” “filing” taken alone may be read restrictively to include only written communications, but the use of “any” broadens the scope of the three-letter phrase. The Justice determined that the three-letter phrase, on its own, “cannot answer the interpretative question.” Usage of the term “file” in the rest of the FLSA also could not lead to a conclusive answer as to its meaning. Other statutes, such as the National Labor Relations Act, use different language, so they could also not serve as sources for definitive answers on the issue. *Id.* at 1331–33.

176. *Id.* at 1333 (citing 29 U.S.C. § 202(a)).

from the workers. Congress put in place anti-retaliation protections to make the overall labor protections effective.<sup>177</sup>

Searching further for Congressional purpose, the Court argued that there was no reason Congress might have wanted to limit enforcement of the FLSA's anti-retaliation provision to cases involving written complaints.<sup>178</sup> First, when the law was enacted in the late 1930s, there was a high level of illiteracy among U.S. workers.<sup>179</sup> Limiting enforcement to situations in which workers filed written complaints would have excluded from protection a very large segment of worker complaints, leaving unprotected the most vulnerable employees and those most in need of FLSA protection.<sup>180</sup> Second, a limitation to written complaints would have prevented enforcement of the statute through hotlines, interviews, and other oral methods of communications that are commonly used today.<sup>181</sup> Third, because the Secretary of Labor consistently had held that the words "filed any complaint" in the above-quoted provision covered oral complaints and that interpretation of the statute was rational, the Court could defer to the Department of Labor's interpretation of the law.<sup>182</sup> Therefore, in *St. Gobain Performance Plastics*, the Court chose the interpretation of the statute most favorable to workers after searching the words of the statute and the purposes of the law; it found that the Congressional purpose was to protect workers, and, as a result, determined that excluding oral complaints would have frustrated Congress' intentions.<sup>183</sup>

Of course, not all FLSA case law has favored workers. Indeed, in another very recent Supreme Court case, the Court determined that "medical detailers" or employees of a pharmaceutical firm who did not sell anything or make any commissions fell under the "outside salesman"

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177. *Id.* at 1333.

178. *Id.*

179. *Id.* at 1333–34.

180. *Id.*

181. *Id.* at 1334.

182. *Id.* at 1336.

183. In his dissent, Justice Scalia (joined by Justice Thomas) argued that under a textual analysis, the word "complaint" in the statute applied only to formal, legal complaints, either at the administrative or judicial levels, not to informal complaints presented to the employer, as was the case in *Saint Gobain*. Therefore, under a textual meaning of the law, the employee was not protected. *Id.* at 1337–38.

The Court majority found the dissent's arguments irrelevant because the question before the Court was not whether or not complaints filed with the employer rather than with the administrative or judicial forum were protected by the anti-retaliation provision of the FLSA. Rather, the question presented to the Court by the appellants was whether or not oral complaints were covered by such provision. *Id.* at 1334.



exception of the FLSA, disqualifying the medical detailers from overtime pay under the law.<sup>184</sup> The medical detailers' job was to promote their employer's product; they informed doctors of the drugs made by their employer so that the doctors would consider prescribing the drugs to patients.<sup>185</sup> The medical detailers were more akin to "nonexempt promotional employees" who stimulate sales made by others, the drugstores.<sup>186</sup> However, the Court decided that the medical detailers were exempt as "outside salesmen" by expanding the meaning of the word "sale"; as the majority stated:

[I]t follows that petitioners made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOL's regulations. Obtaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells. This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate. . . .<sup>187</sup>

The majority's opinion strongly suggests that the interpretation of what an outside salesman and a "sale" is depends on the industry's needs and the "regulatory environment." Doctors cannot buy drugs from pharmaceutical companies and re-sell them to patients. They merely prescribe drugs. Pharmacies sell the drugs to patients with prescriptions. This regulatory arrangement, where the pharmaceutical firms could not sell directly to doctors and doctors to patients, seemed to matter a lot to the Court majority when it decided that the medical detailers—who sold nothing but promoted the products of their employer—were outside salesman.<sup>188</sup>

A careful reading of the case additionally alerts us to why the Court stretched the statute in favor of the employer; the medical detailers made about \$70,000 dollars, annually.<sup>189</sup> Such higher paid workers, in the view of the five justices who signed off on the majority opinion, were not protected by the FLSA.<sup>190</sup> The Court stated, "Petitioners—each of whom earned an average of more than \$70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work

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184. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

185. *Id.* at 2163–64.

186. *See* 29 C.F.R. § 541.503 (2011).

187. *Smithkline Beecham Corp.*, 132 S. Ct. at 2172.

188. *Id.* at 2172–73.

189. *Id.* at 2173.

190. *Id.*

related to his assigned portfolio of drugs in his assigned sales territory—are hardly the kind of employees that the FLSA was intended to protect.”<sup>191</sup>

Nothing in the FLSA says that workers who make \$70,000 dollars or more are exempt from overtime protections. Perhaps the rule the Court decided to follow in *Christopher* was something akin to *in dubio pro bulla*—when in doubt, rule in favor of the employer?

In the authors’ view, tainted by a Latin American lens, *Christopher v. SmithKline Beecham* was not even a “hard case.” Medical detailers did not sell anything in the ordinary sense of the word and made no commissions. They could not be considered outside salesmen. As argued by the dissent in the same case, medical detailers promoted the sales of others as “nonexempt promotional employees.”<sup>192</sup> However, even if there was a hard question before the Court, the FLSA does not support the conclusion that medical detailers who make \$70,000 a year are exempt employees, at least not more so than the contrary. Part of the purpose of the FLSA is to protect workers, including from overwork. According to the majority’s own statement of the facts, detailers spent between 10 and 20 hours per week working in excess of 40 hours,<sup>193</sup> time that they could have spent with their families or resting. Instead, the medical detailers were compelled to work without receiving payment for overwork. In the authors’ view, a Latin American labor judge would likely determine that given the rules in favor of overtime pay in the FLSA,<sup>194</sup> and constitutional protections of work under the Thirteenth Amendment, the FLSA protects workers such as medical detailers by compelling employers to pay them overtime. Overwork exhausts the high and low paid alike.

All this said, it is clear that *Christopher* is one of those cases where commercial interests prevailed over those of protecting workers. If courts recognized that there was a constitutional protection of work under the Thirteenth Amendment, and that the FLSA is one of those statutes that aim to protect the freedom of individuals suffering employment, it would be

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191. *Id.*

192. *Id.* at 2177.

193. *Id.* at 2173.

194. As the FLSA clearly states:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

easier to persuade future courts that medical detailers such as those in *Christopher* require protection from overwork. Employers require increasingly more onerous hours from “exempt” employees because they can, not only by leave of courts that narrowly interpret FLSA protections, but also because employers’ relatively higher level of bargaining power over workers gives employers the plain opportunity to require such onerous terms from employees. The fact that the U.S. is one of the industrialized nations with the highest number of overworked workers, with the average hours worked per employee being among the highest in the industrialized world, attests to the need to protect American workers from overwork.<sup>195</sup> With a constitutional mandate and a statute such as the FLSA protecting workers, commercial interests that favor uncompensated overwork can be better reined in and the freedom of workers such as medical detailers—who can be forced to work in economic conditions that are not of their making—can be better protected.

### C. *The Protective Principle in the NLRA*

The NLRA also protects workers. It states the desirability of protecting the right of employees to organize and bargain collectively in order to equalize and correct power asymmetries between employers and workers.<sup>196</sup> The text of the NLRA states:

Experience has proved that *protection by law* of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.<sup>197</sup>

Different from the Latin American reasons for protection, which are based on the defense of workers’ dignity and safeguarding them from dehumanization when locked in unequal bargaining relationships with

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195. For example, U.S. workers worked on average about 1,800 hours in 2009, compared to less than 1,400 hours in Germany, the leading manufacturing industrial democracy. See BLANPAIN ET AL., *supra* note 26, at 52. See *id.* for other comparators.

196. 29 U.S.C. § 151.

197. *Id.*

employers, protection in the NLRA is instrumental to safeguard industrial peace and interstate commerce, or, some would argue, the market. Either because of the legacy of *Lochner v. New York* or attempts to legitimize government regulators, the drafters of the 1935 NLRA sought to constitutionalize the NLRA through the Commerce Clause and include this language regarding obstructions to commerce in the statute.<sup>198</sup>

As argued earlier, however, the NLRA could have been constitutionalized through the Thirteenth Amendment to find a legally stronger protective base for workers. A Latin American jurist could effortlessly find a more protective constitutional basis for the NLRA under the Thirteenth Amendment, strengthening the statute's protections of workers.

But even if the NLRA's protections of workers were a means to safeguard the market, the statute still protects workers in Section 7, the most important clause of the NLRA, which states, "[e]mployees shall have the right 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. . . ."<sup>199</sup> In this manner, the NLRA protects workers' rights to engage in collective action not only for bargaining with the employer, but also for other reasons related to their "mutual aid and protection."

The law also establishes employer unfair labor practices to protect workers against employers who violate Section 7,<sup>200</sup> dominate labor organizations,<sup>201</sup> discriminate against workers for exercising their Section 7 rights,<sup>202</sup> retaliate against workers who have filed charges or given testimony under the NLRA,<sup>203</sup> or fail to bargain in good faith with the union.<sup>204</sup>

Some key NLRA cases have also shown that American work law jurisprudence can sometimes recognize the protective nature of work law, and, therefore, hold in a manner that interprets the law in favor of the worker. The need to protect workers' right to act in concert for collective

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198. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 31 ("[The NLRA] purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.").

199. 29 U.S.C. § 157.

200. See *id.* § 158(a)(1).

201. See *id.* § 158(a)(2).

202. See *id.* § 158(a)(3).

203. See *id.* § 158(a)(4).

204. See *id.* § 158(a)(5).

bargaining and mutual aid and protection was very recently stressed by the National Labor Relations Board (hereinafter referred to as “NLRB” or “Board”) in *D.R. Horton, Inc.*<sup>205</sup> The Board decided that an employer violates the NLRA if it compels an employee, as a condition of employment, to sign an agreement that precludes the employee from joining class or collective suits against employers in any forum, arbitral or judicial.<sup>206</sup> In *D.R. Horton*, an employee had joined a collective action suit under the FLSA, not the NLRA.<sup>207</sup> The employer attempted to bar the employee from joining the FLSA suit, alleging that the employee had signed an agreement with the employer promising not to participate in collective or class action suits of any kind.<sup>208</sup> The NLRB stressed that

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205. 357 N.L.R.B. No. 184 (2012). However, the Fifth Circuit failed to enforce the Board’s order. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013). The Fifth Circuit held that the Board failed to consider the importance of the Federal Arbitration Act when it decided that an employee could waive his or her right to join class actions under the FLSA in lieu of individual arbitration. *Id.* As of this article other Federal Courts have also refused to follow *D.R. Horton*. The ruling has been controversial because courts have questioned the NLRB’s authority to interpret the Federal Arbitration Act, which creates the federal policy regarding arbitration of claims, even if it interrelates with the NLRA. *See Delock v. Securitas*, 883 F. Supp. 2d 784 (E.D. Ark. 2012) (*D.R. Horton* conflicts with the Federal Arbitration Act (“FAE”) because the FAE only requires that employees have some forum, arbitral or judicial, to hear their claims.); *LaVoice v. UBS Fin. Serv., Inc.*, 2012 WL 124590, at \*6 (S.D.N.Y. 2012) (In the absence of explicit language in the FLSA providing an absolute right to join a class action, and given the expansive policy in favor of arbitration, there is no absolute right to collective action, despite *D.R. Horton*) (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2012) (The “principal purpose” of the FAA is to “ensure[e] that private arbitration agreements are enforced according to their terms.”); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F.Supp.2d 831, 844 (N.D.Cal. 2012) (*D.R. Horton* comes in conflict with the Federal Arbitration Act and enforcing individual arbitration agreements in lieu of collective claims does not destroy workers’ substantive rights under the work laws); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. 2012) (The court did not follow *D.R. Horton* because: other district courts failed to follow it, the NLRB had no authority to interpret the Federal Arbitration Act, no substantive statutory right was at play and there is strong federal policy favoring arbitration).

From a South American perspective, to the extent individual arbitration agreements circumvent the NLRA’s protections to workers, this decision under the FAA is a clear derogation of the NLRA. The courts misunderstand the protective principle inherent in the NLRA. Constitutionalizing worker protection through the Thirteenth Amendment is one way to compel courts to be clearer about the protective principle and choose the side of protection in cases where statutes and public policies may come in conflict.

206. *D.R. Horton*, 357 N.L.R.B. No. 184 at \*17.

207. *Id.* at \*1.

208. The agreement signed by the employee stated in relevant part,

that all disputes and claims relating to the employee’s employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration; that the arbitrator “may hear only Employee’s individual claims,” “will not have the authority to consolidate the claims of other employees,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding”; and that the signatory employee waives “the right to file a

Section 7 of the NLRA protects workers' rights to engage in concerted activities, be these traditional industrial actions such as strikes, pickets, and similar job actions, or judicially sanctioned collective and class actions under other laws, such as the FLSA.<sup>209</sup>

In fact, the Board argued that agreements barring workers from joining collective and class actions resemble the “yellow dog” contracts of the turn of the twentieth century,<sup>210</sup> when employers made workers sign agreements promising not to join a union as a condition of employment. The Board not only recalled the protections for concerted activities for collective bargaining and mutual aid and protection under Section 7, but it also reiterated that the Act recognizes that there is an unequal power relationship between employees and employers inherent in the employment contract, and, therefore, there is a need to equalize the employment relationship through state protection of concerted activity.<sup>211</sup> As the Board stated,

[i]n enacting the NLRA, Congress expressly recognized and sought to redress: “[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association.” . . . Congress vested employees with “full freedom of association . . . for the purpose of . . . mutual aid or protection,” in order to redress that inequality.<sup>212</sup>

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lawsuit or other civil proceeding relating to Employee’s employment with the Company” and “the right to resolve employment-related disputes in a proceeding before a judge or jury.”

*Id.*

209. As the NLRB stated, “[i]t is well settled that ‘mutual aid or protection’ includes employees’ efforts to ‘improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.’” *Id.* at \*2 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978)).

210. *Id.* at \*5. As the NLRB stated in *D.R. Horton*,

The Board has long held, with uniform judicial approval, that the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation. Not long after the Act’s passage, the Board held that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, as was an employee’s circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA. In the decades that followed, the Board has consistently held that Section 7 protects concerted legal action addressing wages, hours or working conditions.

*Id.* at \*2 (internal citations omitted). See also Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *DENV. U.L. REV.* 1017 (1996) (explaining why mandatory arbitration agreements are contemporary “yellow dog contracts.”).

211. *Id.* at \*3.

212. *Id.*

Since workers' rights to join unions or otherwise act in concert for collective bargaining and for mutual aid and protection could be effectively destroyed by the modern version of the yellow dog contract, the NLRB declared the class suit waivers illegal and contrary to public policy.<sup>213</sup>

*D.R. Horton* is a particularly insightful case regarding the manner in which the NLRA protects workers, because the case dealt with an employee's right to engage in concerted activities, normally stemming from Section 7 of the NLRA. The authors underline that the NLRA does not explicitly state that collective claims pursued under a statute other than the NLRA are protected. However, the NLRB, with approval from the courts, has declared that under the policy objectives and the language of Section 7, existing federal labor law protects collective claims brought under the FLSA and other statutes. In this manner, the NLRB has interpreted the NLRA broadly to live up to the protective nature of the statute.<sup>214</sup> A Latin American jurist would likely reach a similar conclusion.

The U.S. Supreme Court also has argued that Section 7 rights provide broad support to employees seeking to act in concert for collective bargaining and for mutual aid and protection. The seminal case of *NLRB v. Washington Aluminum*<sup>215</sup> held that a group of employees who walked off the job because the workplace premises were too cold were protected by Section 7 of the Act. The Court held that the employer could not summarily terminate the employees for acting in concert, for collective bargaining, and for mutual aid and protection, even if the employees violated company policies when they engaged in such acts.<sup>216</sup> The narrow question before the Court was whether the NLRA protected the employee walkout if the workers had not presented a demand to the employer, prior to walking out.<sup>217</sup> According to the employer, the workers' failure to provide a demand made it impossible for the employer to resolve the issue, avoid industrial action, and workers' violation of company policies.<sup>218</sup> The employer maintained that the termination was "for cause" under the law

213. *Id.* at \*8.

214. While *D.R. Horton* has not been followed by some circuit courts because of Federal Arbitration Act preemption or other reasons, these courts have erred. Moreover, the Board's determination that workers who join class actions to seek redress of FLSA violations is protected under the NLRA. See Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 AL. L. REV. 1013 (2013).

215. 370 U.S. 9 (1962).

216. *Id.* at 17.

217. *Id.* at 13–14.

218. *Id.* at 15–16.

and could not be declared an unfair labor practice.<sup>219</sup> The employer argued that the NLRB could not order reinstatement, back-pay, or other remedies in favor of allegedly aggrieved workers.<sup>220</sup>

The Supreme Court disagreed. Basing its decision on Section 7 of the Act, it held that the actions of the employees were protected. The Court reasoned,

The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to *protect the right of workers to act together to better their working conditions*. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively *nullify the right to engage in concerted activities which that section protects*. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could.<sup>221</sup>

Hence, even though the statute was silent as to whether employees needed to present a demand to the employer prior to engaging in collective action, the Court determined, based on Section 7, that such a demand was not necessary.<sup>222</sup> Any other interpretation of the NLRA would have been likely to render Section 7 rights ineffective by placing obstacles in the way of workers' concerted actions. Here, the Supreme Court resolved a gap in the law in favor of the workers given the protective purposes of the NLRA; a Latin American labor judge would have likely done similarly.

Some may contest that the NLRA protects workers. One view of some American labor lawyers is that the NLRA does not provide any

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219. *Id.*

220. *Id.* at 16–17. According to Section 10(c) of the NLRA, “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”

29 U.S.C. § 160(c).

221. *Wash. Aluminum*, 370 U.S. at 14 (emphasis added).

222. *Id.* at 17–18.



substantive worker protections.<sup>223</sup> Rather, they argue that the NLRA simply lends workers with a guarantee that they can organize in the same manner that capital has organized into corporations. The goal of the NLRA, according to this view, is to facilitate formal equality and contractual relations, even “freedom of contract” between capital and labor. The resilience of this freedom of contract view has some basis in the landmark Supreme Court case *NLRB v. Jones & Laughlin Steel Corp.*,<sup>224</sup> where a divided Supreme Court found the NLRA constitutional on the grounds that the NLRA simply sought to extend to workers the same rights of organization that employers had.<sup>225</sup> The law did not compel the parties to reach an agreement of any kind. Therefore neither the NLRB nor the courts could compel any party, a union or an employer, to agree to any term. As the Supreme Court stated in *H.K. Porter Co. v. NLRB*,<sup>226</sup>

One of these fundamental policies is freedom of contract. While the parties’ freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the *procedure alone*, without any official compulsion over the actual terms of the contract.<sup>227</sup>

Parties have to reach *their* agreement. The NLRB can merely supervise the bargaining procedure without compelling any substantive agreement.

While the authors agree that the nature of collective bargaining is to provide for a private ordering of the workplace, an idea that is also central to Latin American work law under the principle of labor union autonomy, it is also true that such private ordering is collective and is protected by law, a *public* institution.<sup>228</sup> Employers can agglomerate corporations,

223. See DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 449 (2009) (“Collective bargaining statutes reflect a policy determination that favors a privately ordered workplace over one controlled by direct government mandates . . .”).

224. 301 U.S. 1 (1937).

225. *Id.* at 45 (“The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer ‘from refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine’). Moreover, since the Taft-Hartley Act, employers need only to “bargain in good faith” with the union. 29 U.S.C. 158(d).

226. 397 U.S. 99 (1970).

227. *Id.* at 108 (emphasis added) (internal citations omitted).

228. The influential economic historian Karl Polanyi already detailed how pure self-regulated market societies are utopian. He showed that real market societies are embedded in social institutions including the state, debunking the stylized view that existing capitalist, market societies were mainly the product of private orderings. For example, modern markets required state policies to create money,

partnerships and other groupings because of laws that legitimize such associations and provide liability limitations and other incentives to its stockowners and managers. Labor law facilitates the organization of unions and collective bargaining. Laws provide legal and, hence, *public* support to collective contractual relations and a private ordering of the workplace. Laws provide protections to those private markets and contracts. Implying that a law that helps workers to get a seat at the bargaining table with employers is merely a “governmental supervision of the procedure alone,” i.e., “procedural” and not “substantive,” conceals the NLRA’s real protections for workers to organize to equilibrate relations with a more powerful actor, the employer.

In fact, even in *H.K. Porter Co.* the Supreme Court recognized the qualified nature of the “freedom of contract” principles inherent in the NLRA:

[T]he employer is not free to choose any employee representative he wants, and the representative designated by the majority of the employees represents the minority as well. The Act itself prohibits certain contractual terms relating to refusals to deal in the goods of others. . . . Various practices in enforcing the Act may to some extent limit freedom to contract as the parties desire.<sup>229</sup>

The law mandates with whom the employer may collectively bargain, and that collective actor must also represent the minority, not just the majority that supports it. Some terms cannot be bargained by the parties, such as terms relating to “hot cargos”.<sup>230</sup> Yes, there is a collective, private ordering of the workplace, but those contours are shaped by law, a public institution.

Moreover, and as argued earlier, to the extent labor law facilitates “freedom of contract,” it is only because it equalizes bargaining relationships between employers and workers. Otherwise, without this protection, workers would be treated as commodities; they would be incapable of meaningfully effecting their contractual relationships with employers. In fact, the scholarly authority cited by Supreme Court in *H.K. Porter* to defend its view of freedom of contract, former Yale Law School professor Harry F. Wellington, mentioned “freedom of contract” but only

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labor and land markets required for capitalist development. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 201–08 (Beacon Press 1957).

229. *H. K. Porter*, 387 U.S. at 108.

230. 29 U.S.C. § 158(e).

as a shortened form of the term “*collective* freedom of contract”—a legislative goal inherent in the NLRA, as stated by Professor Wellington:

Among the many competing goals of national labor policy, two have been frequently proclaimed and staunchly defended, almost but never quite to the death, by the Supreme Court of the United States. One is industrial peace; the other is freedom of contract—*collective contract, to be sure.*<sup>231</sup>

Hence, the NLRA has a goal to facilitate publicly guarded, *collective* contractual relations by protecting workers to organize and bargain with the employer.<sup>232</sup> In effect, for workers to be free, as understood in the Thirteenth Amendment of the U.S. Constitution, and as argued earlier, the government must intervene in employment relations.

Moreover, as explained above, the NLRA is not just about collective bargaining. Section 7, as clearly explained in *Washington Aluminum*, also protects workers who lack union representation, have made no prior demands to the employer and wish to protect themselves from abuse at the workplace.<sup>233</sup> The NLRA is more than a contractual statute. Moreover, viewed through the Latin American perspective, the NLRA can be construed as legislative action necessary to enforce the U.S.’ constitutional protection of work under the Thirteenth Amendment. When workers band together and walk out to protect themselves from abuse at work, they are not only protected by the NLRA but also by the Constitution, which safeguards the freedom and dignity of all Americans.

Others may argue that while the words of the NLRA and some outstanding cases such as *Washington Aluminum* provide worker protections, American courts have “de-radicalized” and otherwise hollowed-out the NLRA. James Atleson, for example, argued that hidden “values and assumptions” of American decisional labor law stemming from the class biases of judges and the status assumptions that society makes of workers helped to erode the NLRA.<sup>234</sup> These corrosive values and assumptions for labor law have been that employers have a right to

231. Harry H. Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964) (emphasis added) (internal citations omitted).

232. We should note that the common law understands some circumstances where parties have differing degrees of bargaining power, rendering contracts unenforceable, such as in the doctrine of unconscionable contracts. Joseph M. Perillo, Calamari & Perillo on Contracts § 9.38 (6th ed. 2009). However, work law does not aim at rendering employment contracts unenforceable, but as we have been arguing here, at protecting workers so that more legitimate contracts can be formed in the employment relationship.

233. *Washington Aluminum*, 370 U.S., at 15–18.

234. ATLESON, *supra* note 12, at 5.

maintain production, employees will act irresponsibly if not controlled, employees can only be minor partners in managing an enterprise, employers own the workplace, and employee participation interferes with the inherent and exclusive managerial rights of employers.<sup>235</sup> According to Atleson, these values and assumptions run in the common law where collective action by workers has been esteemed illegitimate and illegal and where only rational, individual action, rather than collective self-help is justified by law.<sup>236</sup> These values have been central in the evisceration of the right to organize and to strike in the U.S. through the doctrine of permanent economic strike replacements, among others.<sup>237</sup>

Similar to Atleson, Professor Karl Klare argued that a “radical” interpretation of the Wagner Act, which was reasonable at the time it was enacted, was hindered by the courts and other institutional actors that domesticated the statute.<sup>238</sup> According to Klare, the NLRA had six vaguely-stated but nevertheless cognizable goals: industrial peace, collective bargaining, equalization of bargaining power, free choice of workers to join a union, rationalization of the market to stop under-consumption, and industrial democracy.<sup>239</sup> Of these goals, the more radical ones were rationalization of the market, which included wealth redistribution, equalizing bargaining power, and industrial democracy.<sup>240</sup> These goals, however, “were jettisoned as serious components of national labor policy.”<sup>241</sup> In turn, “industrial peace, collective bargaining as therapy, a safely cabined worker free choice, and some rearrangement of relative bargaining power survived judicial construction of the Act.”<sup>242</sup> While the Wagner Act’s goals were vague, it could have been reasonably

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235. *Id.* at 8–9.

236. *Id.* at 5–9; *see also* Klare, *supra* note 12, at 265; DANNIN, *supra* note 12, at 58–59.

237. Pope, *Contract, Race and Freedom of Labor*, *supra* note 129, at 1541. Employers can employ permanent strike replacement to the workplace of unions. The employer strategy normally goes this way: During contract negotiations the employer bargains to impasse. It then unilaterally implements terms and conditions of employment, which is legal once impasse occurs. The union may then call a strike to support its bargaining position. In response, the employer permanently replaces the striking workers, which is legal under the law. Finally, the employer may file for a decertification election with the NLRB where the permanent strike replacements can vote. *See* JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, AND PERMANENT REPLACEMENTS*, 31–40, 192–200 (1998). The practice has proven devastating in key cases. *See id.* at 224–28. *See also* DAUSCHMIDT ET AL., *supra* note 223, at 614.

238. Klare, *supra* note 12.

239. *Id.* at 282–83.

240. *Id.* at 293.

241. *Id.*

242. *Id.* at 292–93.

interpreted in a more “radical” manner. Courts ensured that radical interpretation did not occur.

As the authors argued above, constitutionalization of worker protection through the Thirteenth Amendment would help to limit judicial erosion of labor rights. A Latin American jurist would find him or herself hard-pressed to confirm any immanent employer right to permanently replace strikers, for example, given a constitutional protection of workers and a statute which clearly states in Section 13 that, “Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.”<sup>243</sup> With such legal foundations, judges would interpret the right to strike to be part and parcel of Congress’ authority to enforce the Constitutional ban on involuntary servitude. Under the language of the statute, the policies on which it is based, and the Constitutional ban against involuntary servitude, the Latin American jurist would be similarly hard-pressed to find other commercial interests more important to look after than workers’ needs to be free.

We must also clarify that even if NLRA has been judicially domesticated, this does not mean that the protective principle is entirely absent from it. Under the current NLRA, workers can act in concert in protest of workplace hazards thanks to the NLRA’s protective principle. Workers can proselytize at work in non-working areas of the employer and during their own time, as long as the issues are related in some fashion to their terms and conditions of employment.<sup>244</sup> To the extent courts have narrowed U.S. work law protections, they could broaden them in future cases if persuaded that the law lends itself to protective interpretations favorable to weaker parties.

There is also the argument that the NLRA has been significantly amended by the legislature to favor employers, particularly through the Taft Hartley Act of 1947. Taft-Hartley was decried by organized labor at the time as the “slave labor bill.”<sup>245</sup> Its most controversial provisions, or at least the ones most resisted by unions, included the creation of labor union unfair labor practices,<sup>246</sup> which encompass, most importantly, banning secondary activities strikes and boycotts,<sup>247</sup> protecting employer speech

243. 29 U.S.C. § 163.

244. *Eastex*, 437 U.S. 556.

245. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 n.263 (2001) (internal citations omitted).

246. 42 U.S.C. § 8(b).

247. 42 U.S.C. § 8(b)(4).

during union elections,<sup>248</sup> excluding certain employees from labor law protections,<sup>249</sup> allowing states to enact legislation to permit employee free riding (so-called “right to work laws”),<sup>250</sup> and amending Section 7 so that workers’ negative rights of association (to not join a union) would be enforced,<sup>251</sup> among others.<sup>252</sup>

However, the NLRA’s protection of employees survived even through the Taft-Hartley Amendments. As Professor Ellen Dannin has argued, rights favoring workers’ collective action for their mutual aid and protection were not changed by the Taft-Hartley Amendments.<sup>253</sup> The NLRA still punishes actions by employers who try to curb workers’ collective rights. In fact, stating that the Taft-Hartley Act was enacted to protect employers is not wholly correct since some sections arguably benefit both employees and employers, such as the right to not join the union when the employee understands that a particular labor organization will not represent his or her interests. Certainly, the Taft-Hartley Act slimmed down the Wagner Act’s original protection of workers’ rights, but the core of those protections remains.<sup>254</sup> Additionally, if on top of the existing protections there is a constitutional protection of work under the Thirteenth Amendment, the NLRA remains, or at least has the potential to be, solidly protective. Understanding legal principles, and particularly the protective principle of work law, provides a different interpretation of U.S.

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248. *Id.* § 8(c). For a review of pro-labor critiques of the employer speech rights clause, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516–23 (1993) (Employers and workers are locked in unequal bargaining relationships and the union election model of the NLRA has fostered the wrong impression that unions and employers square off as equals in election campaigns, just as political parties in government elections.); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832 (2005) (“When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact upon employees is likely to reflect their perceptions about the speaker’s basic power over their work lives rather than the persuasive content of the words themselves. Captive audience speeches, oblique or direct threats to act against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline lawful techniques that have proven especially effective in diminishing union support or defeating unionization over the years.”); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 372–73 (2001) (Neutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract.)

249. 42 U.S.C. § 9.

250. *Id.* § 14(b).

251. *Id.* § 7.

252. See DAU SCHMIDT ET AL., *supra* note 223, at 68–71.

253. DANNIN, *supra* note 12, at 71.

254. See *id.*

work law, one that is more consistently in favor of workers and the NLRA itself.

#### IV. OBJECTIONS TO THE PROTECTIVE NATURE OF U.S. WORK LAW

While the authors argue that a Latin American labor judge would find something like the Latin American protective principle in U.S. work law, the authors expect further objections to their claims. The objections will likely state that:

- The peculiar American doctrine of “employment-at-will,” which exists in all U.S. states except Montana, underpins the edifice of U.S. work law, making American work law un-protective.
- The protective principle and something like the rule *in dubio pro operario* is nothing more than a new name for the obsolete common law legal maxim that “remedial statutes must be liberally interpreted.” According to Justice Antonin Scalia and Bryan A. Garner,<sup>255</sup> the legal formulation that remedial statutes must be legally construed is “incomprehensible or superfluous” because (1) all statutes are “remedial,” so all deserve a “liberal” reading and (2) modern textualism posits that all statutes must be “fairly” interpreted, so there is no need for “liberal” construction of statutes.

While legal principles provide a compass to navigate the “stormy seas”<sup>256</sup> of work law, including U.S. work law, the authors agree that employment-at-will considerably weakens existing work law, even with further constitutional protection through the Thirteenth Amendment of the U.S. Constitution. To fully protect workers Congress must extinguish employment-at-will through preemptive federal law. On the other hand, the brand of American textualism espoused by figures such as Justice Scalia and Professor Garner is too narrow. Statutes that derogate the common law, such as those related to work, require a liberal reading in favor of workers, not just a “fair” reading or the same “liberal” reading that any other statute would require. Legislative purpose can help us determine how “liberal” or protective a statutory construction needs to be. Certainly, a constitutional protection of work under the Thirteenth

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255. ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF TEXTS* 5084 (Kindle ed. 2012).

256. See Cynthia Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1995–1996) [hereinafter Estlund, *Wrongful Discharge*].

Amendment would further compel us to give existing labor protective statutes an even stronger “liberal” interpretation.

*A. Employment-at-Will Erodes Protection*

Some may argue that U.S. work law is not protective because the centuries old “employment-at-will” doctrine prevails. The American employment-at-will doctrine, in its bare and traditional formulation, states that employers and employees may terminate their employment relationship for good, bad, or no reason.<sup>257</sup> In other words, unlike the law in all other industrial democracies, the U.S. employment-at-will doctrine does not require “cause” or “just cause” for termination of the employment contract. With zero protections afforded by what appears to be the baseline rule of American work law, how can American work law be protective? Even if some statutes such as the NLRA and FLSA protect workers, these seem to be mere islands of protection in a wide, lonely sea of non-protection.

First, the authors do not consider the American common law rule of employment-at-will to be part of “work law.” From a Latin American perspective, work law is statutory and derogates the common law (or the civil law in civil law jurisdictions) because of the common law’s failure to adequately consider the subordination of employees in the employment relationship. By definition, the authors exclude employment-at-will from the U.S. work law, such as the way Brazilian labor courts excluded civil law tenets from its jurisprudence.<sup>258</sup>

Second, from an empirical treatment of U.S. law, there is a law of “wrongful discharge”<sup>259</sup> in the U.S. derived from statutory protections against discriminatory and retaliatory discharges.<sup>260</sup> The crude rule of employment-at-will under which “bad” reasons can justify termination is no longer the rule.<sup>261</sup> Legal scholars and social scientists have even shown how workplace protections against wrongful discharge are so widely

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257. *See Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884) (“Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.”).

258. *See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 152–53* (2d ed. 1985) (Explaining how micro-systems of law have developed in civil law countries which compete with the traditional civil law, rendering the traditional civil law as “residual.”).

259. Estlund, *Wrongful Discharge*, *supra* note 256, at 1662.

260. *Id.*

261. *Id.* at 1656.



recognized that many employers overzealously guard themselves against liability when they terminate employees.<sup>262</sup>

It has also been argued that employment-at-will is the backdrop against which wrongful discharge causes of action are litigated. In such a backdrop, workers, not employers, are the ones who must prove that “bad” causes motivate terminations. Even with burden-shifting tests under equal opportunity law, employees retain the final, practical burden to prove their cases. The employment-at-will backdrop is different from “for cause” or “just cause” regimes because in those jurisdictions employers, rather than employees, must prove that the termination was lawful.<sup>263</sup> Hence, for example, Professor Cynthia Estlund argues that considerations regarding proof and correlative issues regarding delay and cost of the litigation to workers make it difficult for workers to bring suit and win cases even under statutory work laws that protect workers.<sup>264</sup>

The authors must agree with Professor Cynthia Estlund. Employment-at-will erodes work law. This means that employment-at-will, a lingering relic of master-servant law,<sup>265</sup> must be statutorily rescinded for statutory work law to be more effective in the U.S.<sup>266</sup> The authors suggest that such statute should be federal to lay a floor for the entire U.S. It should be anchored in the Thirteenth Amendment of the U.S. constitution, for the reasons laid out above.

All this said, the authors cannot overstate the fact that work law is still quite real in the U.S., as are its protections. Workers can engage in concerted activity in the absence of a union to protest unhealthy work environments. They must also be compensated for donning and doffing, among many other protections. These are real workplace protections enacted by the U.S. Congress and judicially recognized. U.S. work law could be more protective, but it is protective, nevertheless.

262. Cynthia Estlund, *How Wrong Are Employees About their Rights and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 11 (2002).

263. Estlund, *Wrongful Discharge*, *supra* note 256, at 1691.

264. *Id.*

265. See Laura A. Turczanski, *Closing the Door on the Public Policy Exception to At-Will Employment: How The Washington State Supreme Court Erroneously Foreclosed Wrongful Discharge Claims For Whistleblowers in Cudney v. AlSCO, Inc.*, 36 SEATTLE U. L. REV. 2025, 2027 n.11 (2013) (internal citations omitted).

266. See Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment-at-Will*, 58 UCLA L. REV. 1, 1 (2010). For a “Latin” view of a dismissal statute from within the U.S. see Jorge M. Farinacci-Fernós, *The Search For A Wrongful Dismissal Statute: A Look At Puerto Rico’s Act No. 80 As A Potential Starting Point*, 17 EMPLOYEE RTS. & EMP. POL’Y J. 125 (2013) (arguing that the Commonwealth of Puerto Rico is the only American jurisdiction with a strong pro-worker “for cause” dismissal statute and can serve as the basis for other dismissal statutes in the U.S.).

*B. Work Law Deserves Liberal Interpretation in Favor of the Worker*

There has been an age-old legal maxim in the common law that remedial statutes must be construed liberally. According to the eminent common law jurist William Blackstone, remedial statutes are:

those which are made to supply such defects, and abridge such superfluities, in the common law, as arise [from] either the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever.<sup>267</sup>

Liberal construction generally has been said to mean that statutes that are remedial and change the common law should not be construed “strictly.”<sup>268</sup>

However, Justice Scalia and Professor Garner have argued that all statutes change the common law and, as such, are “remedial.”<sup>269</sup> Therefore, the maxim that remedial statutes deserve a liberal construction makes no sense. All statutes are remedial, so all statutes must be construed “liberally.”<sup>270</sup>

Moreover, according to Justice Scalia and Professor Garner, modern textualism posits that all statutes deserve a “fair reading,”<sup>271</sup> not “strict construction.” No serious, modern jurist would argue that statutes today deserve only a “strict” construction. If “fair” and “liberal” mean “not strict,” then the legal maxim that remedial statutes require a “liberal” construction has, in addition to being incomprehensible, become “superfluous.”<sup>272</sup>

The Latin American perspective is at odds with the textualism of Justice Scalia and Professor Garner. Under the Latin American perspective remedial statutes do deserve a special reading, perhaps a “liberal” one. Not all statutes deserve the same type of “fair” reading. There is a difference

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267. SCALIA & GARNER, *supra* note 255, at 5069 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 86 (4th ed. 1770)).

268. *Id.* at 5090.

269. *Id.*

270. *Id.* at 5070.

271. A fair reading requires “determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.” *Id.* at 814.

272. *Id.* at 5090.

between statutes that add to existing common (or civil) law and those that *derogate*—that in fact completely change—aspects of the common law to protect weaker parties or to otherwise safeguard rights that traditional, individual, and private ordering cannot do.<sup>273</sup> Work law is precisely this type of law that completely changes the common law—that turns it on its head.

To understand the manner by which statutes derogate important principles of the common law, judges and other adjudicators need to pay attention to principles, as we have been arguing for in this article. In the U.S., principles are derived from the purposes of laws, including their consequences, and the legislative debates from where they were born.<sup>274</sup> Justice Scalia and Professor Garner frown upon the use of “purpose” to understand statutes because, among other reasons, they believe that using purpose leads to undue manipulations of the law.<sup>275</sup> However, as Justice Breyer has argued, textualism, the brand of statutory construction that Justice Scalia and Garner advocate for, suffers from the flaw that words in a text can have too many meanings to provide the basis for consistent legal interpretations.<sup>276</sup> Moreover, using legislative purposes is warranted in statutory interpretation not only because it helps judges and other adjudicators provide a better understanding of the law, but also because legislative writing staffs themselves use “general or imprecise terms while relying on committee reports, statements of members delivered on the floor of Congress, legislative hearings” and other materials to draft laws.<sup>277</sup> In other words, legislators use purpose to build their legal texts. Therefore, Congress must also count on courts to use purpose to understand its laws.<sup>278</sup>

A Latin American jurist, in the authors’ view, would agree with the American “purposivists” in this regard. In order to understand the law, adjudicators need to search beyond the pure text and understand the purposes of the law, which are also contained in the principles of law. It is in this light, in the attempt to find what undergirds law, that, for example,

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273. As an important treatise on statutory interpretation reads,

When a statute is both in derogation of the common law and remedial in nature, the rule of strict construction should not be applied to frustrate the legislative intent; the statute should be construed liberally in order to give effect to the legislation.

3 Sutherland Statutory Construction § 60:1 (7th ed. 2007).

274. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 89–92 (2010).

275. SCALIA & GARNER, *supra* note 255, at 602.

276. BREYER, *supra* note 274, at 97.

277. *Id.*

278. *Id.*

the Uruguayan court recognized the so-called “complex employer” liable for the wages of the employees of its contractors, even if positive law was silent about such liability or even about the existence of a so-called “complex employer.”<sup>279</sup>

The maxim that one should give a “liberal” reading of a remedial statute parallels the rule of *in dubio pro operario*, to the extent a “liberal” reading includes an understanding of how the statute aims to benefit weaker parties; inasmuch as it does, the maxim makes significant sense from a Latin American perspective. A Latin American judge may further argue that some statutes deserve more liberal interpretation than others if the law attempts to protect high ordered goals such as human dignity and to protect the weak.

#### CONCLUSION

Latin American work law, coming from a civil law tradition, contains a body of systemic principles. The principles can be gleaned from the constitutions and statutes of the region. These principles include the principle of protection, primacy of reality, non-waiver of statutory rights, employment stability, and labor union autonomy, as elaborated above.

This Article was concerned with the first principle, the principle of protection, which is central to Latin American work law. The principle of protection posits that the law must protect the worker because workers are weaker parties in employment contracts. Without protection, the worker would be turned into a commodity and his or her humanity would be threatened. The law must aid in correcting this moral concern.

The authors also described how the principle of protection has led to the development of the rule of *in dubio pro operario*, which means that when deciding hard cases a judge must interpret the relevant rule in the way most favorable to the worker. We saw that a different but similarly pro-worker rule exists in France and Germany, under the rule or principle “of favor.” While each rule or principle posits slightly different things, all show the same intent: to favor the worker in hard cases.

We argued that a Latin American jurist would likely find the principle of protection in the U.S. The judge would agree with American legal scholars who argue for the extension of the Thirteenth Amendment to ordinary employment contracts and work laws. The whole reason behind labor protection in Latin America is to protect workers from

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279. See Uruguay Court of Appeals, *supra* note 93 and accompanying text.

commodification and affronts to human dignity, goals that are closely paralleled by the Thirteenth Amendment. Hence, the Latin American labor judge would find labor protection in the involuntary servitude clause of the U.S. Constitution, which similarly protects workers, as they are weaker parties in employment relations. In doing so, the judge would better cement labor protection in the general legal landscape of the U.S. and guard existing work law statutes against encroachments by commercial interests that are hostile to work law and limit workers' freedom.

Similarly, a Latin American labor judge would find that the NLRA and the FLSA are concerned about the disparate bargaining relationships between workers and employers. Both laws protect workers to equilibrate power relations. Latin American labor jurists would recognize that while in Latin America the law is concerned about commodification as a moral concern resulting from disparate bargaining positions, in the U.S. the law is more concerned with market failures and "obstructions to commerce" produced by said inequities. The Latin American labor judge would recognize that the commercial goals behind the U.S. laws open some opportunities for erosions of workers' protections. However, the statutes still protect workers. Moreover, if the statutes find further constitutional grounding in the Thirteenth Amendment, they can be read in a more protective light. All this said, Latin American labor jurists would recognize that the statutes protect.

The authors also argued that something similar to the rule of *in dubio pro operario* exists in the U.S. under the legal maxim that remedial statutes should be interpreted liberally. While textualists such as Justice Scalia and Professor Garner have argued against the relevance of that American canon of statutory interpretation, the authors argue that the canon remains valuable if one considers the protective purposes inherent in work law, which derogates the common law to rebalance power asymmetries. If anything, a Latin American labor judge would argue that work law would require an even more liberal interpretation than other laws given its goals to correct inequalities and safeguard human dignity.

We hope that with this introduction to the Latin American principle of protection and the authors' view of how it could be expressed in U.S. work law, the authors can start a conversation with and among U.S. work law scholars and lawyers about the underpinnings of their own work law. Professor Michael Zimmer has already sounded an alarm bell, cautioning against the soft codification of American employment law through an American Law Institute restatement without first identifying the principles

of American work law.<sup>280</sup> The authors' attempt in this Article is to move the discussion in that principled direction.

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280. Michael Zimmer, *The Restatement of Employment Law is the Wrong Project*, 13 EMPLOYEE RTS. & EMP. POL'Y J. 205 (2009).