

Justice at Work: Minimum Wage Laws and Social Equality

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Are minimum wage laws just? Existing legal academic debate implies that they are not. Drawing on neoclassical labor-market models, various legal scholars have argued that minimum wage laws increase unemployment and cause other inefficiencies, and therefore that direct transfers to the working poor are a superior means of ensuring distributive justice. Accepting for the sake of argument that minimum wage laws have such economic effects, this Article nevertheless defends them on grounds of justice. It builds on well-worn arguments that a just state will not just redistribute resources but will also enable citizens to relate to one another as equals. This ideal of “social equality” is most commonly associated with republican and communitarian theories of justice, but it is also central to major strands of egalitarian liberalism. Minimum wage laws advance social equality, and do so better than direct transfers, in several ways. They increase workers’ wages, which are a primary measure of the social value of work; they alter workplace power relationships by giving workers rights vis-à-vis employers; and they require employers and consumers to internalize costs of higher wages rather than mediating all distribution through the state. In short, minimum wage laws help ensure decent work, work that enhances rather than undermines workers’ self-respect. Reduced demand for extremely low-wage labor is a cost worth bearing to ensure decent work—and may even be an affirmative social good.

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Introduction

In 1935, as minimum wage provisions established by President Roosevelt's National Recovery Administration came into effect, a journalist asked a New England textile worker for his reaction. The response was telling:

You can guess that the money is handy. . . . But there is something more than the money. There is knowing that the working man don't stand alone against the bosses and their smart lawyers and all their tricks. There is a government now that cares whether things is fair for us.¹

The sentiment remains remarkably common: low-wage workers often describe the minimum wage as a matter of respect and fairness, not just resources.² President Obama has framed his push to raise the minimum wage in similar terms, calling income inequality “the defining challenge of our time” and a violation of “middle-class America’s basic bargain that if you work hard, you have a chance to get ahead.”³ The overwhelming political popularity of the minimum wage—which transcends income

1. M.D. Vincent & Beulah Amidon, *NRA: A Trial Balance*, SURV. GRAPHIC, July 1935, at 333, 337, reprinted in *THE NEW DEAL AND THE AMERICAN PEOPLE* 34, 40–41 (Frank Freidel ed., 1964).

2. See *infra* section II(A)(1).

3. President Barack Obama, Remarks on the Economy (Dec. 4, 2013), in WASH. POST (Dec. 4, 2013), http://www.washingtonpost.com/politics/running-transcript-president-obamas-december-4-remarks-on-the-economy/2013/12/04/7cec31ba-5cff-11e3-be07-006c776266ed_story.html.

groups, political affiliation, and racial identity—may likewise reflect an intuitive sense that a just state will promote decent wages and decent work.⁴

Legal academic and policy debates around the minimum wage are bloodless in comparison, focusing almost entirely on the minimum wage's efficacy at redistributing wealth. For example, law and economics scholar Daniel Shaviro has argued that the minimum wage is a perverse redistributive tool, for it not only reduces overall efficiency but also “destroys jobs in the low-wage sector of the economy and thus hurts many of the people it is intended to help.”⁵ Shaviro therefore advocated repealing the minimum wage and instead assisting low-wage workers through negative income taxes or other transfers funded out of general revenues.

It is of course unsurprising that legal economists would focus upon questions of efficiency rather than justice. What may be more surprising is that the minimum wage has also troubled legal scholars within another major branch of Anglo-American normative legal theory, the “egalitarian liberalism” of heirs to John Rawls.⁶ (While philosophical liberalism is of course far broader than Rawls et al., for ease of exposition this Article will use the term “liberals” to denote Rawls and his heirs and “liberalism” to denote their thought.⁷) Liberals insist that justice is a matter of fairness,

4. See JEROLD WALTMAN, *THE POLITICS OF THE MINIMUM WAGE* 50 tbls.2 & 3 (2000) (summarizing public opinion data from 1945–1996); *id.* at 48 (“[The public] usually favor[s] setting the wage level higher than whatever Congress is considering at the moment.”); see also ROBERT POLLIN ET AL., *A MEASURE OF FAIRNESS: THE ECONOMICS OF LIVING WAGES AND MINIMUM WAGES IN THE UNITED STATES* 4 (2008) (noting the popularity of state- and local-level minimum wages set above the national level); *2011 American Values Survey*, PUB. RELIGION RES. INST. (Nov. 8, 2011), <http://publicreligion.org/research/2011/11/2011-american-values-survey/> (providing the results of a 2010 national poll in which two-thirds of individuals supported raising the minimum wage to at least \$10 per hour, well above the current rate of \$7.25).

5. Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 406 (1997); see also EDMUND S. PHELPS, *REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE* 147 (reprint 2007) (“[I]t is impossible to understand the lingering appeal of the statutory minimum wage as a way to widen self-support, social cohesion, and so on among the disadvantaged.”).

6. “Egalitarian liberalism” is the name commonly given to the works of John Rawls, Ronald Dworkin, and others who seek to combine traditional liberalism’s focus on a neutral and minimal state with an egalitarian distribution of wealth, typically defined via a “maximin” or similar criterion that seeks to maximize the well-being or social position of the worst off in society. See generally JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001) [hereinafter RAWLS, FAIRNESS]; JOHN RAWLS, *POLITICAL LIBERALISM* (expanded ed. 2005) [hereinafter RAWLS, LIBERALISM]; RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000) [hereinafter DWORKIN, SOVEREIGN VIRTUE]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, THEORY]; Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). Since Dworkin’s *What is Equality?* articles were reprinted as Chapters 1 and 2 of *Sovereign Virtue*, future citations will be to that book rather than the articles.

7. Liberalism also includes, for example, contemporary libertarianism which rejects Rawls’s commitment to an egalitarian distribution of social goods. See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

especially for society's worst off.⁸ But some prominent liberals—including Rawls himself—have implied that tax-and-transfer policies are preferable to minimum wage laws as means of achieving distributive justice.⁹ Indeed, liberals' priority concern for society's worst off may render the minimum wage especially problematic since those with few skills or marginal labor-market connections face the greatest likelihood of job loss after a mandated wage increase.¹⁰ A leading liberal tax scholar has, therefore, proposed a system of unconditional cash transfers to poor citizens in part on the grounds that doing so would “help clear the way for repealing minimum-wage” laws.¹¹

Minimum wage advocates, for their part, typically respond to such critiques in several ways. Often they simply assume minimum wage laws are desirable and ask how best to ensure their enforcement.¹² At other times, they draw on growing—yet still disputed—empirical evidence that minimum wage laws do not in fact increase unemployment.¹³ Such arguments turn what might be a question of first principles into an evidentiary contest. Other advocates appeal to the dignitary values of workplace regulations highlighted by the New England garment worker. But they have only rarely linked those values to broader theories of justice,¹⁴ leaving the minimum wage a bit of an academic orphan. Policy debate around the minimum wage, which has recently become more urgent due to President Obama's proposal and due to recent growth in the low-wage sector,¹⁵ likewise revolves around questions of unemployment.¹⁶

8. See *infra* subpart I(B).

9. See *infra* subpart I(B).

10. See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1004–09 (1999) (arguing that the minimum wage keeps wages “artificially” high for unskilled workers and thus reduces employment opportunities).

11. *Id.* at 1008–09.

12. See *infra* subpart I(C) and section III(B)(3).

13. See *infra* subpart I(C) and section III(B)(3).

14. See *infra* subpart I(C). Professor Samuel Bagenstos is exploring similar questions in his current work, and has defended a similar conception of equality, but does not consider its application to the minimum wage. See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013); see also Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 4–5 (considering the relationship between egalitarian liberalism and minimum wage laws); *infra* section IV(B)(2) (discussing Zatz's argument).

15. See Ben Casselman, *Low Pay Clouds Job Growth: Unemployment Rate Falls but Hiring Rate Slows; Quality of Positions a Concern*, WALL ST. J., Aug. 3, 2013, <http://online.wsj.com/news/articles/SB10001424127887324635904578643654030630378> (“[M]ore than half the job gains [in July 2013] were in the restaurant and retail sectors, both of which pay well under \$20 an hour on average.”); Editorial, *Fast-Food Fight*, N.Y. TIMES, Aug. 7, 2013, <http://www.nytimes.com/2013/08/08/opinion/fast-food-fight.html> (observing that “lower-wage occupations have proliferated in the past several years”); James Surowiecki, *The Pay Is Too Damn Low*, NEW YORKER, Aug. 12, 2013, http://www.newyorker.com/talk/financial/2013/08/12/130812ta_talk_surowiecki (reporting that today's low-wage workers are on average better educated, older, and responsible for a larger proportion of their family's income than in the past).

This is a problem for minimum wage advocates. If intuitions that the minimum wage is a matter of justice are simply wrong or merely conventional, then advocates should take such critiques far more seriously. Moreover, even if minimum wage laws are here to stay, this underlying debate has implications for a host of subsidiary questions. Those include the level at which minimum wages should be set; whether particular workers deserve coverage under such laws; how much states should invest in enforcement; and which entities should be liable for violations. Lawmakers, executives, and judges often confront such questions, and the answers will differ depending on the underlying defensibility of the minimum wage itself.

To focus its analysis, and to begin to move beyond existing debates, this Article accepts for the sake of argument that minimum wage laws tend to reduce demand for low-wage labor. To be clear, this assumption may be counterfactual: there is significant evidence that past minimum wage increases have not led to job losses.¹⁷ But arguments based on such evidence are essentially empirical, and as Paul Samuelson once wrote, “it takes a theory to kill a theory; facts can only dent a theorist’s hide.”¹⁸ Moreover, even if minimum wages will not increase unemployment if set within traditional limits, at a certain wage rate they would undoubtedly do so. Clarifying the social goods advanced by minimum wage laws will help in assessing whether their costs are worth bearing. What is needed is a nonutilitarian defense of minimum wage laws, one that holds even if they reduce demand for low-wage labor.

16. See Jared Bernstein, *The Minimum Wage and the Laws of Economics*, ECONOMIX, N.Y. TIMES (Dec. 4, 2013, 12:01 AM), <http://economix.blogs.nytimes.com/2013/12/04/the-minimum-wage-and-the-laws-of-economics/> (noting that if the minimum wage increased unemployment, “we’d probably know”); Laura D’Andrea Tyson, *Raising the Minimum Wage: Old Shibboleths, New Evidence*, ECONOMIX, N.Y. TIMES (Dec. 13, 2013, 12:01 AM), <http://economix.blogs.nytimes.com/2013/12/13/raising-the-minimum-wage-old-shibboleths-new-evidence/> (summarizing research finding no substantial link between increased minimum wages and unemployment); Arindrajit Dube, *The Minimum We Can Do*, OPINIONATOR, N.Y. TIMES (Nov. 30, 2013, 2:25 PM), <http://opinionator.blogs.nytimes.com/2013/11/30/the-minimum-we-can-do/> (same). Minimum wage opponents have continued to sound alarms over President Obama’s proposal to raise the minimum wage, and even some prominent Democratic economists have urged caution. See Damian Paletta & Jon Hilsenrath, *Bid on Minimum Wage Revives Issue that Has Divided Economists*, WALL ST. J., Feb. 12, 2013, <http://online.wsj.com/news/articles/SB10001424127887323511804578300702588937498> (“President Barack Obama’s proposal . . . is likely to rekindle debates over whether the measure helps or hurts low-income workers.”); Christina D. Romer, *The Business of the Minimum Wage*, N.Y. TIMES, Mar. 2, 2013, <http://www.nytimes.com/2013/03/03/business/the-minimum-wage-employment-and-income-distribution.html?pagewanted=all> (“The economics of the minimum wage are complicated, and it’s far from obvious what an increase would accomplish.”).

17. See *infra* subpart I(C).

18. Shaviro, *supra* note 5, at 449 (quoting DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 355 (1995)).

This Article takes up that mantle, defending the minimum wage as a matter of justice.¹⁹ It builds on well-established arguments that a just state must not just redistribute resources but also ensure that “people stand in relations of equality to others.”²⁰ This requires combatting status inequalities that result from gender, race, and class differentiation. This ideal of “social equality” is most commonly associated with left-communitarian and republican theories of justice, but it is also central to certain strands of egalitarian liberalism, with Rawls himself arguably a leading proponent.²¹ Among other things, a society committed to social equality will seek to ensure decent work—work that enhances rather than undermines workers’ self-respect and social standing.

Minimum wage laws advance this goal in several interrelated ways.²² First and foremost, minimum wage laws increase workers’ hourly pay; this enhances workers’ self-respect by improving their material lives and by increasing the social value attached to their labor. Second, minimum wage laws alter workplace power relationships. Such laws enable workers to call upon the state to protect them against certain employer demands and require employers *themselves* to bear duties toward workers rather than mediating all distribution through the state. These rights and duties are meaningful independent of their effects on distribution for reasons captured nicely by

19. Three notes on the role of justice in this Article are in order. First, as will be clear, this Article uses the term “justice” in the Rawlsian sense, even if its overall analysis is not necessarily Rawlsian. It understands justice as a characteristic of social institutions, not individual morality, and views the basic structure of society as the primary subject of justice. See RAWLS, *THEORY*, *supra* note 6, at 7 (“The basic structure [of society] is the primary subject of justice because its effects are so profound and present from the start [of our lives].”). Second, this Article’s argument is limited to relatively advanced industrial or post-industrial economies characterized by wage labor; I take no position on whether minimum wage laws are just in preindustrial economies, for example, or in future economies that do not rely upon employment relationships. Finally, it is possible that a set of alternative labor-market regulations could render minimum wage laws superfluous. One can imagine, for example, a country that need not adopt a formal minimum wage because robust labor laws enabled all workers to bargain for relatively high wages and to prevent employers from exerting undue power over them. This Article assumes, then, a society in which other background legal institutions render minimum wage laws structurally necessary to achieve decent wages and formal legal entitlements for some class of unskilled workers.

20. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287, 288–89 (1999); see also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* xii–iii (1983) (“The aim of political egalitarianism is a society free from domination.”). See generally Anderson, *supra*; Joshua Cohen, *Democratic Equality*, 99 *ETHICS* 727 (1989); Norman Daniels, *Democratic Equality: Rawls’s Complex Egalitarianism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 241 (Samuel Freeman ed., 2003); Samuel Scheffler, *What Is Egalitarianism?*, 31 *PHIL. & PUB. AFF.* 5 (2003); Iris Marion Young, *Taking the Basic Structure Seriously*, 4 *PERSP. ON POL.* 91 (2006).

21. See *infra* Part II and subpart IV(A); see also RAWLS, *FAIRNESS*, *supra* note 6, at 131 (arguing that material redistribution is important because “[s]ignificant political and economic inequalities are often associated with inequalities of social status that encourage those of lower status to be viewed both by themselves and by others as inferior”).

22. Assuming, as will generally be done for purposes of argument, that businesses follow the law. *But see infra* subpart IV(A).

the textile-worker quote above. Third, minimum wage laws alter the economics of low-wage employment. They deliver additional resources to low-wage workers as a group, and they force employers and consumers to internalize some of the social costs of low-wage work.²³

Minimum wage laws, in short, help ensure more egalitarian work-based social structures. This analysis thus turns one common line of critique on its head: rather than a tax on low-wage work, the minimum wage can be analogized to a tax on the class and status benefits of employing or consuming the products of low-wage labor. Minimum wage laws' effects on unemployment should therefore no longer give rise to a presumption against them but rather should be seen as a collateral cost to be managed—perhaps through transfers, or perhaps through other policies that enhance employment opportunities.²⁴ In fact, marginally reduced demand for extremely low-wage labor may be an affirmative good insofar as it ensures more egalitarian social relationships.

Part I, below, summarizes the existing legal academic debate around minimum wage laws, unpacking certain utilitarian and liberal scholars' skepticism. Part II defines and defends social equality as an alternative metric of justice. Part III traces the relationship between minimum wage laws and social equality. Part IV then takes up various important counterarguments.

I. Existing Debate: Minimum Wage Laws and Distribution

Legal academic debate on minimum wage laws is largely framed around a simple question: what policy or policies will best increase the resources available to the working poor?²⁵ While the menu of policy options is wide, the most important alternatives to minimum wages all involve taxation and transfer of funds directly to the working poor. These include employment subsidies, in which the government would pay a portion of a low-wage worker's salary;²⁶ the earned income tax credits (EITCs) or other negative income taxes, which deliver additional means-tested resources to the working poor and are gradually phased out via

23. See *infra* Part III.

24. See *infra* section III(B)(3).

25. See DAVID NEUMARK & WILLIAM A. WASCHER, *MINIMUM WAGES* 3 (2008) (“[W]e see the principal intent of the minimum wage as helping to raise incomes of low-income families.”); Shaviro, *supra* note 5, at 407, 457–61 (arguing that three objectives of “low-wage subsidies,” including minimum wages, are progressive redistribution, encouraging work by the poor, and reducing the transfer system’s discouragement of work at the margins); Zatz, *supra* note 14 (noting that both critics and advocates of the minimum wage “basically agree that the minimum wage should be evaluated as an antipoverty program”).

26. See Phelps, *supra* note 5.

positive tax rates;²⁷ and “demogrant,”²⁸ “basic income”²⁹ or “stakeholder”³⁰ programs, under which all citizens would receive a cash grant either annually or at some point during their lives. While the differences among these proposals are important, and will be noted in places, they will generally be treated together because all have a similar institutional form (tax-and-transfer rather than regulate), and because all have advantages over the minimum wage as means of redistributing resources.

Subpart I(A) summarizes the utilitarian case against minimum wage laws and for direct transfers, as reflected in law and economics scholarship. Subpart I(B) summarizes liberal scholars’ arguments for the same policy choice. Subpart I(C) discusses minimum wage defenders’ extant responses.

A. *Utilitarian Critiques*

The most important critiques of the minimum wage arise from neoclassical economics³¹ and have been incorporated most prominently into legal academic debates around the minimum wage by Daniel Shaviro.³² Shaviro’s analysis is basically utilitarian: he seeks to maximize overall utility within a society and takes material resources to be the basic measure thereof.³³ In a utilitarian framework, even if redistributing wealth to the working poor is a good idea—due, for example, to the social costs of poverty or the declining marginal utility of resources—the minimum wage is a suboptimal way of doing so for two interrelated reasons.

27. See Shaviro, *supra* note 5, at 408 (discussing the EITC); *id.* at 410 (discussing other negative income taxes).

28. See Alstott, *supra* note 10, at 1056–58 (proposing the EITC or a demogrant); Shaviro, *supra* note 5, at 469–73 (discussing 1970s proposals for a demogrant in the United States and comparing the EITC and negative income tax).

29. See generally PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM* (1995) (proposing a basic income program).

30. See generally BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999) (proposing a one-time “stakeholder” grant).

31. See, e.g., George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 *AM. ECON. REV.* 358 (1946) (examining the economic effects of minimum wage legislation and reviewing alternative policies).

32. Shaviro, *supra* note 5, at 407–08.

33. While Shaviro does not specifically identify himself as a utilitarian, this is certainly the overall tenor of his argument, and others have specifically described his analysis as utilitarian. See Alstott, *supra* note 10, at 973 & n.24 (describing Shaviro as utilitarian); see also Amartya Sen, *Utilitarianism and Welfarism*, 76 *J. PHIL.* 463, 463–64 (1979) (“[A]ll variants of utilitarianism . . . identifi[y] the goodness of a *state of affairs* (or outcome) with the sum total of individual utilities in that state . . .”). Shaviro’s approach is also largely consistent with welfarist approaches to policy analysis, see Louis Kaplow & Stephen Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 *J. LEGAL STUD.* 331, 332 (2003) (“Under a welfarist approach . . . one first determines how a policy affects each individual’s well-being and then makes an aggregate (distributive) judgment based exclusively on this information pertaining to individuals’ welfare.”), and differences between these approaches are irrelevant for present purposes.

First, the minimum wage is not well targeted at the working poor in the first place. It applies to covered workers regardless of their background family wealth, their annual income (including whether their work is seasonal or year-round), the extent to which they work overtime, whether they have a second job, their family status and wealth, and myriad other factors.³⁴ If policymakers aim to increase the resources available to the working poor, targeted transfers are clearly a superior policy choice.

Second, economically speaking, the minimum wage is “equivalent to a wage subsidy to low-wage employees, financed by a tax on low-wage employers.”³⁵ Its perversity is thus apparent: even if a wage subsidy is a good idea, a tax on low-wage employers will reduce demand for low-wage labor. Granted, the reduction in employment or work hours may be less than the increase in wages due to demand elasticity for low-wage labor, such that the minimum wage may enable low-wage workers to capture a greater proportion of surplus.³⁶ But this only highlights another perversity of the minimum wage: it will always be Kaldor–Hicks inefficient. By creating a cartel among low-wage employees, minimum wage laws—like all price controls—“impos[e] a deadweight loss on society.”³⁷ Net social product will be lower. To maximize the resources available to the working poor, in this view, it is best to set private law and market rules so as to create the maximum wealth possible and then to redistribute as desired through taxation and transfers.³⁸

Granted, it is unclear whether the perversity critiques accurately reflect the effects of the minimum wage in real labor markets.³⁹ Nevertheless, to

34. See Zatz, *supra* note 14, at 9–12; see also Shaviro, *supra* note 5, at 434 (citing Stigler, *supra* note 31, at 362–63) (summarizing the factors that lead to divergence between minimum wage workers and individuals living in poverty).

35. Shaviro, *supra* note 5, at 407.

36. This will depend upon market conditions. As an example, however, Shaviro cites a long-held consensus among economists that a 10% hike would decrease total work hours by 1%–3% and that a 25% hike would reduce such hours by 3.5%–5.5%. *Id.* at 436–37.

37. *Id.* at 416 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 287 (4th ed. 1992)).

38. *Id.* at 474 (“The earned income tax credit . . . is considerably better than the minimum wage as a device for both progressive redistribution and encouraging workforce participation among the poor.”); Stigler, *supra* note 31, at 365 (advocating negative income taxes and cash or in-kind grants to the poor). See generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

39. See *infra* subpart III(B) (discussing incentive effects of minimum wage laws). Compare CARD & KRUEGER, *supra* note 19, at 13–17 (finding that employment tended either to remain stable or even to increase, at least within studied industries, following minimum wage increases), and Arindrajit Dube et al., *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945, 962 (2010) (finding that higher minimum wages do not have a detectable effect upon low-wage employment in the restaurant industry), with NEUMARK & WASCHER, *supra* note 25, at 39 (arguing that a review of studies of the minimum wage’s effects confirms the standard model’s predictions), and Shaviro, *supra* note 5, at 435–59 (criticizing Card and Krueger’s methodology, their models, and their conclusions). See generally

focus the argument, this Article will assume that the neoclassical model is essentially correct—though it will highlight certain idiosyncrasies of labor markets that complicate, but do not undermine, that basic account.⁴⁰

B. *Egalitarian Liberalism and Minimum Wage Laws*

Legal scholars operating within egalitarian liberalism have also often been skeptical toward the minimum wage. This subpart summarizes their arguments.

1. *Justice as Fairness and Basics of Egalitarian Liberalism.*—Since the 1971 publication of John Rawls’s *A Theory of Justice (Theory)*, egalitarian liberalism (again, “liberalism” for ease of exposition) has become the dominant left-leaning Anglo–American normative political philosophy.⁴¹ Rawls argued that classical liberalism and utilitarianism are unconvincing theories of justice, in part because both tolerate economic inequalities that unfairly limit citizens’ autonomy.⁴² His own theory, which he called “justice as fairness,” would require the state first to ensure equal basic liberties, then to ensure distributive justice, and only then to consider questions of aggregate utility or efficiency.⁴³

CONG. BUDGET OFFICE, PUB. NO. 4856, THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME app. B (2014), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44995-MinimumWage.pdf> (providing a bibliography of recent empirical research on the effects of minimum wage laws on employment levels).

40. Those include the role of fairness norms in labor-market behavior and businesses’ differential responses to a minimum wage mandate. See *infra* Part II.

41. Summarizing Rawls’s theory is impossible, and the account *infra* disregards certain influential elements thereof. Those include: his decisional process from behind a “veil of ignorance,” which, Rawls emphasized, is “a purely hypothetical situation,” designed to “account for our moral judgments and . . . to explain our having a sense of justice,” RAWLS, THEORY, *supra* note 6, at 118, 120; and his argument that liberty and equality are both elements of deeper Kantian commitments to individual autonomy and therefore that his overall theory is nonconsequentialist, see generally John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515 (1980).

42. See RAWLS, FAIRNESS, *supra* note 6, at 95–96 (comparing two principles of justice to the principle of average or aggregate utility); RAWLS, THEORY, *supra* note 6, at 65, 75 (arguing that the difference principle requires a system of “democratic equality” rather than the system of “natural liberty” (classical or laissez-faire liberalism) or “liberal equality” (akin to welfare-state capitalism)). Utilitarianism had the added fault—less important for present purposes—of allowing infringements of individual liberties if doing so would increase net utility. See RAWLS, THEORY, *supra* note 6, at 27 (“Utilitarianism does not take seriously the distinction between persons.”).

43. Rawls explains:

First Principle [(the liberty principle):]

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle [(the equality principle):]

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged [the “difference principle”] . . .

and

Rawls's focus upon distributive justice, as encapsulated in his "difference principle," is for present purposes the most important aspect of his theory. That principle permits inequalities in what Rawls called "primary social goods" only if such inequalities benefit the worst off in society, for example by incentivizing talented individuals to develop and deploy their own skills. Primary social goods are things that "normally have a use whatever a person's rational plan of life,"⁴⁴ including income and wealth; positions of responsibility; and—likely most important, according to Rawls—"[t]he social bases of self-respect."⁴⁵ The difference principle is therefore similar to a "maximin" criterion of distributive justice, so called because it requires maximizing the amount of some good possessed by the social group with the least of it.⁴⁶ Nevertheless, Rawls emphasized that the difference principle did not necessarily instantiate a maximin criterion.⁴⁷ It is more fundamentally "a principle of reciprocity," an injunction to organize basic institutions so as to ensure self-respect and autonomy for all.⁴⁸

Rawls held that two forms of society could satisfy these principles: market socialism and what he called "property-owning democracy," a radical form of capitalism that would place in each citizen's hands "sufficient productive means for them to be fully cooperating members of society on a footing of equality."⁴⁹ But Rawls did not describe what property-owning democracy would look like in practice nor how to implement it.⁵⁰ In fact, aside from endorsing "a social minimum covering at least the basic human needs," such as public education, social insurance,

(b) attached to offices and positions open to all under conditions of fair equality of opportunity [the "fair equality of opportunity principle"].

RAWLS, *THEORY*, *supra* note 6, at 302. Rawls ranked the principles in lexical order, such that a principle does not come into play until those before it are satisfied. *Id.* at 302–03. Thus, the first principle is prior to the second principle; within the second principle, fair equality of opportunity is prior to the difference principle; and the second principle is prior to considerations of efficiency, utility, or welfare maximization.

44. *Id.* at 62.

45. RAWLS, *FAIRNESS*, *supra* note 6, at 58–59 (defining and enumerating primary social goods); *see also* RAWLS, *THEORY*, *supra* note 6, at 440 ("[P]erhaps the most important primary good is that of self-respect.").

46. *See* WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 66–67 (2d ed. 2002) (interpreting the difference principle as maximin). This argument brackets alternative formulations of liberal principles of distributive justice such as prioritarianism, "which would attach greater weight to the interests of the less well off, but would still allow major gains to the affluent to outweigh minor losses to the poor." *Id.* at 66.

47. RAWLS, *FAIRNESS*, *supra* note 6, at 94–95 (clarifying that "the reasoning for the difference principle does not rely on [the maximin] rule").

48. *Id.* at 64.

49. *Id.* at 140; *see also id.* at 114 (clarifying that the basic right to property does not require a right to the means of production or to participate in the control of the means of production).

50. *See* KYMLICKA, *supra* note 46, at 90–91 (noting that aside from inheritance taxation, "Rawls gives us no idea of how to implement such a property-owning democracy").

and cash supports for the poor,⁵¹ Rawls gave few details regarding optimal institutions of distributive justice or other matters of public policy. This is in part a structural element of his theory: he did not seek to provide a blueprint for social justice, but rather to formalize a view of justice that could be embraced by “opposing religious, philosophical and moral doctrines likely to thrive over generations in a . . . constitutional democracy, where the criterion of justice is that political conception itself.”⁵² Rawls therefore focused upon “ideal” or “strict compliance” theory, on the view that describing a perfectly just society was a necessary first step to addressing present-day injustices.⁵³ The laws and regulations required to satisfy the difference principle, he held, would need to be worked out in individual societies based upon their own traditions and degrees of economic development.⁵⁴

2. *Egalitarian Liberals’ Criticisms of the Minimum Wage.*—Rawls’s *Theory* has profoundly influenced legal scholarship in myriad fields including tax,⁵⁵ welfare and poverty law,⁵⁶ family law,⁵⁷ constitutional law,⁵⁸ and private law.⁵⁹ Yet relatively little has been written about liberalism’s implications for the minimum wage and other basic labor-

51. RAWLS, FAIRNESS, *supra* note 6, at 162–63.

52. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987).

53. See RAWLS, THEORY, *supra* note 6, at 8–9 (distinguishing ideal or “strict compliance” theory from nonideal or “partial compliance” theory).

54. For example, while Rawls argued that a social minimum covering basic needs would be a constitutional essential, he held that the difference principle should not be accorded constitutional status since individuals could disagree in good faith regarding what it required. RAWLS, FAIRNESS, *supra* note 6, at 47–49.

55. See Alstott, *supra* note 10, at 980–81 (including Rawls on a short list of liberal scholars supporting a basic income). Compare Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 364 (1996) (summarizing Rawls’s justifications for the estate tax and progressive income taxation), with Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 291–97 (1994) (critiquing Rawls’s justifications for the estate tax).

56. See generally Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

57. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 89–109 (1989) (examining the implications of Rawls’s theory for gender, women, and the family).

58. See generally Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004).

59. See *infra* notes 72–78 and accompanying text.

market regulations,⁶⁰ and various liberals who have treated the minimum wage have tended to join utilitarians in criticizing it.⁶¹

Rawls himself set the template. In *Theory* he stated that once a robust social minimum is in place, “it may be perfectly fair that the rest of total income be settled by the price system” and that addressing needs through transfers would generally “be more effective than trying to regulate income by minimum wage standards, and the like.”⁶² This implies that, once the difference principle is satisfied, utilitarian critiques of the minimum wage may properly influence subsequent policy analysis. Yet the argument is stated offhandedly, akin to dicta, making its precise contours unclear. For example, Rawls does not assert that the minimum wage is inconsistent with liberal principles, just that it is less “effective” than transfers at ensuring a fair distribution, and he only states that eliminating the minimum wage “may” be fair, leaving open the possibility that it is defensible, whether to equalize resources or on other grounds.⁶³

A passage in Rawls’s later work has led some to ask whether minimum wage laws are inconsistent with liberal commitments to individual liberty.⁶⁴ Responding to Nozick’s arguments that any effort to

60. See Seanna Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643, 1643 (2004) (arguing that “the precarious presence of race and labor in Rawls’s theory has not generated the same attention” as the question of gender); Zatz, *supra* note 14, at 4–6 (noting, tacitly, liberalism’s failure to influence debates over the minimum wage).

61. See *infra* notes 63, 73, 88 and accompanying text.

62. RAWLS, *THEORY*, *supra* note 6, at 245.

63. Ronald Dworkin’s influential interpretation of Rawls’s theory, which holds that a liberal egalitarian state must correct for accidents of birth but not for individuals’ own bad choices, *DWORKIN, SOVEREIGN VIRTUE*, *supra* note 6, at 5, is also ambiguous regarding such questions. On the one hand, Dworkin criticizes the “laissez-faire labor market” for ignoring human needs, *id.* at 90, and argues that liberals need not always prefer to redistribute via taxation rather than regulation, Ronald Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 133 (Stuart Hampshire ed., 1978). On the other, Dworkin does not consider labor-market regulations in any detail, focusing instead on developing the case for classical forms of social insurance, and his proposal for job “auctions” to ensure an equitable distribution of job-related rents seems to encapsulate a preference for labor-market deregulation. See *DWORKIN, SOVEREIGN VIRTUE*, *supra* note 6, at 94–95. Dworkin’s theory has sparked a wide debate on “responsibility-catering egalitarianism.” See G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 908 (1989) (“I believe that the primary egalitarian impulse is to extinguish the influence on distribution of both exploitation and brute luck.”); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 *PHIL. & PUB. AFF.* 146, 147 (1993) (characterizing the “egalitarian ethic” as holding “that society should indemnify people against poor outcomes that are the consequences of causes that are beyond their control, but not against outcomes that are the consequences of causes that are within their control” (emphasis omitted)).

64. See, e.g., Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 *GEO. WASH. L. REV.* 598, 598–99 (2005) (arguing that the “conventional view of Rawlsian political philosophy is that the private law lies outside the scope of the two principles of justice—it is not part of the ‘basic structure’ of society, which, in this view, is limited to basic constitutional liberties and the state’s system of tax and transfer” (citing) CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17, and Arthur Ripstein, *The Division of*

maintain distributive justice over time would require constant interference with individual conduct,⁶⁵ Rawls proposed an institutional “division of labor” between rules of the basic structure—comprising mainly constitutional law and redistributive taxation—and “another set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on),” which “are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints.”⁶⁶ Various scholars have interpreted this as an argument that private law should be insulated from distributive questions, on the grounds that a liberal state should not make individual citizens responsible for other citizens’ distributive outcomes.⁶⁷

Applied to minimum wage laws, however, such concerns are exaggerated for at least two reasons. First, while some commentators treat the minimum wage as a rule of contract akin to unconscionability,⁶⁸ the analogy is not entirely apt. The minimum wage applies to all covered labor contracts, not just contracts that offend a court’s sense of fairness, and it requires employers to pay standard wages, not wages that are “fair” under the circumstances.⁶⁹ As a result, the minimum wage is *not* agent-specific in a manner that triggers concerns about predictable contracting.

Second, regardless of whether requiring all transactions to advance distributive justice would thwart individual liberty, it is appropriate to ensure that the background legal rules governing those transactions advance

Responsibility and the Law of Tort, 72 *FORDHAM L. REV.* 1811, 1813 (2004) (1981)); *id.* at 600 (classifying minimum wage laws among private law rules including unconscionability that would, on the conventional view, fall outside the Rawlsian basic structure); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 473 (1980) (citing the minimum wage as one example of a contract law rule “deliberately intended to promote a distributional end”).

65. Compare NOZICK, *supra* note 7, at 163 (developing a libertarian argument), with RAWLS, *FAIRNESS*, *supra* note 6, at 52 & n.18, 53–54 (clarifying that his “division of labor” argument is a response to Nozick).

66. RAWLS, *LIBERALISM*, *supra* note 6, at 268.

67. See Aditi Bagchi, *Distributive Injustice and Private Law*, 60 *HASTINGS L.J.* 105, 105 (2008) (“[P]revailing academic opinion is that distributive justice is irrelevant to private law.”); Kronman, *supra* note 64, at 473 & n.9 (interpreting Rawls himself to hold that while “some compulsory redistribution of wealth is morally acceptable . . . [or] even required,” the “legal rules that govern the process of private exchange [should] be fashioned without regard to their impact on the distribution of wealth in society”). But see Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *VA. L. REV.* 1391 (2006) (arguing that Rawls’s division of labor accommodates corrective and distributive justice within broader Kantian commitments to autonomy); *id.* at 1432 (arguing that this Kantian approach may cast “severe inequalities of bargaining power between employers and workers . . . as forms of dependence” incompatible with the social responsibility to enable the conditions of individual autonomy).

68. See Kordana & Tabachnick, *supra* note 64, at 600; Kronman, *supra* note 64.

69. Put differently, the minimum wage is a rule, while unconscionability is a standard. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”).

distributive justice.⁷⁰ After all, an egalitarian liberalism that forbade *all* statutory regulations of private conduct would seem indistinguishable from libertarianism; and in fact, Rawls made clear several pages later in the same text that the difference principle “applies to the announced system of public law and statutes and not to particular transactions,”⁷¹ presumably including the labor-market regulations. Within a liberal framework, the question therefore becomes whether minimum wage laws violate the first principle of justice by infringing individual liberty in some way other than through effects on private ordering—or, alternatively, whether such laws tend to undermine or thwart the difference principle.

Liberal advocates of basic income policies have developed both ideas. For example, during 1990s debates over welfare reform and its aftermath, the tax law scholar Anne Alstott advocated repealing minimum wage laws.⁷² Alstott’s argument draws explicitly on Rawls, Dworkin, and other liberals who “defend the core values of equality of resources, neutrality toward visions of the good life, and individual freedom.”⁷³ To maximize the freedom of the worst off, Alstott argues, the social minimum must be severed entirely from work requirements through unconditional cash grants.⁷⁴ Such grants would reduce women’s economic reliance on men⁷⁵ and would enable the poor to reject bad jobs, to invest in their own education, to start a business, or to engage in caregiving or community service.⁷⁶ In this view, wage subsidies and other work-linked benefits such

70. See Kronman, *supra* note 64, at 500–01 (arguing that Rawls’s division of labor permits rules governing transactions to be evaluated under metrics of distributive justice, even if individual transactions cannot); see also Kordana & Tabachnick, *supra* note 64, at 621 (arguing that it is “the complete scheme of all legal and political institutions,” rather than, say, “the rules of contract law,” that “is directly answerable to the difference principle”); Stephen Perry, *Ripstein, Rawls, and Responsibility*, 72 *FORDHAM L. REV.* 1845, 1854 (2004) (arguing that Rawls’s division of labor reflects pragmatic concern that private law rules be simple and easily understood).

71. RAWLS, *LIBERALISM*, *supra* note 6, at 283.

72. Alstott, *supra* note 10, at 972 (“If the poor were guaranteed a modest income, the government could more readily reduce or eliminate the minimum wage and other market regulations adopted in the name of fairness.”); see also *id.* at 1007 (arguing the minimum wage is one of “the most entrenched barriers to the operation of a free labor market” and thus is a “labor-market obstacle[]” for low-skilled workers); *id.* at 1005 (arguing for a set of policies that include cash grants, measures to combat employment discrimination, welfare reform, and “reduc[ing] regulation of the labor market”).

73. *Id.* at 980; see also *id.* at 981 (arguing that Ronald Dworkin’s refinement of Rawls “offers a distinctive liberal justification for cash grants to low-earners, financed by a progressive income tax”).

74. *Id.* at 983 (arguing that “[c]ompared to an employment subsidy, a cash payment enhances the opportunities of the person with low earnings capacity” by enabling them to choose whether or not to accept work); see also *id.* at 971 (arguing that a “program of unconditional cash grants would enhance the freedom and economic security of the least advantaged”).

75. ACKERMAN & ALSTOTT, *supra* note 30, at 207–08.

76. Alstott, *supra* note 10, at 971.

as the EITC are illiberal insofar as they rest on “mistaken or morally dubious claims about the intrinsic or instrumental value of paid work.”⁷⁷

But Alstott does not just argue that liberal principles tend to favor unconditional cash grants—she also argues that liberals should disfavor labor-market policies that tend to contract the low-wage job market, including minimum wages.⁷⁸ Her arguments draw in part on basic liberal commitments to neutrality, in particular a worry that the liberal state cannot link redistribution solely to employment regulations without violating the liberal state’s injunction not to promote a vision of the good.⁷⁹ But the thrust of her argument combines an empirical claim about the employment-level effects of minimum wages with a liberal commitment to maximizing the economic position of the worst off. Accepting the neoclassical account of labor markets,⁸⁰ Alstott describes “regulatory barriers to employment, like the minimum wage” as one of the major reasons why the poor have difficulty finding work.⁸¹ Maximizing their freedom requires maximizing their employment opportunities, she argues, and, therefore, repealing the minimum wage along with “other regulation that artificially raises wages at the low end” and therefore reduces labor demand.⁸² Indeed, one of Alstott’s

77. *Id.*; see also ACKERMAN & ALSTOTT, *supra* note 30, at 206 (criticizing Edmund Phelps for “locat[ing] the sense of justice in the workplace” rather than the broader society); *infra* Part IV(B).

78. See *infra* notes 76–80 and accompanying text. Alstott has moderated this stance in more recent work. See Anne L. Alstott, *Why the EITC Doesn’t Make Work Pay*, LAW & CONTEMP. PROBS., Winter 2010, at 285, 298–99 (discussing the declining purchasing power of the minimum wage but not criticizing the minimum wage per se).

79. See, e.g., Bruce Ackerman & Anne Alstott, *Why Stakeholding?*, in REDESIGNING DISTRIBUTION 43, 44 (Erik Olin Wright ed., 2006) (“[R]espect for the individual requires respect for her choices—to work in the home, at a paid job, or not at all.”). Such statements imply that liberal state neutrality disfavors labor-market regulations per se on the grounds that such regulations inevitably valorize work over other sorts of activity; at other times, however, Alstott implies that state neutrality disfavors labor-market regulations only relative to transfers that are not linked to work. See ACKERMAN & ALSTOTT, *supra* note 30, at 205 (arguing that “modest [minimum wage] hikes might not be too harmful,” but that “the big increase needed to make a real difference . . . could have catastrophic consequences”).

80. See Alstott, *supra* note 10, at 1009 (noting her general acceptance of the neoclassical model).

81. *Id.* at 1004. While Alstott draws on William Julius Wilson’s work in support of this argument, Wilson does not actually make that argument. See *id.* at 1004, 1007 (listing the “four labor market obstacles that Wilson identifies,” including “labor-market regulation,” and suggesting that “one might add” the minimum wage to the examples of such regulation that Wilson supplies).

82. *Id.* at 1008–09. In making this argument, she implicitly defines poor, urban, unskilled workers as the worst off, a definition narrower than Rawls’s definition of the worst off as either a social group with limited talents such as “unskilled worker[s],” or as a discrete stratum based on “relative income and wealth.” RAWLS, THEORY, *supra* note 6, at 98. This difference might be consequential in certain instances: if the worst off are defined more broadly, improving the lot of unskilled workers as a whole may be the best means of ensuring justice even if doing so harms some subgroup of workers. But Alstott’s (and Rawls’s) adoption of the neoclassical critique of minimum wage laws renders the distinction irrelevant—even if defined broadly, the

affirmative arguments for unconditional cash grants is that their implementation might “help clear the way” for such deregulation.⁸³

Alstott is not alone. In a series of prominent works, the philosopher and political economist Philippe Van Parijs has defended an unconditional basic income as the optimal means of implementing liberal principles⁸⁴ and has argued that such an income be set at the highest sustainable level—not the most efficient level—in order to maximize the resources available to the worst off.⁸⁵ Yet Van Parijs criticizes unionization and minimum wages as partial barriers to equality⁸⁶ and even proposes taxes to eliminate job-related rents.⁸⁷

Utilitarians and (certain) liberal egalitarians therefore converge in rejecting the minimum wage as a mechanism of wealth redistribution.⁸⁸ These are powerful arguments. Part II will not seek to fully rebut them, but rather to indicate their shortcomings. Before treating such issues, however, subpart I(C) discusses extant defenses of the minimum wage.

C. *Extant Defenses of the Minimum Wage*

Labor and employment law scholars have rarely defended the minimum wage with the sort of intellectual firepower deployed to critique it. As one scholar observed recently, theorizing about the minimum wage is “tragically moribund,” with arguments such as Shaviro’s “hegemonic, in the sense that counterarguments largely remain within the same terms of debate while seeking to eke out a victory nonetheless.”⁸⁹ This is

macroeconomic costs that result from cartelizing the low-wage labor market would reduce unskilled workers’ net utility.

83. Alstott, *supra* note 10, at 1008–09.

84. Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101, 102 (1991) (“[A] defensible liberal theory of justice, that is, one that is truly committed to an equal concern for all and to nondiscrimination among conceptions of the good life, does justify . . . a substantial unconditional basic income.”).

85. VAN PARIJS, *supra* note 29, at 30–40.

86. *See id.* at 107, 188–89, 211–13.

87. *Id.* at 113–14 (discussing job-related rents); Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the 21st Century*, in REDESIGNING DISTRIBUTION, *supra* note 79, at 16 (arguing that “employment rents” should be taxed to provide for basic income).

88. In fact, some of Shaviro’s criticisms of the minimum wage echo egalitarian liberal ideals of justice. *See* Shaviro, *supra* note 5, at 458 (stating that “[o]ne need not be a Rawlsian to be uncomfortable with the tradeoff of helping the relatively poorly-off in exchange for hurting the worst-off,” i.e., those left unemployed by the minimum wage); *id.* at 417 (observing that burdens of job loss, underemployment, and black-market employment will fall disproportionately on women, persons of color, and undocumented immigrants or others “who can credibly commit against turning the employer in”); *see also* PHELPS, *supra* note 5, at 138 (arguing that the fairest way to divide the surplus from productive activity is a version of maximin—“delivering the maximum amount possible to the least advantaged”).

89. Zatz, *supra* note 14, at 3–4; *see also* Oren M. Levin-Waldman, *The Rhetorical Evolution of the Minimum Wage*, 3 RHETORIC & PUB. AFF. 131, 131 (2000) (“In recent years, the rhetoric

particularly striking given the minimum wage's ongoing political popularity, as well as its centrality to recent campaigns for economic justice among low-wage and immigrant workers.⁹⁰ Federal wage-and-hour litigation is also an important book of business for employment law firms, and state and federal authorities have often increased resources devoted to wage-and-hour enforcement in recent years.⁹¹ If utilitarian and liberal critics are correct, these efforts are misguided. This subpart analyzes existing defenses of the minimum wage and then lays the groundwork for a new defense.

Two prominent arguments for the minimum wage can be set aside quickly. First, some minimum wage defenders dispute the empirics of utilitarian (and liberal) critiques, drawing on evidence that minimum wage laws do not noticeably increase unemployment.⁹² As noted above, this Article will generally assume for the sake of argument that the minimum wage reduces demand for unskilled labor. Second, much scholarship simply assumes the normative validity of the minimum wage and focuses on how best to enforce the law.⁹³ Such efforts are valuable given the

[around the minimum wage] has narrowed to a debate that revolves around a youth disemployment effect on the one hand and assisting the poor on the other.”).

90. Zatz, *supra* note 14, at 3–4 (citing, *inter alia*, JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005) (describing use of minimum wage litigation as part of immigrant-worker organizing); Benjamin Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2725–26 (2008) (same)).

91. See Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 *VAND. L. REV.* 727, 728 (2010) (“Claims by workers that they are not being paid lawfully have quadrupled over the last ten years.”); Allen Smith, *DOL Ramps Up Wage and Hour Enforcement*, *SOC’Y FOR HUM. RESOURCE MGMT.* (May 11, 2012), www.shrm.org/legalissues/federalresources/pages/dolwageandhour.aspx (citing a former Bush Administration official for the statistic that “[t]here are 50 percent more federal wage and hour investigators now [in 2012] than in 2008”).

92. See PAUL K. SONN ET AL., *NAT’L EMP’T LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR’S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT 2* (2001), available at <http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf> (arguing that extending full wage-and-hour protections to home-care workers will “vindicate the FLSA’s goals of fighting poverty, spreading work and creating jobs across our economy”); Jared Bernstein, *Raising the Minimum Wage: The Debate Begins . . . Again*, *HUFF POST POLITICS* (Feb. 14, 2013, 3:16 PM), http://www.huffingtonpost.com/jared-bernstein/raising-the-minimum-wage_b_2688688.html (defending the minimum wage in terms of resource distribution); T. William Lester et al., *Raising the Minimum Wage Would Help, Not Hurt, Our Economy*, *CENTER FOR AM. PROGRESS*, <http://www.americanprogress.org/issues/labor/news/2013/12/03/80228/raising-the-minimum-wage-would-help-not-hurt-our-economy-2/> (last updated Jan. 2, 2014) (focusing on economic effects of the minimum wage, including lack of negative employment effects).

93. This is the approach of the leading article in the field, Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 *UCLA L. REV.* 983, 988 (1999) (calling for a new approach to joint liability because those “most in need of minimum-wage protection . . . are frequently left with legal recourse only against itinerant, judgment-proof labor contractors when they are not paid the \$5.15 per hour to which they are entitled”). See generally Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise*

complexities of legal institutional design but they beg the question why minimum wage laws in particular cry out for enforcement.

A third approach does draw on concerns of justice, in particular the widespread intuition that good wages are a matter of basic fairness.⁹⁴ But arguments about fairness in the wage bargain are ambiguous “as to whether the offense lies in the low value placed on another’s labor or in the low purchasing power that results.”⁹⁵ If the offense is low purchasing power, then Shaviro et al. have the upper hand: targeted transfers would be a more effective means of delivering additional resources to low-wage workers.

Increasing the social value attached to unskilled workers’ labor is a more compelling normative basis for the minimum wage and, as argued in Part II, is a powerful rejoinder to utilitarian and liberal critiques. But that goal alone does not explain why employers rather than society as a whole should bear the associated economic burdens. After all, individual employers do not violate any classical moral duty to individual workers simply by paying market wages that fall below the statutory minimum. Such employers do not “victimize” or “exploit” or “coerce” workers in a moral sense,⁹⁶ nor do they “steal” from such workers. Rather, the wage bargain takes place at the end of a long and complex causal chain. Low-wage workers have few marketable skills and must compete with many other workers; employers face imperatives to keep wages low due to capital and product market conditions. Moreover, underenforcement of such laws may also lead to pervasive noncompliance within an industry, creating incentives for individual employers not to comply. It is therefore normal for workers to have no choice but to accept immiserating employment without any individual employer acting coercively, as noted by diverse scholars including libertarians, legal realists, and Analytical Marxists.⁹⁷

Disaggregation, 5 EMP. RTS. & EMP. POL’Y J. 101 (2011) (focusing on questions of enforcement rather than normative desirability); Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012) (same); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010) (same); Ruan, *supra* note 91 (same); Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 FORDHAM URB. L.J. 373 (2007) (same).

94. See, e.g., Levin-Waldman, *supra* note 89, at 132 (“[P]eople who work are entitled to an income that enables them to live in dignity and out of poverty because it is a matter of fairness.”); see also POLLIN ET AL., *supra* note 4, at 21 (defining a living wage as “a wage level that offers workers the ability to support families to maintain self respect and to have both the means and the leisure to participate in the civic life of the nation”); Glynn, *supra* note 93, at 101–02 (discussing the role of wages in the International Labor Organization’s “decent work” agenda).

95. Zatz, *supra* note 14, at 6.

96. *Contra* Goldstein et al., *supra* note 93 (“Garment workers, too, have long been victimized by employers who have sought to hide behind judgment-proof middlemen.”); Ruckelshaus, *supra* note 93, at 373 (“Almost every growing sector in the bottom half of our economy—health care, child care, retail, building services, construction, and hospitality—is plagued by penurious employers who drag down working conditions for everyone.”).

97. See NOZICK, *supra* note 7, at 263–64 (claiming that there is no need for employers to use coercion for employees to have limited options); Robert L. Hale, *Coercion and Distribution in a*

Arguments based on individual moral fault therefore do not offer a coherent or convincing justification for the minimum wage.

As argued in Parts II and III, employer duties can nevertheless be grounded in considerations of justice—on the fairness of institutions that determine the division of advantages from social cooperation—once the social effects of the division of labor are taken into account. The seed lies in another classic defense of the minimum wage: that it corrects for unequal bargaining power between employers and employees.⁹⁸ Granted, since power inequality is pervasive in market economies, its mere existence does not identify outcomes that cry out for regulation.⁹⁹ But employers' power over workers is an undeniable and pervasive fact, particularly in the low-wage labor market. That power asymmetry is important due to its systemic effects: innumerable transactions shaped by that unequal power can lead to both individual and social harms without any particular employer acting immorally.¹⁰⁰

Developing the case for an employer duty nevertheless requires a more detailed account of the connection between extremely low wages and dignitary harms, and an account of why such harms trigger concerns of justice. Part II now turns to such questions.

II. Social Equality Defined and Defended

Minimum wage laws help ensure that low-wage workers stand in relations of equality to others. This Article will call this ideal “social equality,” and will call those who emphasize it “social egalitarians.”¹⁰¹ As Professor Samuel Bagenstos argues in a recent article, the core social egalitarian goal is to create “a society in which people regard and treat one

Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 472–73 (1923) (observing that the background structure of property law forces individuals to work in order to survive); John E. Roemer, *Should Marxists Be Interested in Exploitation?*, 14 PHIL. & PUB. AFF. 30, 30–33 (1985) (arguing that low wages and bad working conditions are, economically speaking, a result of property entitlements, not labor exploitation per se).

98. See Zatz, *supra* note 14, at 19 (discussing the pervasiveness of such arguments).

99. *Id.* at 19–21; see also Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 615–20 (critiquing arguments based on unequal bargaining power).

100. See THOMAS W. POGGE, *REALIZING RAWLS* 11 (1989) (arguing that Rawls's focus on the basic structure demonstrates how “injustice can be systemic . . . without being traceable to any manifestly unjust actions by individuals or groups”). See generally Bagenstos, *supra* note 14 (discussing the relationship between social equality and employment-at-will, employee privacy, and employee political speech).

101. See Bagenstos, *supra* note 14, at 232–35 (summarizing others' descriptions of social equality). Other terms for the same or very similar ideals include “social citizenship,” William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999), and “democratic equality,” DANIELS, *supra* note 20, at 241; Anderson, *supra* note 20, at 289; Cohen, *supra* note 20, at 728. See also RAWLS, *THEORY*, *supra* note 6, at 75–83 (discussing the relationship between democratic equality and the difference principle).

another as equals . . . a society that is not marked by status divisions such that one can place different people in hierarchically ranked categories.”¹⁰² For social egalitarians, a fair distribution of material resources is extremely important. But “the subject of social justice is wider than distribution.”¹⁰³ It includes forms of private power within the workplace, the family, and elsewhere; differentiations based on class, race, sex, gender, and disability; and pernicious social norms that mark particular groups as morally deficient.¹⁰⁴ Indeed, for some prominent social egalitarians, the fundamental goal of establishing “a community in which people stand in relations of equality to others” helps explain why a fair distribution of resources is important in the first place.¹⁰⁵

Social equality can be defended within several different philosophical traditions. Its most prominent proponent is likely the left communitarian Michael Walzer, who describes democratic citizenship as “a status radically disconnected from every kind of hierarchy” and argues that equal relations among citizens define a just society.¹⁰⁶ In such a society, he writes, there will be “no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves.”¹⁰⁷ The republicanism of Philip Pettit draws on similar ideals.¹⁰⁸ Pettit defends a conception of freedom as nondomination or independence from arbitrary power—including both public and private power—that distinguishes it from what he describes as liberalism’s focus on freedom as

102. Bagenstos, *supra* note 14, at 227 (quoting David Miller, *Equality and Justice*, 10 *RATIO* 222, 224 (1997)); *see also* Scheffler, *supra* note 20, at 31 (“[T]he core of the value is a normative conception of human relations, and the relevant question . . . is what social, political, and economic arrangements are compatible with that conception.”).

103. Young, *supra* note 20, at 91.

104. *See* Anderson, *supra* note 20, at 312 (describing how within inegalitarian social systems, “[t]hose of superior rank were thought entitled to inflict violence on inferiors, to exclude or segregate them from social life, to treat them with contempt, to force them to obey, work without reciprocation, and abandon their own cultures”); Young, *supra* note 20, at 96 (arguing that the most fruitful egalitarian approach to policy analysis may be “to supplement Rawls’s normative political philosophy” with “social theorizing” that elucidates the effect of social structures upon individuals’ life chances and autonomy).

105. Anderson, *supra* note 20; *id.* at 326 (noting that while the difference principle “might require considerable sacrifices in the lower middle ranks for trifling gains at the lowest levels,” social equality (which Anderson terms “democratic equality”) is concerned more with whether income inequalities can be converted into “status inequality—differences in the social bases of self-respect, influence over elections, and the like”).

106. WALZER, *supra* note 20, at 277; *accord* David Miller, *Equality and Market Socialism*, in *MARKET SOCIALISM: THE CURRENT DEBATE* 298, 298–312 (Pranab K. Bardhan & John E. Roemer eds., 1993) (describing a similar ideal of social equality).

107. WALZER, *supra* note 20, at xiii.

108. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, in *DEMOCRACY’S VALUE* 163, 165 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (positing that one enjoys freedom to the extent that no other person or group has “the capacity to interfere in their affairs on an arbitrary basis”). *See generally* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997) [hereinafter PETTIT, *REPUBLICANISM*].

noninterference.¹⁰⁹ In his telling, republican freedom “requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another.”¹¹⁰ Commitments to social equality can also be rooted in the more philosophical aspects of Marx’s thought. G.A. Cohen’s critique of Rawlsian liberalism, for example, draws upon Marx’s argument that earlier (nonegalitarian) liberalism provided a false vision of human emancipation insofar as it only required that citizens be equal in their relationship to the state—“an alien superstructural power”—rather than in their everyday lives with one another.¹¹¹ In a truly egalitarian society, Cohen argues, each individual’s “freedom and equality [would be] expressed ‘in his everyday life, his individual work, and his individual relationships.’”¹¹²

Yet while Walzer, Pettit, and Cohen are critics of liberalism, Rawls himself was a powerful advocate of social equality, and many of its most influential contemporary proponents—including Elizabeth Anderson, Iris Marion Young, and Samuel Scheffler—are liberals.¹¹³ Rawls’s explanation of the underlying normative bases of the difference principle is illustrative. That principle is not a mechanical test for the validity of any particular distributive outcome, nor does it require charity.¹¹⁴ Rather, it is “a principle of reciprocity.”¹¹⁵ It is the only appropriate distributive criterion in a democracy, Rawls argued, for it will limit class inequalities and hierarchies of social status across generations.¹¹⁶ Doing so is critically important, moreover, not just because material inequality may threaten social stability, nor even because the worst off will be unable to exercise their basic liberties.¹¹⁷ Rather, Rawls argued, a “confident sense of their own worth should be sought for the least favored and this limits the forms of hierarchy

109. PETTIT, REPUBLICANISM, *supra* note 108, at 7–11.

110. *Id.* at 5; *see also* Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 SOC. THEORY & PRAC. 115, 116 (2005) (proposing that justice at work requires “workplace republicanism” informed by both Rawls’s justice-as-fairness and Pettit’s theory of republican freedom as nondomination).

111. G.A. COHEN, RESCUING JUSTICE AND EQUALITY 1 (2008) (drawing on KARL MARX, *On the Jewish Question*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY, 216, 221 (D. Easton & Kurt H. Guddat eds., 1967)).

112. *Id.* (quoting MARX, *supra* note 111).

113. *See generally*, e.g., Anderson, *supra* note 20; Cohen, *supra* note 20; Daniels, *supra* note 20; Scheffler, *supra* note 20; Young, *supra* note 20.

114. *See* RAWLS, FAIRNESS, *supra* note 6, at 139 (arguing that the worst off “are not . . . the unfortunate and unlucky—objects of our charity and compassion, much less our pity—but those to whom reciprocity is owed as a matter of political justice”).

115. *Id.* at 64.

116. RAWLS, THEORY, *supra* note 6, at 158.

117. *See* RAWLS, FAIRNESS, *supra* note 6, at 130–32 (discussing equal citizenship and the difference principle).

and the degrees of inequality that justice permits.”¹¹⁸ This helps explain why Rawls viewed the “social bases of self-respect” as likely the most important of the primary social goods: severe inequalities can lead “those of lower status to be viewed both by themselves and by others as inferior.”¹¹⁹ While deeper tensions between social equality and liberal egalitarian thought remain, and will be taken up again in Part IV, there is clearly a sort of “overlapping consensus” among Walzer’s left communitarianism, Pettit’s neorepublicanism, Cohen’s liberal-inflected Marxism, and Rawls’s own thought: all view equalities of social status as paramount in a democratic society.¹²⁰

Agent-specific duties, in the broad sense of regulations that shape “private” behavior rather than simply transfer resources, are often key to ensuring social equality. This is clear from the historic demands and achievements of the labor, feminist, civil rights, disability, and LGBT movements. Such movements seek not just wealth redistribution but also changes in workplace relations, norms regarding sexual behavior, and the construction of public spaces to better enable members to participate as equals in social, economic, and political life.¹²¹

118. RAWLS, THEORY, *supra* note 6, at 107; *cf.* Cohen, *supra* note 20, at 728–29 (identifying as a key element of Rawls’s theory “the [democratic] ideal that, as citizens, we are free and equal, however much our social class, our talents, our aspirations, or our fortune may distinguish us and that our institutions should respect our freedom and equality”).

119. RAWLS, FAIRNESS, *supra* note 6, at 59, 131; *see also id.* at 131 (arguing that severe economic inequalities are problematic because they “may arouse widespread attitudes of deference and servility on one side and a will to dominate and arrogance on the other”); KYMLICKA, *supra* note 46, at 90 (arguing that Rawls’s focus on social roles embedded within particular jobs indicates his sense that distributive justice is not just a matter of resource distribution).

120. From yet another perspective, William Forbath has argued that the social-citizenship tradition’s commitments to decent work are consistent with both civic-republican ideals of “mutual respect or equal standing” and Rawlsian efforts to “secure the social bases of self-respect.” William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1876 (2001); *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 165–67 (2003) (describing the role of decent work in creating norms of citizenship); Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT’L L. & COM. REG. 497 (2002) (laying out a conception of citizenship in which “the relationship of work to citizenship is one of necessity; a person needs to have access to decent work in order to enjoy equal citizenship”).

121. Anderson, *supra* note 20, at 319–20. This is true even within the labor movement, the social movement most clearly associated with pecuniary gains. The slogan “Bread and Roses,” for example, has long been shorthand for the dignitary and other nonpecuniary goals of workers’ movements. *Bread and Roses*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bread_and_Roses (last modified Apr. 11, 2014); *see also* Forbath, *supra* note 120, at 1831–38 (discussing the influence of social-citizenship ideals on New Deal policies); *id.* at 1829 (arguing that the Populist movement “envisioned a ‘Reconstructed’ political economy as the vehicle for securing the constitutional norms of decent livelihoods, independence, responsibility and dignifying work”); *id.* at 1842 (outlining the role of social citizenship in 1960s civil-rights-movement demands for antidiscrimination laws and full employment policies).

Debates between Rawls and certain left-liberal feminists are illustrative. In later work, responding to criticism that *Theory* basically ignored gender equality, Rawls argued that justice within the family required that women who perform unpaid care work should have some legal entitlement to part of their husbands' earnings.¹²² But this "solution" to the problem of the gendered division of labor "leaves unquestioned . . . the structural division between private domestic care work and public wage and salaried work."¹²³ Gender inequality often depends upon such structures. Some feminists have thus argued for more extensive changes to background rules, such as significantly greater public support for caregiving, as well as employment regulations to better enable both men and women to engage in caregiving.¹²⁴ Others have argued that gender equality "may require a change in social norms, by which men as well as women would be expected to share in caretaking responsibilities."¹²⁵

Another salient example comes from disability-rights activism and law. Since individuals with disabilities may require extremely high subsidies to enjoy an average quality of life, they pose a problem for liberal efforts to eliminate contingencies of birth.¹²⁶ Regrettably, this led Rawls to disregard those with serious disabilities and has sparked debate among subsequent liberals around how to balance their resource needs with other distributive claims.¹²⁷ Such debates may miss the importance of the broader social construction of disability. Individuals with mobility restrictions, for example, confront a physical world that is not natural but rather designed around the needs and abilities of some normative group of nonelderly, "able-bodied" persons.¹²⁸ Fair treatment for those with disabilities thus would take the form not of cash transfers justified on the grounds of a purported inability to live fulfilling lives but of regulation and redesign of the social world so that the disabled can participate in it as equals.¹²⁹

122. RAWLS, FAIRNESS, *supra* note 6, at 167; *see also* OKIN, *supra* note 57 (critiquing Rawls's *Theory* from a feminist perspective).

123. Young, *supra* note 20, at 93.

124. *See id.*

125. Anderson, *supra* note 20, at 324.

126. *See* KYMLICKA, *supra* note 46, at 70–72 (summarizing the problem of natural inequalities).

127. *See* RAWLS, LIBERALISM, *supra* note 6, at 20 (setting outside the scope of his theory those with "temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense"); DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 14, 59 (arguing that people with disabilities may "need more resources to achieve equal welfare" mainly "because they are able to achieve less enjoyment or relative or overall success"); KYMLICKA, *supra* note 46, at 76–79 (discussing Dworkin's attempt to address the problem of natural disadvantages).

128. *See generally* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009).

129. *See* Young, *supra* note 20, at 95–96 (arguing that Rawls's conception of the "'usual sense' in which people are cooperating members of society harbors" both pernicious prejudices

Existing disability law accordingly holds private parties such as employers and landlords to agent-specific duties of reasonable accommodation, in part on the theory that this will assist in the social integration of those with disabilities.¹³⁰

The organization of work raises similar issues.¹³¹ Part of the reason is that labor is not a true commodity, but what the political economist Karl Polanyi called a fictitious commodity.¹³² “Labor is only another name for a human activity which goes with life itself,” Polanyi wrote, “which in its turn is not produced for sale but for entirely different reasons.”¹³³ Understood as the capacity to work, labor is an intrinsic characteristic of human life. It may be deployed for pay, as in wage work; it may be utilized to ensure the reproduction of human society, as in (generally unpaid) care work; or it may be deployed to build human institutions outside of the paid labor market, as in volunteer work for charities. But it cannot be stored or stockpiled, nor is it fungible—one worker’s effort and skill will rarely be identical to another’s.¹³⁴

As a result, labor markets and labor processes are necessarily co-embedded with social relationships and institutions. Several examples should suffice to illustrate the point. For example, since employers must ensure that workers actually deliver a serious effort rather than shirking, “social relations in the workplace . . . involve negotiating a fragile balance between control and consent,” between workplace discipline and incentives that motivate workers to perform well.¹³⁵ This insight is common to

about the abilities and moral standing of “people with differing physical or mental impairments” and “often presupposes contingent physical structures . . . that make some people appear less capable than they would appear within altered structures and expectations”).

130. 42 U.S.C. § 12112(b)(5)(A) (2006) (requiring reasonable accommodation in employment); *id.* § 12182(b)(2)(A) (requiring that landlords and other owners of places of public accommodation make “reasonable modifications in policies, practices, or procedures” to ensure access for the disabled).

131. *See* Young, *supra* note 20, at 93 (discussing the role of work and the division of labor in an egalitarian society); *see also* WALZER, *supra* note 20, at 165–83 (arguing that those who perform hard and dirty work must not become a permanent caste); Anderson, *supra* note 20, at 321 (discussing the role of work in democratic equality).

132. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 75–76 (Beacon Press 2001) (1944).

133. *Id.* at 75.

134. *Id.* at 75–76; *see also* Judy Fudge, *Labour as a Fictive Commodity: Radically Reconceptualizing Labour Law*, in *THE IDEA OF LABOUR LAW* 120, 129 (Guy Davidov & Brian Langille eds., 2011) (noting that “[p]olitical economists and sociologists have long described labour as a ‘fictive commodity’” because it is “neither produced as a commodity, nor is its production governed by an assessment of its realization on the market,” and it “cannot physically be separated from its owner,” among other distinguishing attributes).

135. JAMIE PECK, *WORK-PLACE, THE SOCIAL REGULATION OF LABOR MARKETS* 23–24 (1996); *see also id.* at 23–45 (giving an overview of the differences between labor and standard commodities, as well as the literature on labor control and management problems within contemporary production).

Polanyi's work, to heterodox theories of managerial behavior,¹³⁶ and to theories of the firm that seek to explain the emergence and persistence of managerial power as a solution to the problem of shirking.¹³⁷ The social embedding of labor markets also underlies the vast literature on fairness norms on workers' and employers' behavior, which demonstrates among other things that employees' "effort depends upon the norms determining a fair day's work."¹³⁸

The relationship between the economic and the social is also central to contemporary class theory.¹³⁹ While class and material inequality are often discussed together, they are analytically distinct concepts.¹⁴⁰ In some ways, economic inequality is to class as sex is to gender: on one side stands an economic or biological fact, on the other a set of norms that give that fact a social meaning.¹⁴¹ Class does not emerge automatically out of an unequal

136. See MICHAEL BURAWOY, *MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM* 4 (1979) (outlining his thesis that the balance between conflict and consent transcends "structural" considerations and is tethered both to the "culture" of the "shop floor" as well as the political and ideological considerations that underpin this "culture"); PECK, *supra* note 135, at 23–24 (arguing that the balance between control and consent illustrates that "managerial despotism" is rarely conducive to securing and reproducing a work force and how this balance practically influences firms' hiring and firing behavior).

137. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 794 (1972) ("Monitoring or metering the productivities to match marginal productivities to costs of inputs and thereby to reduce shirking can be achieved more economically . . . in a firm.").

138. George Akerlof, *Labor Contracts as Partial Gift-Exchange*, 97 Q.J. ECON. 543, 543 (1982); see also ROBERT M. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* 22 (1990) (noting the relationship between wage rates and social status); Ernst Fehr et al., *Reciprocal Fairness and Noncompensating Wage Differentials*, 152 J. INSTITUTIONAL & THEORETICAL ECON. 608, 610 (1996) (supporting the "gift exchange" theory of wage determination by showing that there tends to be a positive correlation between a firm's profitability and the wage it offers its workers); Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47, 48 (2002) (emphasizing the role of bounded self-interest as it pertains to reciprocal fair behavior and employment relationships); Mark G. Kelman, *Progressive Vacuums*, 48 STAN. L. REV. 975, 986 n.21 (1996) (reviewing MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* (1995)) (discussing behavioral economics of the "efficiency wage" theory); Albert Rees, *The Role of Fairness in Wage Determination*, 11 J. LAB. ECON. 243, 243–44 (1993) (arguing that wages are not always determined by markets alone and that "fairness" factors into wage determination as a significant qualitative variable); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 206 (2001) ("Workers care a great deal about being treated fairly, and are willing to punish employers who have treated them unfairly, even at the workers' own expense[. . .].").

139. Rawls frequently discussed justice in terms of class divisions. See, e.g., RAWLS, *THEORY*, *supra* note 6, at 158 (discussing the effects of the difference principle upon class over time).

140. See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEXAS L. REV. 1847, 1854–55 (1996) (defining "class" as "a structured system of inequality (as opposed to a simple unequal distribution of economic outcomes among individuals) that is intrinsic to the economic realm and that is not fundamentally altered by the economic mobility of individuals").

141. See Roemer, *supra* note 97, at 39, 63 (differentiating between "domination₁," "the maintenance and enforcement of private property in the means of production," and "domination₂," "the hierarchical and autocratic structure of work," the latter of which is central to class theory but

distribution of resources but rather is rooted in the micropolitics of everyday interactions; others' behavior helps individuals to intuitively grasp their own class position and thus help reproduce class divisions over time.¹⁴² While many fields are important to this process, particularly the family,¹⁴³ labor markets and workplace experiences are utterly central to it. Employment provides the bulk of most individuals' resources, and power relationships within employment help shape individuals' and their children's senses of self-worth: as a leading class theorist argued, in the contemporary division of labor, the working class and poor become "imbued with a sense of their [own] cultural unworthiness."¹⁴⁴

Finally, the relationship between workplace practices and hierarchical social divisions is clear in low-wage worker narratives, which refer often to the indignities of low-wage work.¹⁴⁵ A case in point is *Nickel and Dimed: On (Not) Getting by in America*, in which the investigative journalist Barbara Ehrenreich spent a year trying to survive on jobs paying around \$6 or \$7 an hour: "What surprised and offended me most about the low-wage workplace," Ehrenreich reflected, "was the extent to which one is required to surrender one's basic civil rights and—what boils down to the same thing—self-respect."¹⁴⁶ She confronted rules against "gossip" or even against talking to coworkers, mandated drug testing for menial positions,

unimportant for resource distribution, and also distinguishing exploitation from domination (footnotes omitted)).

142. See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 177 (Richard Nice trans., 1984) ("The . . . economy of means is found in body language: here too, agitation and haste, grimaces and gesticulation are opposed . . . to the restraint and impassivity which signify elevation.").

143. See, e.g., Malamud, *supra* note 140, at 1880–81 ("In the home environment one internalizes a set of understandings based at their core on the family's economic position—understandings about time, about the body, about what it is proper to want and what it is possible to achieve, about what it means to understand the world.").

144. BOURDIEU, *supra* note 142, at 251. Bourdieu's work resonates with ethnographic accounts of workers' identity formation; see, for example, RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1988), as well as the "labor process" literature, which considers the relationship between workers' experiences on the job and their class identification, for example, HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974).

145. See STUDS TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* xxxi–ii (New Press 2004) (1974) ("It's not just the work . . . It's the not-recognition by other people." (quoting Mike Lefevre, steelworker)); *id.* at 112–13 ("When it come to housework, I can't do it now. I can't stand it, cause it do somethin' to my mind. . . . My God, if I had somebody come and do my floors, clean up for me, I'd appreciate it. [But homeowners] don't say nothin' about it." (quoting Maggie Holmes, domestic)); see also WALZER, *supra* note 20, at 176 ("When a garbageman feels stigmatized by the work he does . . . the stigma shows in his eyes. He enters into collusion with us to avoid contaminating us with his lowly self. . . . Our eyes do not meet. He becomes a non-person." (internal quotation marks omitted)).

146. BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 1, 208 (2001).

searches of her person or property, and capricious punishment for trivial violations of workplace rules.¹⁴⁷ Such actions were particularly surprising, Ehrenreich writes, because they often seemed economically irrational: drug testing, for example, is quite expensive, particularly for restaurant servers who will be paid around \$3 an hour. But they made sense, Ehrenreich postulates, as a means of imposing social distance: “If you are constantly reminded of your lowly position in the social hierarchy,” she writes, “whether by individual managers or by a plethora of impersonal rules, you begin to accept that unfortunate status.”¹⁴⁸

To be clear, the sorts of generous redistributions that liberals have defended would be essential in a society committed to social equality; individuals who cannot satisfy their basic needs can hardly “stand eye to eye”¹⁴⁹ with the wealthy and powerful. Nevertheless, ensuring decent relations among individuals—and therefore decent work—has traditionally been less of a priority for post-Rawlsian liberals.¹⁵⁰ Social egalitarian theorists suffer from a reciprocal weakness: they have endorsed various labor-market regulations to address workplace status harms,¹⁵¹ but have not considered in detail the possible costs of those regulations.¹⁵² Part III now turns to such questions in the context of the minimum wage.

III. Minimum Wage Laws and Social Equality

This Part argues that minimum wage laws help ensure decent work and social equality for low-wage workers. Subpart III(A) addresses the effects of such laws on workers’ self-respect. Minimum wage laws

147. *Id.* at 208–13.

148. *Id.* at 210; *see also* WALZER, *supra* note 20, at 176 (discussing such “routines of distancing” as threats to social equality).

149. PETTIT, *REPUBLICANISM*, *supra* note 108, at 5.

150. *See* DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 6, at 114–16 (making no mention of the social bases of self-respect as being among the primary goods and not discussing the difference principle as representing ideals of reciprocity); KYMLICKA, *supra* note 46, at 197 (asserting that both egalitarian liberals and analytical Marxists tend to focus on determining the “just claims of individuals” rather than social equality); VAN PARIJS, *supra* note 29, at 27 (“Perhaps one should depart from strict or maximal justice, for example, if doing so would enable us to make social relations more fraternal.”).

151. *See, e.g.*, ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 142 (1993) (arguing that the “[p]rotection of autonomy may sometimes require prohibiting the commodification of some things,” including, most importantly, “goods embodied in the person, such as . . . the powers of productive and reproductive labor”); WALZER, *supra* note 20, at 174–83 (characterizing “hard” and “dirty” work as a “negative good” that must be distributed somehow and suggesting that reforms to enable more time off and democratic control of such work can alleviate the status harms associated with it); Anderson, *supra* note 20, at 326 (arguing that “[i]n performing routine, low-skill tasks, [low-wage] workers free other people to make more productive use of their talents,” such that interventions such as the minimum wage may reflect a social “appreciation for the roles that low-wage workers fill”).

152. *See* Anderson, *supra* note 20, at 325 (suggesting that the minimum wage “need not raise unemployment” where workers’ productivity is also enhanced).

primarily enhance low-wage workers' self-respect by increasing their wages. This enacts basic moral imperatives that all work has value, that all employees deserve decent wages, and that employers rightly bear most of the associated costs. Minimum wage laws also enhance workers' self-respect by granting them formal legal entitlements against employers. Subpart III(B) then considers the economic costs and benefits of minimum wage laws and transfers. Minimum wage laws tend to deliver additional resources to low-wage workers as a group and to force employers and consumers to internalize some of the costs of extremely low-wage labor. While this may reduce demand for low-wage labor, that is generally a cost worth bearing to reduce work-based class and status divisions—particularly since direct transfers may exacerbate such divisions. Subpart III(B) closes by considering the proper balance among minimum wage laws, transfers, and other regulations in promoting decent work and social equality.

A. *Effects of Minimum Wage Laws on Workers' Self-Respect*

1. *Wage Rates and Self-Respect.*—Wages matter to our self-respect. This point is straightforward, even commonsensical. As the Nobel Laureate economist Robert Solow wrote in an influential study, “Wage rates and jobs are not exactly like other prices and quantities. They are much more deeply involved in the way people see themselves, think about their social status, and evaluate whether they are getting a fair shake out of society.”¹⁵³ Wages are, of course, a primary means through which individuals meet their material needs. But the relationship between wages and respect runs deeper than resources per se since money is a dominant primary good in our society, one “readily converted into prestige and power.”¹⁵⁴ Wages measure the value of our work, and signify our place within the class and status structure.¹⁵⁵

At one extreme, societies have long dealt with the worst sorts of hard and dirty work by assigning it to “degraded people,” ranging from slaves, to “‘inside’ aliens like the Indian untouchables,” to racial minorities, and, of course, to women, all of whom have been understood not to deserve decent wages, or even any wages at all.¹⁵⁶ Given the all-too-recent historical context of slavery and serfdom, the very payment of wages is a powerful indication of workers' moral equality. Outside such extreme examples, low-wage employment is often painful, involving “violence—to the spirit

153. SOLOW, *supra* note 138.

154. WALZER, *supra* note 20, at 11; *see also id.* at 96–97 (noting the universality of money in capitalist societies).

155. *But see infra* subpart IV(B) (discussing threats to social equality that stem from our society's strong association of work with self-respect).

156. WALZER, *supra* note 20, at 165–66.

as well as to the body.”¹⁵⁷ While not all workers risk physical injury, most still must submit to their employer’s unilateral direction, often in jobs that carry little creativity and little hope of advancement.

Minimum wage laws compensate workers, however partially, for the difficulties and indignities of such work. Granted, money is an imperfect compensation for nonpecuniary harms, but it is important nevertheless. Higher wages enable workers to enjoy a higher material standard of living and perhaps to work less and spend more time on leisure. They also give tangible form to the moral equality between workers and employers. Every pay period, minimum wage workers receive a check from their employer for an amount greater than they would otherwise have received. This can have a profound effect on workers’ view of their place in society: for example, after a 1999 living wage ordinance raised his wage nearly \$2 per hour, a janitor at the Los Angeles airport remarked that, while he and his coworkers still did not make much money, “at least now with the living wage, we can hold our heads up high.”¹⁵⁸

The fact that employment is a bilateral and reciprocal relationship justifies the institutional form of minimum wage laws, i.e., the requirement that employers themselves pay higher wages. The harsh conditions and status harms of low-wage employment do not occur in a vacuum: employers and managers enjoy individualized and institutional benefits from workers’ efforts, benefits that are not always shared with the rest of society. Those include profits as well as the higher social esteem and occupational autonomy that accompany entrepreneurship and management. Given such agent-specific benefits, and given that such benefits occur within social structures that impose reciprocal harms on employees, it seems entirely appropriate for employers to shoulder the bulk of the redistributive burdens imposed by minimum wage laws, rather than mediating all redistribution through the state.

Transfers simply have a different valence: they alter power relationships between workers and employers indirectly, if at all. While a robust basic income would enable workers to reject truly undignified work, it would not alter the legal rules that undergird the division of labor.¹⁵⁹ Employers would still enjoy the legal right to issue orders and low-wage workers would still need to obey. Altering parties’ bilateral entitlements is therefore an appropriate policy response. Minimum wages are also far

157. TERKEL, *supra* note 145, at xi.

158. Nancy Cleeland, *Lives Get a Little Better on a Living Wage*, L.A. TIMES, Feb. 7, 1999, at 1.

159. See VAN PARIJS, *supra* note 29, at 95 (arguing that unconditional basic income will “confer[] upon the weakest more bargaining power in their dealings with . . . potential employers,” enabling them to reject the worst sorts of work).

more salient to workers than transfers.¹⁶⁰ As noted above, wages are paid weekly or biweekly by the employer, reflecting the employer's reciprocal duties toward workers; in contrast transfers come from the state, an abstract entity that typically exerts power over workers only indirectly. Wage subsidies would avoid some of these difficulties since workers receive money directly from their employer, but wage subsidies have other drawbacks, as discussed below.¹⁶¹

To be clear, this is not an argument that minimum wage laws require employers to personally express respect for workers. Since respect is an aspect of social relationships, it simply cannot be mandated by the state.¹⁶² But the state often does forbid practices and behaviors that tend to undermine individuals' self-respect, or, in Rawls's evocative phrasing, practices that encourage "attitudes of deference and servility on one side [and] a will to dominate and arrogance on the other."¹⁶³ Rules against sexual and racial harassment are a powerful and clear example.¹⁶⁴ Minimum wage laws are another. They prohibit a certain class of employment relationships that lead to pervasive status harms. Moreover, even if employers pay minimum wages grudgingly, doing so may well reinforce workers' self-respect by demonstrating that the law protects them against certain employer actions.

160. Tax scholars have explored this phenomenon in detail. *See, e.g.*, Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1745 (2005) (reporting the results of studies suggesting how psychological factors cause individuals to react to the purely formal means by which social policies are implemented and thereby overlook important substantive qualities such as efficiency); Gillian Lester, "Keep Government Out of My Medicare": The Elusive Search for Popular Support of Taxes and Social Spending (Dec. 14, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245122 (analyzing how policy makers should react to people's often conflicting attitudes about distributive justice and taxes); *see also* Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *DEMOCRACY AND THE WELFARE STATE* 53, 75 (Amy Gutmann ed., 1988) (arguing that even in robust European social democracies, workers and farmers have tended to prefer indirect rather than direct subsidies despite the latter's superior efficiency).

161. *See infra* section III(B)(2).

162. *See* Elster, *supra* note 162, at 74 (reasoning that just as creating a right to a spouse for the purpose of promoting love would fail because love must be freely given, neither would creating a right to work promote self-esteem since esteem also must be freely given); *see also* JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 43–108 (1983) (cataloguing a number of mental and social states that by nature "can only come about as the by-product of actions undertaken for other ends" because the very attempt to bring them about intelligently or intentionally "precludes the state one is trying to bring about").

163. RAWLS, *FAIRNESS*, *supra* note 6, at 131.

164. *See* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (holding that "hostile environment" sexual harassment violates Title VII); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 7 (1979) (arguing that recognition of workplace sexual harassment as sex discrimination "would support and legitimize women's economic equality and sexual self-determination").

2. *Formal Legal Entitlements and Self-Respect.*—Minimum wage laws also enhance workers’ self-respect by granting them formal legal entitlements vis-à-vis employers. This is in part an expressive effect of minimum wage laws, which are an easily grasped policy “that symbolizes the political system’s commitment to working people.”¹⁶⁵ Such laws signal that the state and broader society view workers as worthy of legal protection, even when doing so imposes costs upon more powerful social groups, as captured well in the textile worker quote in this Article’s introduction. But the legal entitlements provided by minimum wage laws are not merely symbolic. Under such laws, workers can hale employers into court to prevent enforcement of labor contracts that pay less than the minimum, employers owe workers correlative duties, and state agencies stand ready to intervene on behalf of workers.

The relationship between formal rights and self-respect is an enormous topic, but a few notes on that relationship within political and social theory should suffice to develop this point. Within liberalism, this idea seems to have animated Rawls’s argument that in a just society “self-respect is secured by the public affirmation of the status of equal citizenship for all” through protection of equal liberties,¹⁶⁶ as well as through the fact that “everyone endorses the difference principle, itself a form of reciprocity.”¹⁶⁷ Public affirmation of such rights helps demonstrate that rights-bearing individuals are moral equals of other citizens. Once that moral equality is clear, employers will not as readily subject such workers to abuses, and workers will more readily contest unfair treatment by employers and other private actors.

The relationship between rights and self-respect is also clear in Pettit’s republicanism. An “employee who dare not raise a complaint against an employer,” Pettit writes, is in the sort of relationship of domination that neorepublicans condemn.¹⁶⁸ While the most straightforward implication of Pettit’s argument may be that employees deserve general rights to contest employer decisions, or rights against arbitrary dismissal,¹⁶⁹ substantive entitlements such as the minimum wage have a similar effect insofar as they enable employees to block employer efforts to pay below a certain point. This rights-granting aspect means that minimum wage laws are actually *not* equivalent to a wage subsidy funded by a tax on low-wage labor, because

165. WALTMAN, *supra* note 4, at 24.

166. RAWLS, THEORY, *supra* note 6, at 545.

167. RAWLS, FAIRNESS, *supra* note 6, at 60.

168. PETTIT, REPUBLICANISM, *supra* note 108, at 5.

169. See, e.g., Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest* (N.Y. Univ. Sch. of Law, Working Paper No. 13–81, 2013), available at <http://ssrn.com/abstract=2364586> (outlining a neorepublican theory of just work rooted in a right to contest in the workplace).

this entitlement and its accompanying private right of action alter the power dynamics between employer and employee.

The literature on law and social movements also helps elucidate the relationship between legal rights and self-respect. Much of this literature explores the relationship between legal rights and collective mobilization, an issue less central to this Article.¹⁷⁰ But the very existence of such a link demonstrates that legal rights, particularly rights against private parties, can be an important social basis of self-respect. Per Stuart Scheingold's influential account of the "politics of rights," for example, marginalized groups can "capitalize on the perceptions of entitlement associated with [legal] rights to initiate and to nurture political mobilization."¹⁷¹ This process can have effects on workers' self-consciousness and self-respect that extend well beyond immediate campaigns. As two other sociologists argue in a leading study of social movements among the poor, after the assertion of legal rights as part of a demand for social change, "people who ordinarily consider themselves helpless come to believe that they have some capacity to alter their lot."¹⁷² Similarly, I have argued elsewhere that the experience of contesting managerial decisions during union organizing can greatly enhance workers' autonomy by giving them a concrete experience of agency.¹⁷³

In fact, organizers have often mobilized workers around the rights-endowing aspect of minimum wage laws. For example, Jennifer Gordon, founder of the Long Island-based Workplace Project and now a professor of law, developed an innovative workers-rights curriculum that elucidated the gaps among workers' rights to safety and minimum wages, workers' lived experience of unsafe workplaces and sub-minimum wages, and a broader vision of justice that would involve even greater legal protections than those currently enjoyed.¹⁷⁴ Where standard "know your rights" presentations began by listing a set of formal entitlements, Gordon instead flipped the class: she first asked workers to describe their own experiences in detail and

170. See Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 22 (2006) (summarizing scholarship on the "constitutive role of legal rights both as a strategic resource and as a constraint" in social movements).

171. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 131 (1974), cited in McCann, *supra* note 172, at 25.

172. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 4 (Vintage Books 1979) (1977); see also McCann, *supra* note 172, at 34 (discussing studies of wage equity reported in MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) that found women who had participated in such efforts afterward "testified that their individual sense of efficacy as citizens was greatly enhanced").

173. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 355-58 (2012) (discussing the effect of workers' exertion of power against employers upon workers' self-consciousness and self-respect).

174. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 3, 148-84 (2005).

then pointed out that their employers were in fact violating the law.¹⁷⁵ This was a transformative experience: “rights stood for the possibility of government support in a context where government was otherwise notably absent, in an underground economy ruled by the market and by personal relationships in a situation of unmitigated power imbalance.”¹⁷⁶ The fact that working conditions had been *illegal* rather than merely unfortunate altered workers’ perceptions of their work lives and even their selves. Workers began to view themselves as entitled to decent treatment, as having a right to have rights.¹⁷⁷

Gordon’s account resonates with a strand in the social-psychological literature on “collective action framing,” which explores how social-movement leaders and participants describe particular actions or conditions in ways that motivate social groups to take collective action.¹⁷⁸ As legal scholar Benjamin Sachs has argued, efforts such as Gordon’s “deploy employment rights statutes as diagnostic frames,” utilizing those statutes to describe extremely low wages as an injustice.¹⁷⁹ “The fact that it is the law—rather than merely the ideology of a union organizer or other activist—that diagnoses these problems as injustice invests the frame with substantially increased power.”¹⁸⁰

To summarize, minimum wage laws directly enhance workers’ self-respect in two ways. They increase workers’ wages by requiring employers to bear financial burdens. They also grant workers binding legal entitlements against employers and hold employers to legal duties toward workers. Transfers may enhance workers’ net resources, but they do so without altering the fundamental terms of the employment relationship. Granted, minimum wage laws may be a relatively minor alteration to employment-at-will rules—a point to be discussed in subpart IV(A). But insofar as private power in the employment relationship itself undermines workers’ self-respect, minimum wage laws help ensure social equality.

B. Incentive Effects of Minimum Wage Laws and Transfers

The above argument is incomplete in an important respect. Even if minimum wage laws significantly enhance individual workers’ self-respect, they may decrease demand for low-wage labor. Those committed to social

175. *Id.* at 152–53.

176. *Id.* at 172.

177. *Id.* at 172–73; *see also id.* at 168–69 (discussing individual workers’ changes upon viewing themselves as having rights); Sachs, *supra* note 90, at 2708–15, 2723 (discussing Gordon’s efforts and other, similar campaigns that relied upon FLSA rights).

178. *See* Sachs, *supra* note 90, at 2723–25 (discussing collective action frames). *See generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

179. Sachs, *supra* note 90, at 2724.

180. *Id.*

equality cannot overlook this possibility; as an economist once quipped, “the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all.”¹⁸¹ This subpart responds to such concerns. It compares the effects of minimum wage laws and transfers on employers and consumers’ incentives, and therefore on the distribution of resources and on social equality more generally.

Section III(B)(1) considers minimum wage laws. Even assuming that such laws reduce demand for low-wage labor, commitments to social equality suggest this is a cost worth bearing. Some jobs lost may not be worth saving; reduced demand for others may be an affirmative social good insofar as firms and consumers internalize higher labor costs and treat low-wage workers more as equals. Section III(B)(2) then argues that transfers are no panacea. Among other reasons, transfers can actively *encourage* pervasive use of extremely low-wage labor, thereby subsidizing employers and consumers and encouraging work-based class and status divisions. Some combination of minimum wage laws and transfers is therefore required to ensure justice for low-wage workers. Finally, section III(B)(3) relaxes the assumption that minimum wage laws reduce demand and discusses the implications, and then considers other policy tools to address unemployment and work-based social inequalities.

1. Effects of Minimum Wage Laws on Employers’ Incentives.— Minimum wage laws affect the economics of low-wage work in various ways that will tend to enhance social equality. At the macro level, a higher minimum wage will tend to deliver additional resources to low-wage workers *as a group*. This is because any given increase in the minimum wage will generally lead to a proportionately smaller reduction in demand,¹⁸² the magnitude of which will depend on the demand elasticity of labor in the relevant market.¹⁸³ For example, the Congressional Budget

181. JOAN ROBINSON, *ECONOMIC PHILOSOPHY* 45 (1962); *see also Psychological Effects of Unemployment and Underemployment*, AM. PSYCHOL. ASS’N, <http://www.apa.org/about/gr/issues/socioeconomic/unemployment.aspx> (“Unemployed workers are twice as likely as their employed counterparts to experience psychological problems such as depression, anxiety, psychosomatic symptoms, low subjective well-being and poor self-esteem.” (citing Karsten I. Paul & Klaus Moser, *Unemployment Impairs Mental Health: Meta-Analyses*, 74 J. VOCATIONAL BEHAV. 264 (2009))). The unemployed also appear to face job-market discrimination. *See* Rand Ghayad, *The Jobless Trap* 3, 7 (2013) (unpublished manuscript) (on file with author) (discussing the results of a study mailing approximately 3,360 fictional resumes, identical except for current employment status, and finding that employers have a marked preference for employed workers); *see also* Matthew Yglesias, *The Long-Term Unemployed Are Doomed*, MONEYBOX BLOG, SLATE (Apr. 15, 2013, 9:31 AM), http://www.slate.com/blogs/moneybox/2013/04/15/rand_ghayad_on_long_term_unemployment_the_long_term_unemployed_are_discriminated.html (discussing Ghayad’s work).

182. Shaviro, *supra* note 5, at 406–07.

183. *See generally* RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 94–125 (11th ed. 2012) (discussing the impact of demand elasticity of labor on employment levels under minimum wage law).

Office (CBO) recently estimated that raising the federal minimum to \$10.10 per hour would boost wages for 16.5 million workers while reducing employment by around one-half-million jobs.¹⁸⁴ The CBO also predicted that a higher minimum would generally increase the net income of poor and middle-class families, while reducing the net income of wealthy families.¹⁸⁵ The minimum wage can therefore reduce class divisions in a straightforward way: workers as a group will capture more wealth, and will enjoy greater purchasing power, than they would in a laissez-faire labor market.

Of course, a subsidy to the poor financed by a progressive income tax could have similar effects on the distribution of wealth and would not cartelize the labor market. But the costs of such cartelization—including higher consumer costs and reduced demand for low-wage labor—may be worth bearing in order to ensure greater social equality.

This requires some unpacking. Assuming that states invest in compliance,¹⁸⁶ and that a wage mandate is not quickly eroded by inflation, employers will respond to a minimum wage in a variety of ways. Some industries will, frankly, struggle to survive or will fail, with garment manufacturing perhaps the paradigmatic case. But policymakers may well decide that this is no great loss: sub-minimum wage jobs may simply be too punishing for a wealthy society to tolerate, much less to encourage.¹⁸⁷ After all, even in the United States the garment sector continues to have a sweatshop problem, with frequent allegations of unpaid wages, excessive overtime, and unsafe working conditions, in large part because garment

184. CONG. BUDGET OFFICE, *supra* note 39, at 2 tbl.1.

185. *Id.* at 2 & tbl.1, 3 (finding that an increase to \$10.10 per hour would deliver \$12 billion annually to families whose income is less than three times the federal poverty threshold, while reducing by \$17 billion the annual income of families at six times the federal poverty threshold); *id.* at 11 (attributing lost income among wealthier families to the likelihood that “losses in business income and in real income from price increases would be concentrated” in such families); accord Arindrajit Dube, Minimum Wages and the Distribution of Family Incomes 1 (Dec. 30, 2013) (unpublished manuscript), available at https://dl.dropboxusercontent.com/u/15038936/Dube_MinimumWagesFamilyIncomes.pdf (finding “robust evidence that higher minimum wages moderately reduce the share of individuals with incomes below 50, 75 and 100 percent of the federal poverty line”).

186. *But see* subpart IV(A) (discussing the challenges of noncompliance).

187. *See* POLLIN ET AL., *supra* note 4, at 16 (quoting President Roosevelt’s statement, while pressing for the FLSA, that “[n]o business which depends for its existence on paying less than living wages to its workers has any right to continue in this country”); WALTMAN, *supra* note 4, at 16 (quoting Progressive advocate Arthur Holcombe saying, “Such industries as these, the country is better without”); Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 151 (1990) (“Any employer so inefficient that he could stay in business only by paying sweatshop wages—like the employer who could stay in business only by operating an unsafe plant—was told [in the 1938 FLSA] that he did not belong in business.” (quoting *Amendment of the Fair Labor Standards Act: Hearings Before the Subcomm. of the S. Comm. on Educ. & Labor*, 79th Cong. 847 (1945) (statement of Chester Bowles, Administrator of the Office of Price Administration))).

manufacture itself is so labor-intensive and so globally competitive.¹⁸⁸ To ensure social equality, it may be best to price such firms out of the market and to compensate unemployed workers through generous unconditional transfers. Notably, outside of the garment sector, the net effect of a minimum wage increase on manufacturing is likely to be relatively small: according to the Bureau of Labor Statistics, very few manufacturing jobs pay at or below the minimum wage.¹⁸⁹ This likely reflects the higher capital/labor mix required for most contemporary manufacturing.¹⁹⁰

Instead, the vast majority of today's minimum wage workers are in service sectors, including retail, leisure and hospitality, building services, and education and health care.¹⁹¹ While there is little data on such industries' responses to minimum wage laws in the United States,¹⁹² a

188. See ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 49, 77–78 (2007) (reporting workplace violations in the retail and apparel-manufacturing industries in New York City); NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: A SUMMARY OF RESEARCH ON WAGE AND HOUR VIOLATIONS IN THE UNITED STATES 1, 3–4 (2012), available at nelp.3cdn.net/509a6e8a1b8f2a64f0_y2m6bhlf6.pdf (describing a “broad and worsening wage theft crisis” in a variety of industries, including garment production); see also Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1, 1–5 (2013) (noting the prevalence of sweatshop-like conditions in global apparel production).

189. See *Characteristics of Minimum Wage Workers: 2011, Tables 1-10*, BUREAU LAB. STAT., <http://www.bls.gov/cps/minwage2011tbls.htm> (last modified Mar. 2, 2012) (showing that less than 2% of production workers were paid minimum wage or less, compared to 13% in service occupations, including close to 25% in food service occupations); see also Daron Acemoglu, *Good Jobs Versus Bad Jobs*, 19 J. LAB. ECON. 1 (2001) (presenting a theoretical model of the labor market in which “minimum wages . . . shift the composition of employment toward high-wage jobs” by making industries that rely on extensive low-skilled labor unprofitable); Arindrajit Dube, *Minimum Wages and Aggregate Job Growth: Causal Effect or Statistical Artifact?* (Inst. for the Study of Labor Discussion Paper No. 7674, 2013), available at <http://ftp.iza.org/dp7674.pdf> (noting a lack of evidence that higher minimum wages impact the manufacturing sector).

190. See NEUMARK & WASCHER, *supra* note 25, at 39 (arguing that the degree of the “substitution effect” of capital for labor is determined by the “responsiveness of product demand to the change in price, labor’s share of total production costs, the ease of substitutability between labor and capital, and the difference between the minimum wage and the equilibrium competitive wage”).

191. See *Characteristics of Minimum Wage Workers: 2011*, BUREAU LAB. STAT., <http://www.bls.gov/cps/minwage2011.htm> (last modified Mar. 2, 2012) (stating that “[a]bout 6 in 10 workers earning the minimum wage or less in 2011 were employed in service occupations, mostly in food preparation and serving related jobs,” and “[t]he industry with the highest proportion of workers with hourly wages at or below the Federal minimum wage was leisure and hospitality (22 percent)"); see also BERNHARDT ET AL., *supra* note 190, at 21 tbl.3 (identifying industries and industry segments with high proportions of low-wage workers and violations).

192. See, e.g., NEUMARK & WASCHER, *supra* note 25, at 232–41 (2008) (providing an index to recent research on the economic effects of minimum wages and noting case studies exist for only the fast-food and low-wage retail sectors); Jonathan Meer & Jeremy West, *Effects of the Minimum Wage on Employment Dynamics 1* (Dec. 2013) (unpublished manuscript), available at http://econweb.tamu.edu/jmeer/Meer_West_Minimum_Wage.pdf (“To date, nearly all studies of the minimum wage and employment have focused on how a legal wage floor affects the

recent U.K. study found that hotels and catering firms responded by cutting profits, passing costs on to consumers and clients, apparently because there is just no way to alter the changing of beds or serving of food.¹⁹³ Many of today's largest low-wage employers are profitable retail and hospitality chains who could certainly absorb some additional labor costs;¹⁹⁴ in some other sectors, like commercial office cleaning, clients include real estate and professional firms that could similarly absorb higher costs.¹⁹⁵

Of course, individual consumers will also bear some of the burden—particularly for food services, hospitality, and retail goods—which will ultimately reduce demand for low-wage labor. But both higher consumer costs and marginally reduced demand will often be justified on grounds of social equality. Since consumers benefit quite directly from low prices on particular goods and services, forcing them to internalize higher labor costs is a matter of basic reciprocity. Indeed, the CBO predicted that wealthier families would bear the bulk of higher prices from President Obama's proposed increase, making the overall effect of increased consumer prices relatively progressive.¹⁹⁶

The normative case for higher consumer costs is particularly strong as applied to luxury goods or markers of class position.¹⁹⁷ For example, increasing prices for restaurant meals seems eminently reasonable, amid evidence that wage and hour violations remain common even within high-

employment *level*, either for the entire labor force or a specific employee subgroup (e.g., teenagers or food service workers).”).

193. James Arrowsmith et al., *The Impact of the National Minimum Wage in Small Firms*, 41 BRIT. J. INDUS. REL. 435, 442 (2003); see also Sara Lemos, *The Effect of the Minimum Wage on Prices* 1 (Inst. for the Study of Labor Discussion Paper No. 1072, 2004), available at <http://ftp.iza.org/dp1072.pdf> (“With employment and profits not significantly affected, higher prices [are] an obvious response to a minimum wage increase.”). But see David Metcalf, *Why Has the British National Minimum Wage Had Little or No Impact on Employment?*, 50 J. INDUS. REL. 489, 506–07 (2008) (noting evidence that employers “intensified effort,” which would tend to erode social equality).

194. NAT'L EMP'T LAW PROJECT, BIG BUSINESS, CORPORATE PROFITS, AND THE MINIMUM WAGE 34 (2012), available at http://nelp.3cdn.net/e555b2e361f8f734f4_sim6btdzo.pdf (discussing the profitability of the nation's fifty largest low-wage employers).

195. Passing increased labor costs onto consumers is part of the model of the Service Employees International Union's “Justice for Janitors” campaign. See generally John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 1 LAB. RES. REV., no. 15, 1990, at 61 (describing the goals and structure of the Justice for Janitors campaign); Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102, 102–06 (Kate Bronfenbrenner et al. eds., 1998) (describing the history of the campaign).

196. CONG. BUDGET OFFICE, *supra* note 39, at 11.

197. Cf. BOURDIEU, *supra* note 142, at 55 (“Economic power is first and foremost a power to keep economic necessity at arm's length. This is why it universally asserts itself by . . . gratuitous luxury.”); THORSTEIN VEBLÉN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (Penguin Books 1979) (1899).

end establishments.¹⁹⁸ Restaurant workers have also argued that the culture of tipping actively undermines social equality by leaving servers' wages subject to customers' discretion and generosity, rather than requiring restaurants to pay servers decently in the first place.¹⁹⁹ A similar analysis may apply to many other low-wage personal services such as nail salons, valet parking services, car washes, taxi or other drivers, and the like. In all such sectors, marginally reduced demand may be a price worth paying to ensure greater self-respect and autonomy for workers.

A just society may also conclude that domestic work and child care should be quite well compensated, even if doing so will marginally reduce employment.²⁰⁰ As George Bernard Shaw once wrote, "When domestic servants are treated as human beings, it is not worthwhile to keep them."²⁰¹ Many domestic workers of course take pride in their work, but their narratives also highlight the degrading effect of providing services to a wealthier family for low wages.²⁰² Given this context, it is no accident that the FLSA originally excluded domestic workers, many of whom were African-American at the time, and thus helped perpetuate a caste-like domestic labor system.²⁰³

These are important examples of how minimum wage laws can encourage social equality between consumers and workers, but counterexamples can of course be found. For one thing, the relationship between wages and consumer costs may be more complicated in retail and fast food. Employers in those sectors may be able to mechanize more

198. See REST. OPPORTUNITIES CTR. UNITED, NATIONAL EXECUTIVE SUMMARY: BEHIND THE KITCHEN DOOR: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY (2011), available at http://rocunited.org/wp-content/uploads/2013/04/reports_bkd-multisite.pdf (summarizing the prevalence of overtime violations and working off the clock without pay within restaurant industry).

199. See Paul Wachter, *Why Tip?*, N.Y. TIMES MAG., Oct. 9, 2008, at 56 (claiming that "[t]ipping began as an aristocratic practice, a sprinkle of change for social inferiors," and was opposed by the labor movement in the early twentieth century and by other progressives who "deplored tipping for creating a class of workers who relied on 'fawning for favors'").

200. See WALZER, *supra* note 20, at 174–77 (proposing greater compensation for domestic work and other "dirty work" as a symbolic means of sharing its burdens).

201. GEORGE BERNARD SHAW, *Man and Superman*, in SEVEN PLAYS 517, 736 (1951), cited in WALZER, *supra* note 20, at 180.

202. See TERKEL, *supra* note 145, at 113 (recounting an interview with a domestic worker).

203. See Forbath, *supra* note 120, at 1835–38 (tracing how "Dixiecrats" ensured the FLSA and other New Deal legislation did not cover various forms of labor often performed by African-Americans); Eileen Boris & Jennifer Klein, Op-Ed., *Home-Care Workers Aren't Just 'Companions'*, N.Y. TIMES, July 1, 2012, <http://www.nytimes.com/2012/07/02/opinion/fairness-for-home-care-workers.html> (criticizing the (now-repealed) exclusion of home-care workers from overtime protections on grounds that exclusion can "consign" such workers "to perpetual second-class status"); see also Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 269 (2013) (raising concerns about exploitation in the U.S. au pair program).

easily, for example by adding self-service ordering or checkout lanes.²⁰⁴ Granted, the effect of minimum wage increases on the fast-food sector has been extensively studied by empirical economists, and leading studies have found few employment effects or even increases in employment.²⁰⁵ This may indicate that mechanization is not (yet) the most cost-effective means of offsetting a mandated wage increase. But at a higher mandated wage, and once technology develops further, one could certainly imagine greater mechanization of those jobs.

Moreover, the minimum wage may encourage some firms to alter practices in ways that undermine rather than enhance social equality. For example, some firms may reduce labor costs by delaying hiring or expansion, reducing hours, or reducing low-wage workers' benefits.²⁰⁶ Employers may also make up costs by deferring capital investment or repairs, cutting investments in workplace safety, supervising workers more intensively, or hiring skilled rather than unskilled workers, any of which may undermine social equality. Finally, increasing unemployment and raising consumer costs will create distributive conflicts among workers and between poor consumers and poor workers, and increasing the cost of child care and domestic services may also have complicated effects on gender equality.

All such challenges point to the need for trade-offs and perhaps to a multi-pronged approach to helping the working poor. For example, unconditional cash grants could alleviate the burdens of unemployment and of higher consumer costs; child-care subsidies could benefit both the working poor and parents more generally. Such limitations of minimum wage laws should therefore not undermine the basic normative points that a society should encourage decent work and that consumers and employers often *should* bear the burden of higher labor costs. Minimum wage laws are a relatively effective means of achieving both goals.

204. See Steven Greenhouse, *\$15 Wage in Fast Food Stirs Debate on Effects*, N.Y. TIMES, Dec. 4, 2013, <http://www.nytimes.com/2013/12/05/business/15-wage-in-fast-food-stirs-debate-on-effects.html> (“[S]ome [fast-food] restaurants have begun replacing counter workers with computer screens that greet customers and ask them to tap in their orders.”).

205. See CARD & KRUEGER, *supra* note 19, at 20–77 (summarizing evidence from the fast-food sector).

206. Unsurprisingly, the empirical evidence on reduced or deferred hiring appears inconclusive. Compare Meer & West, *supra* note 192 (arguing that deferred or reduced hiring after minimum wage increases explains lack of uptick in unemployment), with Dube, *supra* note 189 (arguing that Meer and West’s conclusions of lower employment growth in low-wage sectors are not supported by their own statistics), and John Schmitt, *More on Meer and West’s Minimum Wage Study*, CENTER FOR ECON. & POL’Y RES. BLOG (Jan. 24, 2014, 4:18 PM), <http://www.cepr.net/index.php/blogs/cepr-blog/more-on-meer-and-wests-minimum-wage-study> (criticizing further Meer and West’s statistical analysis).

2. *Incentive Effects of Transfers.*—While transfers can help alleviate the burdens of unemployment and poverty more generally, they cannot substitute entirely for labor-market regulations. For one thing, while transfers do not cartelize the labor market, income and wealth taxation do reduce talented individuals' incentives to work hard or create jobs and may encourage entrepreneurs to relocate into lower tax jurisdictions.²⁰⁷

More importantly, transfers can incentivize the use of extremely low-wage labor, which will in turn encourage class and status differentiation. For example, the EITC tends to draw additional individuals into the labor market, but not all workers are able to take advantage of the EITC; the net effect is downward pressure on wages, and a subsidy to employers or consumers.²⁰⁸ Wage subsidies can also have perverse distributive effects. They must either be generally available to low-wage employers, in which case many employers will capture a windfall, or they can be targeted to particular groups of workers, in which case employers may favor that group over another, with morally arbitrary distributive consequences.²⁰⁹ Subsidies targeted at particular social groups may also require workers to report their disadvantages to a potential employer, a sort of “shameful revelation” that can actively undermine workers' self-respect.²¹⁰

Ultimately, transfers that are not accompanied by wage regulations can substantially undermine social equality even as they create employment opportunities. For example, consider the effects on low-wage labor markets if the minimum wage were repealed altogether and replaced with the EITC or a general wage subsidy. At a certain market wage—say, \$2 an hour—even middle-class families would have lives of luxury. Food would be cheap. Few such families would mow their own lawn or clean their own

207. See, e.g., Alstott, *supra* note 10, at 985–86 (discussing disincentives caused by wealth and income taxation); Kaplow & Shavell, *supra* note 38, at 667–68 (noting this effect resulting from income taxes).

208. See Jesse Rothstein, *The Unintended Consequences of Encouraging Work: Tax Incidence and the EITC* 1 (Ctr. for Econ. Pol'y Stud., Working Paper No. 165, 2008) (“In the standard model, EITC-induced labor supply increases lead to lower wages.”); see also John Schmitt, *Having Your Minimum Wage and EITC, Too*, CENTER FOR ECON. & POL'Y RESEARCH BLOG (Jan. 8, 2013, 9:45 AM), <http://www.cepr.net/index.php/blogs/cepr-blog/having-your-minimum-wage-and-eitc-too> (noting the EITC “can also drive down the wages of workers”); cf. David Lee & Emmanuel Saez, *Optimal Minimum Wage Policy in Competitive Labor Markets*, 96 J. PUB. ECON. 739, 739–40 (2012) (discussing incidence effects). The EITC also carries administrative costs: employees must realize they are eligible and apply, and the IRS itself estimates that one in five eligible taxpayers fails to do so. *Check Your Eligibility for the Earned Income Tax Credit*, IRS (Jan. 25, 2013), <http://www.irs.gov/uac/Check-Your-Eligibility-for-the-Earned-Income-Tax-Credit>.

209. Alstott, *supra* note 10, at 1025–27; see also *id.* at 1026 (“[I]t is impossible to eliminate all distributional benefit to employers.”); *id.* at 1041 (citing the Organisation for Economic Co-operation and Development's finding that “[g]eneral employment subsidies tend to have significant windfalls, while targeted subsidies tend to displace”).

210. See Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 107–15 (discussing “respect-standing” and “shameful revelation”).

house anymore. Many could even hire a butler, or a chef, or perhaps a chauffeur to make long commutes more tolerable. Notably, those workers might even have a decent standard of living if the EITC or wage subsidy were high enough. But history strongly suggests that many would treat all those \$2-an-hour servants poorly, reasoning that their low wages must be due to some moral failing and consumers' lives of leisure due to some moral virtue.

While basic income programs would avoid some of these perversities, they are not a panacea. Since a basic income would be universal, proponents argue convincingly that it would not carry the stigma attached to means-tested programs—it would be more akin to Social Security than to “welfare.”²¹¹ A basic income would also enable recipients to reject undignified work. But as argued above, rights against the state cannot entirely substitute for rights against employers.²¹² Moreover, the basic utilitarian critique of wealth taxes returns here with a vengeance: if guaranteed a basic income, many individuals would choose not to work at all. Funding such a program would also require high levels of wealth and income taxation, creating incentives for capital flight and reduced effort among the wealthy and talented.²¹³

Finally, the implications of a robust basic income could be strongly dystopian unless it was offered to noncitizen residents, and policymakers have little incentive to do so.²¹⁴ In a basic income state, menial work would still need to be performed; with citizens effectively “excused,” is there any reason to think that guest workers and other irregular migrants from the

211. See, e.g., ACKERMAN & ALSTOTT, *supra* note 30, at 204–10 (proposing stakeholding as the foundation for a new culture of citizenship).

212. See *supra* notes 212–15 and accompanying text.

213. See William A. Galston, *What About Reciprocity?*, in WHAT'S WRONG WITH A FREE LUNCH? 29, 29 (Joshua Cohen & Joel Rogers eds., 2001) (registering “suspicion that a significant [basic income] would be unaffordable and would have labor-supply effects that even its advocates would deem perverse”). For a discussion of some economics of basic income programs, see VAN PARIJS, *supra* note 29, at 38–41.

214. See Michael W. Howard, *Basic Income and Migration Policy: A Moral Dilemma?*, 1 BASIC INCOME STUD. 1, 1 (2006) (“[Basic income] may have a welfare magnet effect that generates pressure for tightening of borders or restricting [basic income] to citizens only.”); Jeffrey S. Lehman & Deborah C. Malamud, *Saying No to Stakeholding*, 98 MICH. L. REV. 1482, 1484, 1489 (2000) (criticizing Ackerman and Alstott’s proposal for not covering immigrants); Hillel Steiner, *Compatriot Priority and Justice Among Thieves*, in REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS 161, 161–62 (Andrew Reeve & Andrew Williams eds., 2003) (calling national basic income programs “justice among thieves”). Van Parijs seems to endorse a global basic income in principle, but as a second best supports a national basic income open to “all legal permanent residents” coupled with restrictions on economic migration. See Van Parijs, *supra* note 87, at 11, 30 (acknowledging migration policy as a potential obstacle to global basic income becoming a widespread reality); see also Howard, *supra*, at 9–10 (discussing Van Parijs’s arguments for restrictions on economic migration).

Global South would not be imported for that purpose?²¹⁵ This is not a criticism of immigration or labor migration, but rather an argument that guest-worker programs, particularly insofar as they offer no path to citizenship, may actively undermine social equality by creating a permanent underclass of degraded workers.²¹⁶

Ultimately, a combination of policies is likely necessary to ensure both equality of resources and social equality. A number of economists have recommended combining a minimum wage increase with a more generous EITC since the policies will have complementary effects: the EITC will encourage employment, while the minimum wage will reduce wage inequality.²¹⁷ If and when a basic income becomes politically feasible, it would also be an attractive policy option alongside minimum wages, particularly if it were generous enough to enable individuals to engage in caregiving or other unpaid work rather than needing to work to survive. In fact, so long as transfers are politically saleable, ideals of social equality may counsel for setting minimum wages at the highest sustainable level, so as to make a substantial difference in workers' ability to live a decent material life, then compensating the unemployed through generous unconditional transfers. Those ideals also counsel for indexing the mandated minimum to inflation: while doing so would likely lead to greater employment effects over time, the resulting gains in social equality would also be more stable.²¹⁸

215. See Galston, *supra* note 218, at 29–30 (“One may restrict [a universal basic income], as Van Parijs does, to permanent residents, but this will only increase the propensity of recipient nations to favor temporary workers over new permanent residents.”).

216. See Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 221–30 (claiming there is a need for social integration of guest workers, as well as a path to citizenship). Certain Gulf States are a case in point: some have implemented a generous citizens' income funded out of oil and gas revenues, while utilizing migrant workers with no opportunity for citizenship to perform virtually all labor; in some such states, migrant workers substantially outnumber citizens, and allegations of substantial human rights abuses including forced labor are common. See HUMAN RIGHTS WATCH, BUILDING A BETTER WORLD CUP: PROTECTING MIGRANT WORKERS IN QATAR AHEAD OF FIFA 2022, at 2–13 (2012) (detailing the abuses of migrant workers in Qatar and proposing solutions).

217. See, e.g., JEANNETTE WICKS-LIM & JEFFREY THOMPSON, POLITICAL ECON. RESEARCH INST., COMBINING MINIMUM WAGE AND EARNED INCOME TAX CREDIT POLICIES TO GUARANTEE A DECENT LIVING STANDARD TO ALL U.S. WORKERS 2 (2010) (“[P]olicymakers must target two goals: insuring that workers have both adequate pay *and* adequate amounts of work.”); accord Lee & Saez, *supra* note 213 (stating that “[a] binding minimum wage enhances the effectiveness of transfers to low-skilled workers as it prevents low-skilled wages from falling through incidence effects” of transfers); Schmitt, *supra* note 213 (calling the EITC and minimum wage “complements”); see also Alstott, *supra* note 10, at 1050–51 (claiming that a minimum wage combined with a wage subsidy may increase wages without increasing unemployment).

218. See Isaac Sorkin, Are There Long-Run Effects of the Minimum Wage? 22 (2013) (unpublished manuscript), available at <https://sites.google.com/site/isaacsorkin/papers> (suggesting that failure to index minimum wages to inflation may explain lack of significant employment effects in past empirical studies).

3. *Further Refining and Extending the Argument.*—At the same time, perhaps policymakers do not face tragic choices after all. The analysis above has assumed that minimum wage laws decrease demand for low-wage labor. But this may be untrue, at least for minimum wage levels within their historic limits. Without going deeply into the research, in recent years an increasing number of economists have spoken in favor of increasing the minimum wage.²¹⁹ For example, in a recent poll of thirty-eight prominent academic economists, a plurality felt that increasing the minimum to around \$9 an hour would not have serious detrimental effects upon the low-wage labor market.²²⁰

There are various reasons why minimum wage laws might not reduce demand for low-wage labor. Minimum wages might force employers to pay “efficiency wages,” or above-market wages that tend to encourage greater effort by employees and greater attachment between employers and employees, which may also reduce turnover.²²¹ Minimum wage laws may boost aggregate demand, leading in turn to job creation or at least stabilization.²²² Other theories have also been proposed,²²³ but the details are unimportant for present purposes. If the empirical evidence begins to show more decisively that minimum wage laws do not force much increase in unemployment in the first place—even once indexed to inflation—then the social egalitarian case for such laws is that much stronger. In that case, minimum wage laws can redistribute to the working poor and help ensure decent work without having perverse effects on the low-wage labor market.

The above argument has also assumed that minimum wage laws and transfers are the only two sets of policies that impact employment levels and the quality of jobs. This was helpful to better understand the comparative merits of those policies. But the assumption is obviously false. If concerned about unemployment, policymakers could institute industrial policies that incentivize job-creation strategies, or even implement a right to

219. See *Over 600 Economists Sign Letter in Support of \$10.10 Minimum Wage*, ECON. POL’Y INST., <http://www.epi.org/minimum-wage-statement/> (presenting a letter from over 600 economists, including seven Nobel Laureates, supporting an increase of the minimum wage to \$10.10 per hour).

220. *Minimum Wage*, IGM F. (Feb. 26, 2013, 10:56 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_br0IEq5a9E77NMV.

221. See, e.g., CARD & KRUEGER, *supra* note 19, at 8–13 (discussing efficiency-wage theory). As Shaviro points out, it is unclear why paying efficiency wages would lead to greater employment anyway since employers would then be able to make do with fewer workers. Shaviro, *supra* note 5, at 454–56.

222. JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, WHY DOES THE MINIMUM WAGE HAVE NO DISCERNABLE EFFECT ON EMPLOYMENT 20–21 (2013), available at <http://www.cepr.net/documents/publications/min-wage-2013-02.pdf>.

223. See *id.* at 15–22 (summarizing such theories).

work of some sort.²²⁴ There are various challenges to large-scale state work-creation programs—including a tendency to create “make work” jobs that may do little to enhance individuals’ self-respect—though smaller scale and more targeted programs may avoid that perversity.²²⁵ Such programs may be particularly necessary insofar as a higher minimum encourages employers to hire workers with marginally greater skills, shutting the least skilled out of the market.²²⁶

A state concerned about unemployment might also consider reforming monetary policy, fiscal policy, and trade rules, all of which have substantial effects on employment.²²⁷

Finally, a state concerned about social equality might consider far more ambitious reforms to workplace and labor-market governance. For example, a state could guarantee participatory rights within the enterprise or at least “rights to contest” of the sort protected by laws governing unionization and collective bargaining.²²⁸ Such reforms could offset another potential cost of minimum wage laws: that they may encourage employers to increase productivity by *increasing* workloads and supervision.²²⁹ Widespread unionization would also likely help ensure a greater degree of wage compression than minimum wage laws alone. In fact, social equality may even support reforms to corporate structures and to the basic structure of capitalism, for example by granting workers capacious democratic rights over economic governance.²³⁰

While full consideration of such matters is well beyond the scope of this Article, getting a handle on the justice of minimum wages should help set the stage for defenses of these more far-reaching reforms. Economically speaking, unionization creates a cartel among unionized workers, and laws encouraging unionization are therefore subject to similar critiques as laws

224. See Zatz, *supra* note 14, at 45–46 (“Taking the perversity argument [about unemployment] seriously might well lead us toward more robust . . . policies that include job creation . . . rather than toward deregulation.”).

225. Elster, *supra* note 162, at 62–78 (discussing this and other problems associated with implementing a right to work).

226. See Stigler, *supra* note 31, at 359 (predicting that minimum wage laws may have this effect).

227. See, e.g., John Schmitt, *CBO and the Minimum Wage, Pt. 2, NO APPARENT MOTIVE* (Feb. 20, 2014, 10:36 PM), <http://noapparentmotive.org/blog/2014/02/20/cbo-and-the-minimum-wage-pt-2/> (“To a first approximation, labor-market institutions such as the minimum wage . . . determine the distribution of wages, benefits, and incomes, while macroeconomic policy determines the level of employment.”).

228. See Bogg & Estlund, *supra* note 171 (describing the neorepublican case for the right to contest); Hsieh, *supra* note 110 (asserting that “[u]nder . . . plausible assumptions about the nature of economic production, protection against arbitrary interference requires . . . workers to be able to contest managerial directives”).

229. Metcalf, *supra* note 193.

230. See, e.g., Joshua Cohen, *The Economic Basis of Deliberative Democracy*, SOC. PHIL. & POL’Y, Spring 1989, at 25, 26 (proposing democratic governance of the economy).

establishing minimum wages, including that they cause inefficiency and tend to increase unemployment.²³¹ Moreover, because their success generally depends upon a sense of solidarity among workers, unions can create in-group/out-group dynamics that are in tension with commitments to individual liberty.²³² How to balance such concerns against the goods that unions deliver—which include both wealth redistribution and greater workplace equality for represented workers—is a question I hope to address in future work.²³³

IV. Counterarguments

With the primary case for minimum wage laws squarely on the table, this final Part takes up several important counterarguments. Subpart IV(A) considers the potential weaknesses of minimum wage laws as means of advancing social equality. Subpart IV(B) then revisits the relationship between egalitarian liberalism and social equality.

A. *Limits of the Minimum Wage as a Means to Social Equality*

Several important counterarguments question whether the minimum wage is an especially effective means of promoting social equality. For example, it is possible that a higher minimum wage may not force much cost-internalization or other changes to workplace relationships because firms will avoid compliance. Some firms will simply ignore the higher mandate, hoping not to be caught.²³⁴ Others will deformatize working

231. *E.g.*, Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1004 (1984).

232. Walzer's endorsement of the San Francisco scavengers' membership process, which seems to discriminate in favor of Italian-Americans, is thus quite problematic. *See* WALZER, *supra* note 20, at 179; *see also* Rogers, *supra* note 175, at 356–59 (discussing contemporary unions' efforts to foment solidarity among workers).

233. Of course, minimum wage critics tend not to endorse such reforms in any event. *See* ACKERMAN & ALSTOTT, *supra* note 30, at 206–07 (claiming that “Americans . . . are notoriously skeptical of worker solidarity,” and that those who wish “to organize for social justice” do not ordinarily “join their fellow workers in a union”); *id.* at 206 (criticizing Phelps for seeking to implement a “workplace intuition” of interpersonal fairness); VAN PARIJS, *supra* note 29, at 211–13 (criticizing unionization as a barrier to equality for low-skilled workers). Contrast Ackerman and Alstott's historical claims about Americans' preferences regarding unionization with Joel Rogers, *Divide and Conquer: “Further Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 99–145, which claims that the 1947 Labor Management Relations Act effectively stopped new union organizing. *See also id.* at 138 (“[U]ntil quite recently American workers engaged in one of the highest levels of strike activity in the advanced industrial capitalist world.”); *accord* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–74 (1983) (arguing that the National Labor Relations Act representation-elections process has systematically tilted against unions and pro-union workers, such that lack of unionization does not reflect workers' uncoerced preferences).

234. *See* Rogers, *supra* note 93, at 19–21 (discussing employers' incentives to comply with or violate the FLSA).

relationships by outsourcing unskilled labor to uncapitalized subcontractors, hiring under the table, hiring more family members, or hiring irregular immigrants who will be unlikely to enforce their rights.²³⁵ While many low-wage employees work for large companies in relatively standard employment relationships,²³⁶ such judgment-proofing strategies are a major impediment to enforcement of minimum wage laws today.

Yet if social equality is a major social priority, a society should not just pass a minimum wage at a reasonably high level but should also invest sufficient resources in enforcement, and perhaps implement forms of third-party liability that will better ensure cost-internalization.²³⁷ Such strategies will of course carry costs, which must be weighed in the balance. But insofar as policymakers aim to actually alter employers' behavior, greater investment in enforcement will generally be justifiable on the same normative grounds as are minimum wage laws *per se*.

A second objection cuts deeper. The U.S. tradition of linking redistribution to paid work is problematic in many ways,²³⁸ and strengthening minimum wage laws may continue the perversities of that tradition. For example, efforts to achieve social equality through higher wages may reinforce family-wage ideology—the view that paid employment, which has been traditionally performed by men, is somehow of greater social value than unpaid care work, which has traditionally been performed by women.²³⁹ Similarly, efforts to enhance the dignity of work may reinforce pernicious stereotypes about the unemployed and those who receive forms of public assistance.²⁴⁰ As sociologists and anthropologists have demonstrated, employed workers often draw moral distinctions between themselves and those on public assistance, holding that their work ethic explains their relative success and entitles them to greater respect.²⁴¹

235. See Monder Ram et al., *The Dynamics of Informality: Employment Relations in Small Firms and the Effects of Regulatory Change*, 15 WORK, EMP. & SOC'Y 845, 845 (2001) (noting that in response to the U.K. national minimum wage, some firms moved upmarket and utilized more formal employment and management systems, while others moved downmarket and increased reliance on illicit or familial labor); Shaviro, *supra* note 5, at 417 (asserting that increased enforcement may create incentives to employ undocumented immigrants who will not report violations).

236. NAT'L EMP'T LAW PROJECT, *supra* note 198.

237. See Rogers, *supra* note 93, at 47–60 (proposing a regime of third-party liability for FLSA violations).

238. Forbath, *supra* note 120, at 1824 (describing the New Deal tradition as “coercive, caste-ridden, and gendered”).

239. See Zatz, *supra* note 14, at 11, 41–42 (noting the problem of family-wage ideology).

240. See, e.g., Forbath, *supra* note 120, at 1877 n.252 (“[T]he most salient border between minimum respect and degradation in [contemporary] class structure falls along the line between those who are recognized . . . as working and providing a decent living for themselves and their families, and those . . . who are not.”).

241. See MICHÈLLE LAMONT, *THE DIGNITY OF WORKING MEN* 3 (2000) (suggesting based on ethnographic research that white working class men draw “strong[] boundaries against blacks

Welfare-rights advocates and their descendants—including basic income advocates—have accordingly criticized the view that employment is a *precondition* of equal citizenship, particularly given the risk that work requirements will be used to discipline the poor.²⁴²

But this Article advocates no such thing: it instead argues that labor-market regulations are one among other tools that policymakers should utilize to ensure social equality. Even if promoting decent work has the collateral consequence of marginally reinforcing family-wage ideology or divisions between workers and nonworkers, this does not mean efforts to promote decent work should be abandoned—particularly when low-wage work delivers asymmetric benefits to more powerful social groups and classes.²⁴³ While egalitarians should not seek to solve all distributive problems through labor-market regulations, nor should they ignore the workplace as a site where social inequalities are produced and reinforced. Even the National Welfare Rights Organization, the leading advocate for a system of public assistance wholly delinked from work requirements, argued that those who worked deserve “decent jobs with adequate wages.”²⁴⁴

Moreover, given the deep relationship between legal rights against private parties and citizens’ self-respect and autonomy, it seems highly unlikely that even the most generous basic income could fully displace labor-market regulations as means of promoting and sustaining a culture of egalitarian citizenship.²⁴⁵ Robust welfare states have typically been built in conjunction with or upon a foundation of robust labor-market institutions such as wage regulation and unions—not as an alternative to such institutions.²⁴⁶ Removing such protections may then undermine the very

and the poor on the basis of a universal morality organized around the ‘disciplined self,’ particularly their work ethic and sense of responsibility”); KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 98 (1999) (“[P]ointing to the essential virtues of the gainfully employed, [black fast-food] workers align themselves with the great mass of men and women who work for a living” and against the jobless).

242. See, e.g., Alstott, *supra* note 10, at 989–90 (outlining and criticizing a “communitarian” case for work requirements that “hard work [in the form of paid employment] is morally required” for equal citizenship).

243. See *supra* Part III.

244. Forbath, *supra* note 120, at 1852 (quoting Felicia Kornbluh, *The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later*, 24 FEMINIST STUD. 65, 68 (1998)); accord Vicki Schultz, Essay, *Life’s Work*, 100 COLUM. L. REV. 1881, 1883 (2000) (“[A] robust conception of equality [for women] can be best achieved *through* paid work, rather than *despite* it.”).

245. But see Ackerman & Alstott, *supra* note 79, at 50 (“We expect [stakeholding] to serve as the institutional focus for a dynamic culture of citizenship.”); ACKERMAN & ALSTOTT, *supra* note 30, at 197 (“Stakeholding is not a poverty program. It is a citizenship program.”).

246. See generally GØSTA ESPING-ANDERSEN, POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER (1985) (attributing the success of social democracy in Scandinavia in part to the early alliance of the peasantry with organized labor); Wolfgang Streeck, *The Sociology of Labor Markets and Trade Unions*, in THE HANDBOOK OF ECONOMIC

solidaristic politics required to pass and sustain a basic income program in the first instance. This is true on an individual level, as low-wage workers and the poor may feel less allegiance to a state that fails to protect them against domination by other private actors.²⁴⁷ It is also true on a structural level, as the sorts of intermediate institutions promoted by the welfare state—again, unions, social security schemes, and certain other basic social regulations—may provide the baseline political support necessary for a basic income program in the first instance.²⁴⁸

The third objection holds that the link between minimum wage laws and social equality can be both over- and underinclusive. Such laws are overinclusive insofar as they apply both to the working poor and to temporarily employed wealthy teenagers. There is little reason to think that the latter group needs particular *wages* to ensure that they see themselves as moral equals, nor to ensure that they are treated fairly. Minimum wage laws are underinclusive insofar as many forms of unpaid work are an important source of self-esteem. Parents and relatives clearly find fulfillment in unpaid care work; others find fulfillment by volunteering for religious, nonprofit, or charitable organizations. But it does not follow that minimum wage laws are unimportant to social equality—only that they are not a complete means of achieving social equality. Indeed, the fact that volunteer work can enhance self-respect may actually bolster this Article's argument, for volunteers—unlike employees—are not directed on pain of termination, nor does their work typically provide asymmetrical benefits to other individuals.

The final objection holds that arguments from social equality may prove too much. Namely, if policymakers accept that work is an important site for social equality, then how “good” or “equal” must work or work relationships be? Must policymakers ensure that work is a site for workers' self-realization more generally? There are important reasons not to do so. While work can be a form of self-realization, this often involves such high costs and such investments of time that it may be a realistic goal only for a few—with “the artisan, the artist, and the scientist” as classic exemplars.²⁴⁹ An economy that sought to ensure that all workers could achieve self-realization may end up with a much lower social product and would risk becoming illiberal insofar as it prevented individuals from seeking self-realization outside of work. More to the point, however, commitments to social equality need not make the perfect the enemy of the good. Even if

SOCIOLOGY 254 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) (describing the role of industrial unions in pressing for a social-welfare state).

247. In a way captured well, once again, by the textile worker's remarks quoted in the introduction. See *supra* note 1 and accompanying text.

248. See Streeck, *supra* note 251, at 269–71 (discussing the relationship between industrial unions and welfare states in Scandinavia, Continental Europe, the United States, and Japan).

249. Elster, *supra* note 162, at 66.

tens of millions of menial jobs cannot be rendered more interesting, they can receive better pay and fairer working conditions; workers affected would then have greater self-respect as well as more time for leisure, caregiving, or other activities through which to achieve self-realization.

B. *Revisiting the Relationship Between Social Equality and Egalitarian Liberalism*

1. *How Strong Is the Liberal Case for Social Equality?*—While the argument above relies heavily upon Rawls's work, the place of social equality within Rawls's theory is somewhat ambiguous. On the one hand, Rawls's difference principle requires maximizing the primary social goods of the worst off group, and Rawls argued that the social bases of self-respect are the most important of the primary social goods.²⁵⁰ Rawls also recognized that a theory of justice could not ignore the workplace or the division of labor. Under justice as fairness, he argued, "no one need be servilely dependent on others and made to choose between monotonous and routine occupations which are deadening to human thought and sensibility."²⁵¹ He also noted in later work that *Theory* had paid insufficient attention to questions of work and that the "long-run prospects of a just constitutional regime may depend" upon the emergence of firms owned and managed by workers.²⁵² All such passages imply a concern with social equality, including decent work.

Yet due to Rawls's emphasis on the priority of liberty, and due to his attention to matters of ideal rather than nonideal theory, his theory focused almost entirely on relationships between citizens and the state and relationships among citizens in the political sphere, devoting far less attention to interpersonal relationships. Rawls also made clear that a just basic structure "most likely permits significant social and economic inequalities in the life prospects of citizens," due in part to "the need for incentives."²⁵³ Thomas Pogge has accordingly criticized Rawls's *Theory* for failing to specify whether extreme poverty violates the liberty principle's requirement "that social institutions protect the freedom and integrity of the person" and has argued that egalitarian justice requires that the difference principle condemn "abridgements of self-respect that are due to a significantly inferior share of . . . goods" other than basic liberties, including income and wealth, and the powers and prerogatives of office.²⁵⁴ G.A. Cohen has criticized Rawls's project from a different direction,

250. See *supra* subpart I(B).

251. RAWLS, *THEORY*, *supra* note 6, at 529.

252. RAWLS, *FAIRNESS*, *supra* note 6, at 178–79.

253. RAWLS, *LIBERALISM*, *supra* note 6, at 270.

254. POGGE, *supra* note 100, at 6–7, 163 & n.4.

holding that Rawls's theory, by excusing or even endorsing rampant self-interested behavior in markets, fails to respond to Marx's critique of liberal rights.²⁵⁵

Rawls's ambiguities regarding such matters may also reflect a basic tension between social equality and liberals' primary definition of freedom as noninterference. As Philip Pettit writes, liberalism's "relative indifference to power or domination has made liberalism tolerant of relationships in the home, in the workplace . . . and elsewhere, that the republican must denounce as paradigms of domination and unfreedom."²⁵⁶ While liberals do often manifest a concern with poverty and inequality, Pettit argues that this is typically because of independent commitments, such as "the realization of a certain equality between people."²⁵⁷ Neorepublican and left-communitarian approaches to such questions, neither of which rely upon a lexical ordering of principles, capture the normative impulse more directly: a just society cannot disregard private forms of power that systematically limit groups' and individuals' life opportunities.

Social equality therefore occupies an ambiguous position within liberalism. It is a baseline value, but may trigger concerns at the level of ideal theory only where groups or individuals suffer *formal* inequalities of status—denial of basic civil and political rights and the like—such that the threat of a caste-like social structure is acute.²⁵⁸ The status harms that emerge from workplace inequalities are relatively minor in comparison, and remedying them requires the sorts of interferences with individual liberties that liberals disfavor.

In my view, the notion of social equality, particularly as grounded in liberalism's baseline commitments to individual autonomy, nevertheless captures why agent-specific employer duties are important independent of their effects upon material distribution. There is ample support in Rawls's own writings for the idea that in an egalitarian society autonomy and equality should animate our everyday lives. Rawls was clear, for example, that standard welfare state redistributive institutions were insufficient to ensure justice because welfare state capitalism did not incorporate "a principle of reciprocity to regulate economic and social inequalities."²⁵⁹

255. See COHEN, *supra* note 111 (explaining that his disagreement with Rawls is rooted in "the nonliberal socialist/anarchist conviction that Karl Marx expressed . . . that human emancipation would be complete only when the actual individual man . . . has recognized and organized his own powers as *social* powers so that social force is no longer separated from him as a *political* power" (second omission in original) (internal quotation marks omitted)).

256. PETTIT, REPUBLICANISM, *supra* note 108, at 9.

257. *Id.*

258. This helps explain Rawls's emphasis on the priority of liberty as a main guarantee of the social bases of self-respect. RAWLS, THEORY, *supra* note 6, at 544.

259. RAWLS, FAIRNESS, *supra* note 6, at 138.

Rawls also held that a just society must satisfy the “Publicity Condition,” the idea that “in a well-ordered society, citizens accept the principles of justice as well as their major justifications.”²⁶⁰

Various liberals have subsequently argued that, in a just society, individuals would feel themselves constrained to act in accordance with egalitarian principles—this seems to be the upshot of arguments that an egalitarian society must inculcate an “egalitarian ethos.”²⁶¹ While a complete defense of the minimum wage on liberal grounds is beyond the scope of this Article, the basic liberal impulse—that social institutions should work together to ensure equality and self-respect for all—would certainly support efforts to reform labor markets so as to reduce work-based social inequalities, so long as such efforts do not themselves cause greater social or economic inequalities.

Moreover, the most prominent alternative normative theories—republicanism and left communitarianism—suffer their own weaknesses. Both theories condemn subordination above all, including subordination resulting from private power,²⁶² and therefore indict hierarchical workplace practices more directly than this more interstitial argument for social equality within liberalism.²⁶³ But both define domination and subordination ostensibly: they know it when they see it.²⁶⁴ Pettit, for example, condemns private interferences that are “arbitrary,” in the sense that they do not “track the interests and ideas of the person suffering the interference.”²⁶⁵ Labor scholars have drawn on this idea to indict workplace practices and background rules that leave workers subject to managers’ whims.²⁶⁶ But this raises its own challenges of administrability: how, for example, are workers’ interests to be defined, so as to separate arbitrary from nonarbitrary interference? Which external criteria are appropriately brought to bear on such questions? Walzer, meanwhile, condemns the *systematic*

260. Seana Valentine Shiffrin, *Incentives, Motives, and Talents*, 38 PHIL. & PUB. AFF. 111, 113 (2010); see also RAWLS, THEORY, *supra* note 6, at 453–54 (discussing the role of a “public conception of justice”).

261. Daniels, *supra* note 20, at 244 (discussing the need for an egalitarian ethos); see also Wolff, *supra* note 215, at 118 (describing the egalitarian ethos as “a collection of possibly competing values, including both fairness and respect,” which structures decision making in an egalitarian society); Scheffler, *supra* note 20, at 37 n.77 (arguing that G.A. Cohen’s “emphasis on the importance of a choice-constraining egalitarian ethos is quite congenial to” Scheffler’s own liberal formulation of democratic equality (i.e., “the social and political ideal of equality”).

262. See PETTIT, REPUBLICANISM, *supra* note 108, at 51–52; WALZER, *supra* note 20, at 17–20.

263. See PETTIT, REPUBLICANISM, *supra* note 108, at 5, 57 (discussing threat of arbitrary interference in employment); WALZER, *supra* note 20, at 165–83 (discussing work).

264. See PETTIT, REPUBLICANISM, *supra* note 108, at 57–58; WALZER, *supra* note 20, at 10–11.

265. PETTIT, REPUBLICANISM, *supra* note 108, at 55; see also Hsieh, *supra* note 110, at 117 (defining a just workplace as one without arbitrary interferences).

266. See, e.g., Bogg & Estlund, *supra* note 171.

translation of power in one social sphere into power in another social sphere but does not clarify when such translations are systematic rather than partial.²⁶⁷ Compared to Rawls's egalitarian liberalism, such theories trade a degree of analytical clarity for greater moral clarity and greater traction on everyday matters of justice. As Walzer and certain republicans acknowledge, they are perhaps best viewed as complementary rather than opposing approaches to justice.²⁶⁸

2. *Is There an Alternative Liberal Case for Minimum Wages?*—Finally, to the extent that a theory of just work is to be built on a roughly Rawlsian foundation, perhaps social equality—a relatively malleable, context-specific value—is not the optimal centerpiece. After all, the very term “social equality” may be a misnomer: it does not actually mandate *equality* in social position and status but rather places a floor beneath inequalities of status. Would another interpretation of liberal principles better ground such a project?

Professor Noah Zatz has recently developed a different case for the minimum wage rooted in Ronald Dworkin's influential argument that a just society will indemnify individuals against accidents of birth but not against the consequences of their own bad choices.²⁶⁹ Many, if not most, people who end up working at or below the minimum wage, Zatz argues, have suffered hardships traceable to accidents of birth—including race, gender, relative lack of marketable abilities, being born into poverty, and the like.²⁷⁰ Proving that one's low wages are traceable to such disadvantages is of course incredibly difficult, but “[a]t some point,” Zatz writes, “wages become low enough that we can infer unfairness from the brute fact of the poor outcome. . . . [I]f someone is making \$2 per hour, it probably is because she has gotten the short end of the stick in some fashion, probably in many. *Res ipsa loquitur*.”²⁷¹ Minimum wages are thus somewhat akin to accommodation mandates in employment discrimination: they force employers to pay higher-than-market costs for particular labor in part to undo historical patterns of injustice.²⁷²

267. See WALZER, *supra* note 20, at 20 (“No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.”).

268. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 6 (1990) (arguing that the so-called “communitarian” critique is not so much a refutation of liberalism as “a consistently intermittent feature of liberal politics and social organization”); see also Hsieh, *supra* note 110 (drawing from both Rawls's liberalism and Pettit's republicanism to develop a theory of workplace justice).

269. See Zatz, *supra* note 14, at 33–37.

270. *Id.* at 38–40.

271. *Id.* at 38–39 (footnote omitted).

272. *Id.* at 7.

While this Article has benefitted enormously from Zatz's analysis, he and I are attracted to different positions in a broader debate over the role of individual responsibility in egalitarian liberalism. Crudely put, Dworkin and his ilk worry that Rawls's *Theory* overdistributes, excusing many individual failures of responsibility and raising the specter of talent-slavery; Elizabeth Anderson and her ilk worry that placing too much emphasis upon individual choice undermines the self-respect of the poor and thus undermines the moral force of egalitarian liberalism.²⁷³ I further worry that the choice/circumstance distinction is an unstable foundation for the minimum wage, for it may counsel for leaving workers to bear the costs of their own bad choices, including failures to take advantage of educational opportunities, failures to stay within the job market and to improve one's skills, and failures to avoid criminal conduct and conviction, all of which make it more difficult to find and maintain any work, much less decent work.²⁷⁴

Moreover, Dworkin's basic goal was to defend social insurance against libertarian attack by demonstrating how autonomous individuals would agree to social insurance from behind a sort of veil of ignorance; his focus is upon distributive justice, fairly narrowly defined, rather than the relationship between private actions and social equality.²⁷⁵ He paid even less attention to the division of labor or employment relationships than Rawls, grounding his theory on a thought experiment that posits a society of Robinson Crusoes seeking to determine how best to distribute resources on a desert island.²⁷⁶ This is not a criticism of the hypothetical per se—which nicely demonstrates some of the intuitions behind social insurance—but rather an effort to highlight its limits. Dworkin's theory simply says little about the social division of labor.²⁷⁷

I am therefore skeptical that a choice/circumstance distinction itself would justify minimum wage laws. It strikes me as more promising to first ask how existing work relationships contribute to injustice by substantially limiting individuals' life chances and then to consider which combination of regulations and other distributive institutions will best alleviate such harms. At the same time, Zatz and I do end up in much the same place,

273. See generally Anderson, *supra* note 20 (criticizing responsibility-catering egalitarianism); Scheffler, *supra* note 20 (same).

274. See Anderson, *supra* note 20, at 296–301 (discussing certain luck egalitarians' abandonment of these and other seemingly deserving individuals).

275. See DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 65–119.

276. See *id.*; *id.* at 94–95 (offering a proposal for job auctions but not discussing questions of the division of labor).

277. See KYMLICKA, *supra* note 46, at 90–92 (criticizing Dworkin on such grounds, including his failure to challenge the “civilization of productivity” that has “perpetuat[ed] entrenched inequalities of race, class, and gender”).

perhaps reflecting that these are complementary rather than competing approaches to the question of how a just society should govern work.

Conclusion

A just society will both redistribute resources and ensure that citizens confront one another as equals. Even if transfers are a more effective means of redistribution, minimum wage laws are more effective at ensuring decent work and social equality. Such laws directly increase workers' wages; they grant workers agent-specific rights against employers; and they force employers and consumers to internalize some of the social costs of low-wage labor. As a result, minimum wage laws mitigate work-based class and status distinctions and enhance low-wage workers' self-respect. By unpacking the common intuition that minimum wage laws are a matter of basic fairness, this Article aims to place those laws on a more sound philosophical footing and to enrich the increasingly urgent public debate surrounding them. In this age of increased inequality, minimum wage laws help ensure justice at work.