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### Foreword: The Labor Constitution in 2020

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## FOREWORD: THE LABOR CONSTITUTION IN 2020

BY  
RUBEN J. GARCIA\*

### I. INTRODUCTION

There is a single United States Constitution.<sup>1</sup> That Constitution, however, means multiple things to different constituencies. The Constitution can be deployed as a shield against government oppression or a sword to establish new rights and obligations as against the government. The Constitution also has different significance for lawyers who work in different areas of law. As in other areas of law, statutory labor law may be defended against constitutional challenge, and also may be furthered by constitutional values. Several constitutional values uniquely applicable in labor law—freedom of speech, due process, freedom of association, and freedom from servitude—form the foundations of the essays in this special symposium of the *Employee Rights and Employment Policy Journal*.

On September 26 and 27, 2019, judges, scholars and lawyers from around the United States and Canada gathered at Cornell University's New York City campus to discuss interactions between the United States Constitution and U.S. labor law.<sup>2</sup> The Conference came at a particularly uneasy time for workers' rights advocates, as the federal courts and the federal agencies have increasingly become inhospitable to the workers' rights enshrined in federal law. As tumultuous as times have been in the politics of labor law over the last four years, there is certainly a growing interest in the concept of a "Labor Constitution" as evidenced by the gathering.

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1. U.S. CONST., <<https://www.archives.gov/founding-docs/constitution>>.

2. Thanks to the Cornell University Industrial and Labor Relations School and Professor James Gross, all the staff of the Conference, and all participants for making the conference so worthwhile. The conference web site can be found at LABOR & THE U.S. CONST.: PAST, PRESENT & FUTURE, <<https://www.ilr.cornell.edu/labor-and-the-constitution>> (last visited May 13, 2020).

The start of 2020 already brought uncertainty to the direction of the discussion about labor rights in the United States, as the election year primaries began in earnest. No one, however, was prepared for the unprecedented turn of events brought by the global coronavirus pandemic in March 2020.<sup>3</sup> The COVID-19 disease has sickened millions throughout the world, is approaching 225,000 deaths in the United States, and has changed the economies and health care systems that have also been strained by it. The fallout from the pandemic has also changed the conversation about the future of labor protections, the Constitution, and the obligations of governments to protect the most vulnerable.<sup>4</sup>

This Symposium continues the thought-provoking discussions about labor constitutionalism of the kind that occurred in New York City, but also expands them.<sup>5</sup> This Symposium is not limited to the topics or participants at the Cornell conference, and it also incorporates the last nine months of sea change in our political economy and law. The parallels to other historical moments are becoming clear, but we will have to wait several more years to gain a perspective on just how consequential this moment will be.<sup>6</sup>

The participants in this Symposium discuss the constitutional values embedded in the regulation of the working relationship. Each paper suggests new directions of thought for the future. And the essays also follow several familiar frames of constitutional law, as I will follow in this Foreword.

3. Megan Specia, *What You Need to Know About Trump's European Travel Ban*, N.Y. TIMES (Mar. 12, 2020), <<https://www.nytimes.com/2020/03/12/world/europe/trump-travel-ban-coronavirus.html>>.

4. Nicholas Kristof, *America's True COVID Toll Already Exceeds 100,000*, N.Y. TIMES (May 13, 2020), <<https://www.nytimes.com/2020/03/12/world/europe/trump-travel-ban-coronavirus.html>>.

5. The panelists at the Cornell conference have published a large share of the scholarship on the intersection of labor and constitutional law. *See, e.g.*, Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5 (2018); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 U. MICH. L. REV. 169 (2015); Catherine Fisk & Martin Malin, *After Janus*, 107 CALIF. L. REV. 1821 (2020); JOSEPH R. FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (2019); James G. Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010); JOSEPH G. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, LAW AND THE STATE 1900-62* (2004); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016).

6. *See, e.g.*, Michelle Goldberg, *The New Great Depression is Coming. Will There Be a New Deal?*, N.Y. TIMES (May 2, 2020), <<https://www.nytimes.com/2020/03/12/world/europe/trump-travel-ban-coronavirus.html>>.

## II. THE OFFENSIVE LABOR CONSTITUTION

A longstanding type of offensive constitutional labor law is the use of the First Amendment to strike down federal and state labor regulations by corporate and conservative interests.<sup>7</sup> In his article *Janus and the First Amendment of the Workplace*, Professor Martin Malin describes the state of the First Amendment and *Janus* and the litigation that it has spawned. He concludes that *Janus* may not have been as ground moving as its adherents might have hoped.

### A. *The Constitution as Conservative Sword*

Several conservative groups have recently used the First Amendment to the Constitution to advance an agenda that is likely to reduce the power of the labor movement.<sup>8</sup> In *Janus v. AFSCME Council 31*, the National Right to Work Committee and several conservative think tanks supported plaintiff Mark Janus, while unions sought to uphold the fair share laws passed by twenty-three states.<sup>9</sup> In 2018, the U.S. Supreme Court struck down the fair share statute in Illinois on the ground that requiring bargaining unit employees to pay fees for the union representation they receive is compelled speech.<sup>10</sup> Unions and states prepared for the predicted impact of the *Janus* decision for some time, on the theory that it would lead to a great decrease in the union dues that employees in fair share states would collect.

Professor Malin discusses the under-appreciated impact on public employees of the *Janus* case. Malin argues that *Janus* has had a greater impact on a long line of First Amendment employee speech cases, including the paradigm-shifting case *Garcetti v. Ceballos*.<sup>11</sup> Malin argues that the effects of *Janus* on the non-union public employee speech rights, rather than unionized workers, may be greater on First

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7. Charlotte Garden, *The Deregulatory First Amendment at Work*, 53 HARV. C.R.-C.L. 323 (2016).

8. See, e.g., SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014); Ruben J. Garcia, *Right to Work Laws: Ideology and Impact*, 15 ANN. REV. L. & SOC. 509 (2019).

9. 138 S. Ct. 2448 (2018). Amicus briefs supporting Janus were filed by the Mackinac Center for Public Policy, the Rutherford Institute, and the Cato Institute, among others. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, SCOTUSBLOG, <<https://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31>> (last visited Aug. 9, 2020).

10. *Janus*, 138 S. Ct. at 2460.

11. 547 U.S. 410 (2006).

Amendment values, which Malin explains very thoroughly. Ironically this way, the offensive use of the First Amendment by public employees may be enhanced, perhaps to the chagrin of some lawyers and commentators who supported *Janus*.<sup>12</sup>

### B. The Thirteenth Amendment as a Positive Floor

One of the panels at the Cornell Conference discussed the Thirteenth Amendment as the conceptual floor for a number of labor rights, including the right to strike, the right to a minimum wage, and the right to organize. The prohibitory section of the Amendment gets the most attention: “Neither slavery nor involuntary servitude, except as punishment for a crime for which the person has been duly convicted, shall exist within the United States or any place subject to its jurisdiction” — is the subject of a number of interpretive battles.<sup>13</sup> Section 2 of the Act is a textually broad grant of authority as in section 5 of the Fourteenth Amendment, but that has been narrowed in several recent Supreme Court interpretations.<sup>14</sup> The full scope of Congressional authority under section 2 has yet to be written. Congress has recently located some rights in the Thirteenth Amendment such as the right to be free from human trafficking and hate crimes.<sup>15</sup>

Dean Aviam Soifer discusses some of the conflicts between the promise of the Amendment and how Congress has legislated in *Righting the Wrong Wrongs: A Cautionary Tale of Congress, Labor and European Immigrants in the Gilded Age*. Soifer discusses the Thirteenth Amendment as a way to problematize unfree labor regimes like the Foran Act, which ensnared many immigrants. Unfortunately, the parallels to the struggle that many immigrants are going through today are clear — and Congress has not acted to reverse any of them.<sup>16</sup>

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12. For a discussion of the mixed effects of *Janus*, see Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677 (2018).

13. U.S. Const. amend. XIII.

14. *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); see REBECCA ZIETLOW, *ENFORCING LIBERTY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006).

15. See, e.g., *Victims of Violence and Trafficking Protection Act of 2000*, Pub. L. No. 106-386, § 102(b)(22), 114 Stat. 1464 (2000), <<https://www.govinfo.gov/content/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf>>.

16. At this writing, Congress has not acted to regularize the status of immigrants who received Deferred Action for Childhood Arrivals (DACA) status. Most recently, the Supreme Court held that the Department of Homeland Security’s rescission of the program violated the Administrative Procedures Act. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911-12 (2020).

Soifer's article is a reminder of the way that law may create historical baggage burdening vulnerable workers, particularly immigrants. When we look ahead, history shows that the Constitution has not provided a viable remedy for immigrant workers. The new promise of the Thirteenth Amendment for the protection of vulnerable populations has been the subject of scholarly attention for some time.<sup>17</sup> Litigators have recently taken up the challenge. Perhaps the current crisis will cause courts and legislators to rediscover the Thirteenth Amendment's promise.

### III. THE DEFENSIVE LABOR CONSTITUTION

I define the defensive Labor Constitution as the use of constitutional text and principles to defend against overbroad government action or statutory limitations on labor rights.<sup>18</sup> Or, legislating broad obligations on employers to respect labor rights and defending against inevitable constitutional challenges by some employers. Finally, as discussed below, the First Amendment can be shield against retaliation by individual employer wrongdoing.

#### A. Whistleblower Protections

Locating a constitutional right to blow the whistle has been elusive for courts and commentators, particularly after *Garcetti*.<sup>19</sup> The First Amendment, with its immanent values of government transparency and accountability is a good start, and yet the centuries-old "right-privilege" distinction has prevented full fruition of the First Amendment as robust protection for government employees speaking out about government wrongdoing. While the government employee may have a right to speak, so goes the distinction, he or she is not necessarily entitled to the privilege of government employment. Whistleblower protections, thus, may also emanate from the due process clause, but that requires either a liberty interest or a property interest in public employment.

Scott Bauries, in his article *Public Employees Who Testify*, argues for the Constitution as a defensive shield for public employees

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17. See, e.g., Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World: Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004); Rebecca E. Ziellow, *The Constitutional Right to Organize*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 57 (Martha Albertson Fineman & Jonathan Fineman eds., 2017).

18. See generally works cited *supra* note 5.

19. *Garcetti v Ceballos*, 547 U.S. 410 (2006).

who seek to expose wrongdoing through statutory channels or by using the justice system. Knowing that the United States Supreme Court's decision in *Garcetti* denies protections to government workers who are speaking pursuant to their official duties, Bauries examines the promise of *Lane v. Franks*, the 2014 Supreme Court case that protected the right of public employees who testify.<sup>20</sup> The Court upheld the act of testifying truthfully as protected under the First Amendment.<sup>21</sup>

Professor Bauries sees *Lane* as a vindication of due process, rather than free speech principles. This article nicely shows the multiple constitutional values that may also inform a "Labor Constitution." The question of whether the Due Process Clause will provide a better shield for employees continues to vex scholars and advocates.

### *B. Using the Constitution to Defend Bold Statutory Reform*

As 2020 began, the Clean Slate for Worker Power Project, based at Harvard Law School's Labor and Worklife Program, released its report, *A Clean Slate for Worker Power: Building a Just Economy and Democracy*.<sup>22</sup> The project, led by Professors Sharon Block and Benjamin Sachs, involved over eighty academics, lawyers and advocates over a two-year period to craft the recommendations. The project seeks to rewrite federal labor law to prioritize worker power in a new labor law written on a clean slate. Some of the recommendations in the report touch upon long sore subjects like reforming the secondary boycott laws because they violate the First Amendment. In general, the goal of the Clean Slate Project is to push the boundaries of what is possible legislatively and then defend (or help defend) against constitutional challenges by business leaders.

Our northern neighbor Canada offers another perspective. Canada has a constitutionalist-human rights approach to its labor rights.<sup>23</sup> York University Professor David Doorey in *Clean Slate and the Wagner Model: Comparative Labor Law and a New Plurality*, describes

20. 573 U.S. 228 (2014).

21. *Id.* at 238, 242.

22. I am pleased to serve as a member of one of the working groups on the Project. See SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 111 (2020), [https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fc537\\_CleanSlate\\_Report\\_FORWEB.pdf](https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e28fba29270594b053fc537_CleanSlate_Report_FORWEB.pdf). Professor Doorey serves as a member of the International Advisory Group of the Project. *Id.* at 112.

23. See, e.g., Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3 (Can.); B.C. Health Servs., [2007] S.C.R. 391 (Can.).

some of the cautionary tales for integrating labor constitutionalism into statutory law. Still, the human rights-comparative frame is a long overdue way to discuss reforms that are needed in the United States. David Doorey's contribution to that dialogue in this Symposium is very valuable.

#### IV. CONCLUSION

The COVID-19 pandemic has caused the ground under our society to shift in appreciable ways in multiple directions. Conceptions of liberty and justice, previously relegated to academic debates between philosophers, are now being played out in reality.<sup>24</sup> Our conceptions of anarchy and state, liberty and community, are being tested and re-examined. The Constitution, as well as its many meanings, will continue to be tested in the near future and the long-term.

At the same time, the utility, and the very existence, of a "Labor Constitution" will continue to be contested and debated, as well as its offensive and defensive uses as described above. All of these discussions will be inevitably affected by the COVID-19 pandemic, but at this early stage of the crisis, it is hard to determine whether these effects will be short-lived or long-lasting. The essays in this Symposium, and the issues that they discuss, speak to the enduring and urgent importance of defining and utilizing a Labor Constitution.

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24. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).



