PROTECTING WORKERS AS A MATTER PRINCIPLE: A SOUTH AMERICAN VIEW OF U.S. WORK LAW

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ABSTRACT

This article discusses the central pillar of South American labor and employment law (hereinafter referred to as "work law"), the principle of protection. Under this principle, one of work law's essential functions is to protect workers from employers and the "market." This protection is thought to be necessary because the worker is in an asymmetrical power relationship with the employer, a condition that without regulation threatens the human dignity of the worker.

The protective principle is operationalized in South American work law through the rule of in dubio pro operario*, which essentially means that a judge must rule in favor of the worker when confronting "hard cases."*

After describing Latin American work law's protective principle, we turn to the U.S. to explain how protection plays a role there. While we agree that U.S. work law has been deficient in protecting workers in practice we explain how U.S. work law remains protective in principle.

Finally, we rebut some likely objections to our arguments. We conclude by arguing that to the extent U.S. work law requires a reform for the 21st Century, it is important to return to basic principles and recognize their utility.

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I. INTRODUCTION

And was Jerusalem builded here / Among these dark Satanic Mills?...
I will not cease from mental fight, / Nor shall my sword sleep in my hand /
Till we have built Jerusalem / In England's green and pleasant land. --
William Blake[4]

South American law, as that of the rest of Latin America, stems from the civil code tradition. To paraphrase Professor James Smith, in this tradition judges must apply code provisions, rather than interpret them, reason deductively from the principles reflected in them and, when necessary, consult scholarly work to decide "hard cases."[5] South American work law, therefore, has a number of important principles used by judges and other adjudicators who "apply" the law. These principles are the principles of: (1) protection (over individual autonomy or freedom of contract), (2) the primacy of reality (over legal formalism), (3) non-waiver of statutory rights, (4) employment stability, or continuity of the employment relationship (over precarious employment), and (5) labor union autonomy (over employer and/or government domination of unions).

For space limitations, here we only discuss the principle of protection, which we consider to be the pillar of South American work law, particularly in Argentina,[6] Brazil,[7] Chile[8] and Uruguay.[9] In future work we will discuss the other four principles.

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[4] William Blake, *The New Jerusalem*, available at http://poetry.eserver.org/new-jerusalem.html (last visited on May 13, 2013).
[5] ROGER BLAINPAIN ET AL., THE GLOBAL WORKPLACE: INTERNATIPNAL AND COMPARAIVE EMPLOYMENT LAWS: CASES AND MATERIALS 288, citing James F. Smith, Differences in the United States and Mexican Legal Systems in the Era of NAFTA, 1 U.S.-Mex. L.J. 88 (1993).
[6] M.E. Ackerman, *Los Principios en el Derecho del Trabajo*, TRATADO DE DERECHO DEL TRABAJO, TOMO I 307 *et seq.* (MARIO E. ACKERMAN & DIEGO M. TOSCA EDS. 2005).
[7] A. MASCARO NASCIMENTO, INICIAÇÂO AO DIREITO DO TRABALHO 118-119 (1997).
[8] SERGIO GAMONAL C, FUNDAMENTOS DE DERECHO LABORAL 104 *et seq.* (2008).

South American work law protects and safeguards workers because workers under capitalism, being subordinated and dependent on an employer, are perceived to be the weaker party in employment relations. As weaker parties, workers risk becoming mere commodities exchanged in markets, which dehumanizes them. Protection is provided by defending, *inter alia*, rights to form unions and bargain collectively, by setting maximum hours, minimum wages, health and safety standards, holiday and family leave rules, job training opportunities, and terms for contract termination.

But here we not only describe the South American protective principle. We also argue that the protective principle is universal; it is work law's *raison d'être*. Work under capitalism, if left to the market, naturally leads to the kinds of "Satanic mills" -- the large, sooty factories that endangered workers, destroyed communities and polluted the environment -- that the English poet and artist William Blake and many others detailed and decried during the English industrial revolution.[10] Blake's and others' protests against "Satanic Mills" popularized disgust and anger against modern industry, leading England to begin to regulate employment relationships.[11]

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[9] AMÉRICO PLÁ RODRÍGUEZ, LOS PRINCIPIOS DEL DERECHO DEL TRABAJO (3rd. ed., 1998).

[10] An exhibit on the critics of the human and environmental costs of industrial England was recently on display at the British Museum, including those made by William Blake, J.R.R. Tolkien and others. *See* British Library, Writing Britain, available at http://www.bl.uk/whatson/exhibitions/prevexhib/writingbritain/index.html (last visited on April 5, 2013).

[11] The Speenhamland Act of 1795 was perhaps Britain's first work laws, albeit it would today be recognized as "social security" law. According to Professor A. V. Dicey, in the dawn of the English industrial revolution the Justices of Berkshire wanted to grant workers relief in proportion to the number of their families, or a "living wage," and therefore proposed Speenhamland. A.V. Dicey, *The Combination Laws as Illustrating the Relation Between Law and Opinion In England During The Nineteenth Century*, 17 HARV. L. REV. 511, (1904). The economic historian Karl Polanyi further described the Speenhamland Act as one that gave relief in aid of wages, or supplementary wages to the "working poor" in order to guarantee a "right to life." Generally, workers earning less

Similarly, we argue that despite the more *laissez faire* nature of U.S. work law as compared with that of Latin America and continental Europe, and despite the U.S. "patchwork"[12] of work laws interlaced by the doctrine of so-called "employment at will,"[13] *statutory* U.S. work law

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than 3 shillings per day, enough to buy three loaves of bread, would qualify for the subsidy. The Act was enacted in1795 because that year marked an era of "great distress" in England. The Speenhamland Act was geared as an emergency measure to calm the hunger pangs of the British working class.

One of these more properly termed "work laws" in Great Britain was the Health and Morals of Apprentices Act of 1802, commonly known as the Peel Act, which was the first law that attempted to limit the hours of apprentices. Thilo Ramm, "*El* Laissez-Faire *y la Protección de los Trabajadores por parte del Estado*", in LA FORMACIÓN DEL DERECHO DEL TRABAJO EN EUROPA 104 (Bob Hepple ed., 1st ed. in English 1986) (translated to Spanish by José Rodríguez de la Borbolla, Madrid, Ministerio del Trabajo y Seguridad Social 2004).

Speenhamland, however, was repealed on or about 1832-34, partly because the paternalistic and pre-capitalist nature of the Act eviscerated workplace productivity. In essence, workers worked enough to earn a shilling and then sought the subsidy. While the experience with Speenhamland showed a necessity to protect workers, its failure to sustain capitalism served as a historical lesson for workplace regulation. Learning from past mistakes, in the 1830s England passed a series of different factory laws and "Poor Laws" while employers recognized trade unions, all which better guaranteed productivity and labor protections, leading to the creation of a modern, market economy in England. *See* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME, 78-83 (2001). One of these more properly termed "work laws" in Great Britain was the Health and Morals of Apprentices Act of 1802, commonly known as the Peel Act, which was the first law that attempted to limit the hours of apprentices. Thilo Ramm, "*El* Laissez-Faire *y la Protección de los Trabajadores por parte del Estado*", in LA FORMACIÓN DEL DERECHO DEL TRABAJO EN EUROPA 104 (Bob Hepple ed., 1st ed. in English 1986) (translated to Spanish by José Rodríguez de la Borbolla, Madrid, Ministerio del Trabajo y Seguridad Social 2004).

[12] MATTHEW W. FINKIN, IN I.B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 33A-2 (3D ED., WILLIAM KELLER & TIMOTHY DARBY EDS., 2008)

[13] Much has been written in favor and against the American rule of "employment at will". Here we will emphasize that employment at will differentiates the U.S. from other developed nations and creates gaps and contradictions in the system of work law. See Clyde W. Summers, *Employment at Will in the United States: The Divine Rights of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 86 (2000). Employment at will also makes it harder to enforce anti-discrimination law. See Donna E. Young, *Racial Releases, Involuntary Separations, and Employment at Will*, 34 LOY. L.A. L. REV. 351, 438 (2001); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1444, 1524 (1996). It also generally consolidates employer power. See *Raymond L. Holger, Employment at Will and Scientific Management: The Ideology of Workplace Control*, 3 HOFSTRA LAB. L.J. 27, 28 (1985). See also *infra* at __.

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similarly protects the worker *as a matter of principle*. Similar to 19th Century England and contemporary Continental Europe and Latin America, the U.S. has had to regulate work in order to rein in its own "Satanic Mills."

We expect that our statements that U.S. work law has principles and that it is protective will be controversial. Professor Matt Finkin, for example, has argued that U.S. work law is devoid of discernible principles and that it can only be understood from a historical perspective.[14] Professor Karl Klare, when speaking only about federal collective labor law, the National Labor Relations Act ("NLRA"), similarly mentioned that:

> [T]he indeterminacy of the text and legislative history of the Act, the political circumstances surrounding its passage, the complexity and fluidity of working-class attitudes toward collective bargaining and labor law reform during the [New Deal] period, and the hostility and disobedience of the business community make it clear that there was no coherent or agreed upon fund of ideas or principles available as a conclusive guide in interpreting the Act.[15]

Hence, not even one of the laws that make up U.S. statutory work law, the NLRA, appears to have guiding principles. When compounded by the vagueness of other important statutes, such as Title VII, which have further led to particularistic interpretation[16] determined by force and not just reason, U.S. work law appears, indeed, to be an incomprehensible "patchwork."

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[14] MATTHEW W. FINKIN, IN I.B INTERNATIONAL LABOR AND EMPLOYMENT LAWS, 33A-2 (3D ED., WILLIAM KELLER & TIMOTHY DARBY EDS., 2008) ("The current body of U.S. labor and employment law may be described as a scarcely rational patchwork. It is comprehensible as a whole, if at all, when viewed through the lens of its history.")

[15] Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 291 (1977).

[16] See Frank Dobbin, The Invention of Equal Opportunity (2009)

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But we disagree. It is true that the U.S. work law does not have a comprehensive labor code that systematically ties together all areas of workplace regulation, as South American countries are purported to have – and we say "purported" because Uruguay has no labor code and yet has been one of the jurisdictions where work law principles have had most impact. It is also true that the pillars of U.S. work law, such as the NLRA and Title VII have been contested and challenged by employers and the management bar,[17] leading to controversial interpretations questioned by many, including the labor movement and the racial and sexual subalterns that the law purports to protect. But work law is similarly open-ended and contestable around the world, even in countries where judges are tempered by legal principles. Despite the fact that so-called "legal science" tried to develop more consistent law, law is far from mathematics. In fact, one of the fundamental teachings of the realist legal tradition has been that all law is open ended and can take varying interpretations. Amidst the law's tendencies towards anarchic involution, our role as legal scholars and professionals is to protect reason and consistency -- legality. It is because of such open-endedness of the law that we believe that principles are so fundamental. We believe, as legal scholars, that in legal discourse some arguments are more legitimate and more correct than others. As work law scholars, we also believe that some interpretations of work law are more correct than others. Principles can help legal professionals craft more robust legal arguments in jurisprudential jousts over vague laws and where interests may try overpower law. Principles can help, for example, and as we will discuss in this article, to point out to judges how concepts extraneous to work law can filter into work law jurisprudence, effectively

[17] For a discussion on how the NLRA has been challenged by the management bar see *infra* at __. For a discussion of how Title VII has been challenged by the management bar see *infra* at ___.

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destroying that which work law attempted to perform, protect subordinated and dependent individuals, workers, from employers and untrammeled markets.

In South America, the revival of work law principles in the democratic and post-dictatorship eras helped to revive legality in the workplace. Dictatorship crushed work law and its institutions not through the power of legal argument, but through the barrel of the gun. Embarrassed by the cruelty and illegality of the military juntas, sometimes with the tacit support of judges, today's generations of judges value legality more than ever. Legal principles, including those of work law, are fully embraced by law's institutional actors. In the U.S., work law has been progressively chipped away by decades of jurisprudence that values property rights over worker rights and markets over workers, to the detriment, we argue, of work law, which attempted to place buffers on those property rights and those markets. Principles can help us turn the tide in the opposite direction – towards the legal way.

This article, therefore, has dual goals. The first is simply descriptive: to describe as faithfully as possible, and in a comprehensible manner, what is the principle of protection in South American work law, which is frequently used by judges to justify their decisions in "hard cases." There is no scholarly work, to our knowledge, which has attempted to explain South American work law principles to an international, English-speaking audience. As South America plays a more central role in international trade and foreign relations, learning more about its law, including work law, matters.

Our second contribution is to find a similar principle of protection in perhaps one of the developed world's least protective work law regimes, the U.S. Here, our aim is to argue the universality work law's

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protective principle. Moreover, by understanding the existence of protection in U.S. work law we believe that the purposes of U.S. work law can be better comprehended. Judges and other adjudicators will find better answers to "hard cases" and more closely follow the law. In essence, we not only want to describe South American work law principles. We want to advocate for their utility for global work law reconstruction.

Below we describe the South American principle of protection in Argentina, Brazil, Chile and Uruguay, all key players of the South American region. We then describe the rule *of in dubio pro operario* which follows from the principle of protection. Third, we argue that the principle of protection is universal. We can find it in international and comparative work law, including in the U.S. We then provide some arguments contesting our claim that U.S. work law is protective, or that principles can help us craft better law. Finally, we conclude the article.

II. THE PROTECTIVE PRINCIPLE

South American work law starts with the claim that power underpins all social relations, particularly in employment relations where workers are subordinated to the employer.[18] If society leaves workers

[18] For Argentinian scholars see ADRIÁN GOLDIN & ALIMENTI J., CURSO DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL 3 Y SS (2009); For Brazilian scholars see MAURICIO GODINHO DELGADO, PRINCÍPIOS DE DIREITO INDIVIDUAL E COLETIVO DO TRABALHO 33 Y SS (2ª ED. 2004); JOSÉ MARTINS CATHARINO, DIREITO DO TRABALHO 12 (2ª ED. 976); For Chilean scholars see SERGIO GAMONAL C., FUNDAMENTOS DEL DERECHO DEL TRABAJO 4 (2008); JOSÉ LUIS UGARTE C., LA SUBORDINACIÓN EN EL DERECHO LABORAL CHILENO 1-9 (2008); For Uruguayan scholars see PLÁ RODRÍGUEZ *supra* note __ at 63 y ss; MARIO GARMENDIA ARIGÓN, ORDEN PÚBLICO Y DERECHO DEL TRABAJO 68 Y SS (2001); Oscar Ermida Uriarte, *Crítica de la Libertad Sindical*, 242 REVISTA DERECHO LABORAL 226 (2011).

South American work law scholars will regularly cite comparative sources to buttress their arguments. On the particular point of worker subordination and, hence, the need for work law they commonly cite: OTTO KAHN-FREUND, TRABAJO Y DERECHO 48-49, 133

subject to "freedom of contract" and to the market, workers' labor is turned into a commodity. Consequently, South American work law stands for the proposition that the workers' subsistence and their moral interests are compromised if workers bargain and contract under "freedom of contract." Workers require legal protection. This protection is the essence of work law. In the words of Uruguayan work law scholar, Professor Oscar Ermida, "a non-protective work law would have no *raison d'être*."[19] To Ermida, and as the South American jurisdictions studied here, work law aims to reduce the inequality inherent in the employment relationship and safeguards workers' dignity.[20]

In this section we illustrate how the protective principle of work law is manifested in Argentina, Brazil, Chile and Uruguay. We chose these countries do to their importance in the South American and, indeed, Latin American region. While Brazil and Argentina are the largest South American economies,[21] Uruguay and Chile are the best economically

(1987) (German-Britton scholar who argued that work law serves as a counterweight to employer power in the employment relationship); MANUEL CAMPOS PALOMEQUE, EL DERECHO DEL TRABAJO E IDEOLOGIA 17 (1985) (Spanish work law scholar who argued that work law stabilizes the employer-worker relationship); Bruno Veneziani, *Tre Commenti alla Critique du Droit du Travail de Supiot*, 67 GIORNALE DI DIRITTO DEL LAVORO E DI REKLAZIONI INDUSTRIALI 3 (1995) (Italian work law scholar describes the subordination of the worker to the employer and, hence, argues for the need to protect); and Alain Supiot, CRÍTICA DEL DERECHO DEL TRABAJO 133-134 (Ministerio del Trabajo y Asuntos Sociales de España 1996) (French work law scholar who argued that in employment relations the employer commands the worker and the worker must obey, hence the need for a protective work law).

[19] Ermida Uriarte *supra* note __ at 226.

[20] Oscar Ermida Uriarte, *Protección, Igualdad, Dignidad, Libertad y No Discriminación*, 15 CADERNOS DE AMATRA IV 11 (2011). Note, however, that South American work law also cognizes that work law principles are the product of a political compromise at the legislative level and, therefore, are not absolute. Work law presumes that the employer must remain economically viable if the worker is to keep a job. In this regard, work law also safeguards employers' rights in addition to protecting the worker. The protective principle contains an implicit presumption of flexible protection to the worker. On this point, South American work law scholars cite French professor Gérard Lyon-Caen, LE DROIT DU TRAVAIL, UNE TECHNIQUE REVERSIBLE 6 (1995).

[21] CITE

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performing ones in the region.[22] Their importance in the region cannot be underestimated.

A. Argentina

The protective principle in Argentina stems form the Constitution, which provides specific workers' rights.[23] It states:

> *Work in its various forms shall enjoy the protection of the laws,* which ensure to workers: dignified and equitable work; limited time, rest and paid vacations; fair pay; adjustable minimum wage, equal pay for equal work, participation in company profits, production control and collaboration in management, protection against arbitrary dismissal; stability of public employment; free and democratic trade union recognized by registration in a special record.[24]

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[22] CITE

[23] The Argentian constitution is known in comparative constitutional law as one of the most protective of social rights given the expansive interpretaion that its "general welfare" clause has been given by the Argentinean Supreme Court since the 19th Century. See Jonatha M. Miller, *The Authority Of A Foreign Talisman: A Study Of U.S. Constitutional Practice As Authority In Nineteenth Century Argentina And The Argentine Elite's Leap Of Faith*, 46 Am. U. L. Rev. 1483, 1562-1563 (1997), citing Suprema de Justicia [CSJN], 3/7/1897, *Ferrocarril Central Argentino c/Provincia de Santa Fé*, 68 Fallos 227, 228-29 (1897), available at http://www.csjn.gov.ar/microfichas/jsp/consultaTomosFallos.jsp (lasr visited on May 13, 2013). As Jonathan Miller details, the expansive interpreation of the general welfare clause of the Argentinean constittion contrasted with the limited one of the U.S., narrowed mainl to taxing and spending powers. This constititonal difference iminges dramatactically on the hierarchical position of the protective principle of work law in the U.S. and Argentina and the overall legal justification for potection. While in Agentina work is protected by the constitution as an end in itself, in the U.S. protection is instrumental to overall protection of interstate commerce. See i*nfra* at ____.

[24] Argentina Constitution 14(a) ¶1 (emphasis added by authors). In fact, the Suprme Court of Argentina has recognized "social justice" as a constituional principle. See concurring opinion of Elena I. Highton de Nolasco and Juan Carlos Maqueda in Corte Suprema de Justicia [CSJN], 28/6/2011, Aceval Polacchi, Julio César c/ Compañía Radiocomnicaciones Móviles S.A. s/ despido., http://www.csjn.gov.ar (last visited on May 11, 2013). In *Aceval Polacchi* the concurrent opinion statred that because the Constittion of the country names the general welfare, which means "justice in its highest expression", or "social justice", as a goal of the country, courts should interpret the law, when in doubt, in the manner that social justice can be best safeguarded. As the Suprme Court stated, in the original Spanish version,

> "el objetivo preeminente de la Constitución, según expresa su preámbulo, es lograr el bienestar general, o cual significa decir la

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In this way, and as the Supreme Court of Argentina has held in numerous occasions, the Constitution of the Republic of Argentina explicitly recognizes the principle of protection.[25]

Argentinean courts readily invoke the protective principle when deciding "hard cases." For example, an Argentinean judgment emphasized that exclusion of university medical professionals from the legal regulations of the employment contract has no recognizable basis under the law. Such exclusions would violate the protective principle.[26] The Court, facing contradictory laws and normative sources, noted that "the most favorable outcome should be adopted based on the principle of protection of individual work law."[27] Therefore, the court declared that the country's work laws covered the university medical professionals.

The protective principle, being of constitutional rank in Argentina has even been used to declare unconstitutional aspects of statutory law. For example, in *Aníbal c/ Disco, S.A.*,[28] the Supreme Court of Argentina

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> justicia en s más alta expresión, esto es, la justicia social, cuyo contenido actual consiste en ordenar la actividad intersubjetiva de los miembros de la comunidad y los recursos con que ésta cuenta con vistas a lograr que todos y cada uno de sus miembros participan de los bienes materiales y espirituales de la civilización." En función a esto, el análisis del plexo normativo aplicable al caso no puede prescindir de la orientación que marca la máxima *in dubio pro iustitia socialis* dado su carácter de principio inspirador y, por ende, guía de hermenéutica segura de cualquier normativa vinculada con los derechos y garantías laborales y sociales establecidos constitucionalmente.

Id. at *11, citing Corte Suprema de Justicia [CSJN], 13/971974, Berçaitz, Miguel A. s./jubilación, Fallos, 289:430, available at http://www.constitucionweb.com/2012/11/bercaitz-miguel-a-s-jubilacion-reajuste-de-haberes-fallos-289430.html (last visited on May 12, 2013).

[25] See *infra* at __.

[26] MARÍA DEL CARMEN PIÑA, LA CONDICIÓN LABORAL Y EL PRINCIPIO PROTECTORIO 202 (2007).

[27] *Id.* at 207 (original translation by authors).

[28] Corte Suprema de Justicia [CSJN], 1/9/2009, Pérez, Aníbal Raúl c/ Disco S.A., http://www.csjn.gov.ar (last visited on May 11, 2013).

declared article 103 bis (c) of the Employment Contract Law (according to the text current at the time the cause of action was filed by the plaintiff, per Law 24.700 of 1996)[29] unconstitutional for excluding as legal compensation any food stamps ("*vales alimentarios*") provided by the employer to the employee as consideration for work. The challenged law considered food stamps "social benefits that are not compensation, not moneyed, which cannot be accrued or substituted by money."[30] Because the text of the law made it clear that food stamps were not compensation, the employee could not include their value into back a pay award. Law 24.700, however, raised a constitutional issue because workers' pay was protected by the Constitution. The law limited something that the Constitution afforded special protection – employees' pay. Based on the protective principle, which is of constitutional character in Argentina, and after also considering Argentina's international commitments, which also take constitutional hierarchy in Argentina, the Court declared Argentina Law 24.700 of 1996, which restricted food stamps provided by employers as consideration for work, unconstitutional. The employee could request the value of food stamps that were not provided by the employer as a

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[29] Article 103 bis (c) stated in its Spanish original that,

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

Pérez, Aníbal Raúl c/ Disco S.A., citing Argentina Law 24.700 of 1996.

[30] Id.

result of an unfair dismissal as part of lost wages and salaries for purposes of his or her back pay award.[31]

The protective principle is considered by Argentinean courts even when workers lose cases. For example, in *Murillo with Compibal S.R.L.*,[32] the Supreme Court of Argentina granted a petition by a corporation, a pharmaceutical company (hereinafter referred to as "principal") that had contracted with a third party to provide meals to the principal's employees (hereinafter referred to as "contractor"). The Court reversed a decision by the intermediate (appellate) court stating that the principal was jointly liable to the employees of the contractor. The Supreme Court stated that joint liability was triggered only when the principal contracted for functions that were normal and specific and inherent to the productive process of the principal.[33] In this case, the employer was a producer of pharmaceuticals. It had contracted with a third party to provide meals to the employees making the pharmaceuticals. Meal preparation was, according to the employer and the Supreme Court of Argentina, not normal, specific and inherent to the production process of the principal. Therefore, the food service workers could not hold the principal liable for the debts arising out of the employment contract between the contractor and the food service workers.

In reaching its conclusion, the Supreme Court of Argentina considered that the Court should protect workers when the law so justified it. As the Court stated:

> That the foundation of art. 30 of the Law of Employment Contracts ("*Ley de Contrato de Trabajo*") is the protective

[31] Id.
[32] Corte Suprema de Justicia [CSJN], 30/9/2008, Murillo, Hector Octavio c/ Compival S.R.L. y otro / reurso de hecho, http://www.csjn.gov.ar (last visited on May 11, 2013).
[33] The Spanish original reads: "La solidaridad se produce cuando se trata de na actividad normal y específica,entendiéndose port al aquélla inherente al proceso productive". Id at * 7.

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> principle of the rights of the worker, which the National Constitution prescribes and has been applied repeatedly by this Court (Decisions: 315: 1059, 126; 319: 3040; 327: 3677, 3753, 4607, among many others). The protection referred to is made concrete, in this case, by a legal rule that establishes [joint liability] with the goal of broadening the dependent's [the worker's] credit guarantee.

Hence, the Court recognized the important, Constitutional duty to protect the worker by giving him or her special rights to seek relief from principals who contract with his or her direct employer.

In fact, according to the Court, the special joint liability rule stems from the protection principle. However, as mentioned previously, the principal's joint liability with its contractors only arises in those cases where the contracting is for tasks that are inherent to the production process of the employer. Otherwise, principals could be held liable for any and all employment obligations of their contractors, including those of the public utilities it has commercial relations with, information technology services it contracts for, advertising agents, security providers, and many others that employers normally contract for but which have no direct relationship with the core productive functions of the principal.[34]

Argentina therefore recognizes the protective principle in its constitution, in its statutory work law and in its jurisprudence. It is alluded to constantly by the Supreme Court and considered in many cases where workers' rights are in question.

B. Brazil

Brazil's constitution contains a detailed and exhaustive list of labor and social security rights.[35] Hence, Brazilian Professor Mauricio Godinho expressed that:

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[34] Id. at 7.
[35] Some of these rights enumerated in the constitution are:

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> The principles and rules that protect the person and her labor constitute a structural part of the Constitution of the Brazilian Republic. Wisely, the Constitution realized that esteeming work is one of the most important conduits for the valuation of the human being. [36]

Brazilian scholarship has also highlighted how "the protection principle that guides and justifies the existence of work law as a specialized branch of the law is necessary to place the principle of human dignity in the field of labor relations." [37] Brazil explicitly recognizes work law's protective principle.

The Labour Court of Brazil normally applies these principles when facing "hard cases." For example, in one case, an employee filed a

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- protections against arbitrary dismissal without just cause;
- unemployment insurance;
- minimum wage;
- worker participation in company profits;
- a regular working day not exceeding eight hours and forty-four hours weekly;
- paid weekly rest, preferably on Sundays;
- overtime pay of at least fifty percent of normal pay;
- paid vacations;
- paid maternity leave;
- paternity leave;
- prohibitions against discrimination at work;
- the prohibition of night, hazardous or unhealthy work for children under eighteen and any work to under fourteen, except as an apprentice;

See Brazil Constitution Art. 7.

[36] Original text in Portuguese states:

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

MAURICIO GODINHO DELGADO, PRINCPIOS DE DIREITO INDIVIDUAL E COLETIVO DO TRABALHO 32 (2ND ED.).

[37] Valdete Severo, *A Força de um Paradigma e a Interpretação dos Artigos 60 e 62 da CLT*, 2 CADERNOS DA AMATRA IV 11 (2007).

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complaint against an employer who failed to pay the employee accrued vacation time after the employment contract was terminated.[38] The law stated that holidays needed to be "enjoyed" by the workers.[39] The law was silent as to whether employers must pay holiday time accrued but not enjoyed by the worker, when the parties terminated the contract. The Court held that the employer was required to compensate the worker for his or her vacation time, regardless of the law's silence or ambiguity concerning holiday pay. The court noted that the law was

> established with the objective of protecting the health of workers, and it would be inconsistent if the legislator allowed situations where no one could enjoy them. Based on this premise, the judge must address situations where the enjoyment of the holiday is materially impossible, which could happen when the employment contract is extinct. Under these assumptions, we must apply the legal maxim that says: "The judge must serve the social goals and the common good pursued in the application of the law."[40]

Hence, the Court decided that the worker's vacation had to be paid, even if the law was silent on the particular issue.

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[38] Proc. 55.396/92.4 E-RR, of 11.06.1995.

[39] Brazil Consolidated Labor Laws, art. 129 states: "Todo empregado terá direito anualmente ao gozo de um período de férias, sem prejuízo da remuneração". See also Brazil Consolidated Labor Laws, arts. 129-152.

[40] The original prtuguese text reads:

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

CITE CASE, cited in ARION SAYAO ROMITA, DIREITOS FUNDAMENTAIS NAS RELAÇOES DE TRABALHO 373 (2005).

{INSERT MORE CASES HERE}

C. Chile

Chile has also recognized a principle of protection that stems from the country's constitution. The 1980 Chilean Constitution states: "Everyone has the right to self-employment and free choice of employment with just remuneration."[41] Interpreting those precepts, the Chilean Constitutional Court has pointed out that,

> Indeed, the constitutional protection … is not limited to guarantee[ing] freedom of choice and hiring, but … [is a] protection of work itself, in response to the inalienable commitment to respect the worker in the manner in which he or she performs his or her labor and the inescapable social function that work provides.[42]

Legal scholars have supported the protective and more expansive construction of the constitution by the Chilean constitutional court.[43]

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[41] Chile Constitution, Article 19 ¶ 1-2.

[42] Rol Nº 1852-10 (2011): TC 26 de julio de 2011, expressly citing
Luz Bulnes, *La libertad de trabajo y su protección en la Constitución de 1980*, 28 REVISTA DE DERECHO PÚBLICO DE LA UNIVERSIDAD DE CHILE 215 (1980); JOSÉ LUIS CEA, DERECHO CONSTITUCIONAL CHILENO, TOMO II 427 (2004) (Freedom to work is protected, i.e., the right to seek a job by the Chilean constitution, but without any guarantee that the worker will obtain the job he or she intended or will obtain any other satisfactory employment. However, the legislature, and the Chilean Labor Code has expanded this narrow view by protecting the social function of employment and the right to work to ensure stability and tenure in employment.)

[43] Luz Bulnes, *La libertad de trabajo y su protección en la Constitución de 1980*, 28 REVISTA DE DERECHO PÚBLICO DE LA UNIVERSIDAD DE CHILE 210 y ss. (1980); Humberto NOGUEIRA ALACALÁ, Emilio PFEFFER URQUIAGA y Mario VERDUGO MARINKOVIC (1994): *Derecho Constitucional* (tomo 1, Santiago, Editorial Jurídica de Chile), p. 281; Guido MACCHIAVELLO Contreras (1986): *Derecho del Trabajo* (Santiago, Fondo de Cultura Económica), p. 36; Alejandro SILVA BASCUÑÁN (2010): *Tratado de Derecho Constitucional* (con la colaboración de María Pía Silva Gallinato, Tomo XIII, Santiago, Editorial Jurídica de Chile), p. 222; Alan BRONFMAN VARGAS, José Ignacio MARTÍNEZ ESTAY, Manuel NÚÑEZ POBLETE (2012): *Constitución Política Comentada* (Santiago, AbeledoPerrot), p. 336; Pedro IRURETA Uriarte (2006): *Constitución y Orden Público Laboral. Un análisis del art. 19 n° 16 de la Constitución chilena* (Santiago, Colección Investigaciones Jurídicas N° 6, Universidad Alberto Hurtado), p. 52 y ss., y

The Chilean courts use the protective principle regularly to interpret the law. For example, in the case *Opazo con Lan-Chile*,[44] a worker sued for severance pay,[45] for payment in lieu of the statutorily mandated 30-day termination notice,[46] and for penalties related to the employer's delay in making those payments.[47] The employer argued that it was not liable for the penalties because, according to the employer's interpretation of the labor code, the penalties applied only when the parties agreed to make payments in installments and not when they were owed in their entirety. The Labor Code stated, in relevant part, that when the employer terminates the employee for allegedly breaching his or her duties, or for disciplinary reasons, and the employer fails to prove its case, then:

> The termination notice [becomes] … an irrevocable offer to pay compensation for years of service …. The employer is obligated to pay the compensation referred to in the preceding paragraph in a lump sum….
>
> Without prejudice to the foregoing paragraph, the parties may agree to make payments in installments, in which case the amounts owed shall include interest and adjustments. The settlement agreement must be ratified by the Labor Inspectorate. Breach of the settlement will accelerate payment of the total debt and shall be punished with an administrative fine.

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Sergio GAMONAL C. (1998): *Introducción al Derecho del Trabajo* (Santiago, editorial Jurídica ConoSur), pp. 53 y ss.

[44] SERGIO GAMONAL C., LINEAMIENTOS DE DERECHO DEL TRABAJO 15 *et seq*. (2006).

[45] Once an employment contract is terminated for economic reasons (employer needs), Chilean law provides that the employer must pay the worker severance based on time of employment, which is approximately one month's salary per year of employment, limited to a total of eleven years . Chile Lab. Code, article 163.

[46] Employers must also give 30 days' advance notice before terminating an employee for economic reasons. Otherwise, the worker must be paid an indemnity substituting for prior notice, equal to one month's salary. Chile Lab. Code, art. 162.

[47] CITA

> If such compensation is not be payable to the employee, the employee may request enforcement proceedings to the appropriate court …and the judge … may increase the amounts owed by up to 150%...[48]

Because the paragraph providing for the 150% penalty was placed by the legislature after the paragraph regarding installment payments, the employer argued that the 150% increase applied only when the parties had agreed on a payment plan.

The Chilean labor court and the Court of Appeals disagreed with the employer and held in favor of the worker. Even in the absence of a payment plan the employer could be penalized with 150% of the total money owed to the worker. As the Chilean Supreme Court stated:

> [T]here is no justification to conclude that the increase of 150% … applies only if the parties agree on installment payments. … [T]he legislature made no distinction as to whether these were indemnities that the employer had to pay in one lump sum … or [in installments]. Therefore, it is necessary to conclude that the sanction for failure to pay the indemnities offered refers to both situations. This criterion is corroborated if one also takes into account that the objective of the rule is none other than to establish a minimum mechanism of *protection of the worker*. *Accordingly, considering the protective principle that inspires work law, there is no legal reason to discriminate between two cases that are both harmful to the worker.*[49]

Hence, the Supreme Court of Chile used the principle of protection to buttress its construction of the Labor Code. The protective principle is a cornerstone of Chilean work law.

D. Uruguay

[48] Chile Labor Code, art. 169(a)
[49] GAMONAL *supra* note __ at 20 (emphasis added).

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Uruguay also recognizes the protection principle as part of its constitutional ordering. Article 53 of the Uruguayan Constitution states:

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

While somewhat nationalistic in its tone, the Uruguayan constitution recognizes that work is especially protected by law.

The Uruguayan courts, like others that we have seen here, have extended protections regarding work beyond a mere recognition of freedom of contract. As the Labor Court of Appeals has stated:

> When in doubt, the judge should keep with the general principles of work law … and take into consideration the *special protective principle*, this last one which is the fundamental backbone of work law, which aims to restore balance to the unequal relationship between employer and employee.[50]

The Uruguayan labor courts could not be any clearer about their adherence to principles to resolve legal controversies, particularly the "special protective principle" that they consider to be fundamental, the "backbone," of work law.

[50] The Spanish original source reads:

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

Caso 481, Anuario de Jurisprudencia Laboral, 1984-1985, cited in Plá Rodriguez , supra note ___ at 89.

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Similarly, the Court of Appeals of the Primer Turno of Montevideo has used the principle of protection to decide "hard cases." It recently held, for example, that employers who were formally independent of each other but that in practice constituted a common entity were jointly liable for workers' wages, even when the law was silent about such liability.[51] The facts showed that one employer had hired contractors. Those contractors owed wages to their workers. The workers sued the contractors and the principal for nonpayment of wages. The principal refused to accept liability towards the employees of its subcontractors. However, the court found that both the principal and the contractors were liable. The Court said,

> If we pretend to ignore the legal category of the complex employer merely because there is no rule establishing such legal category, we would introduce an extreme and outmoded positivist paradigm into our court and would show a *want of protective constitutional foundation* … which served as the foundation of Work Law doctrine and jurisprudence. This for two reasons. First, *principles inform the entire legal system*…. Second, because the mandate of article 53 of the constitution is directed not only at the legislator but also at [the judges].[52]

[51] Uruguay Court of Appeals, Montevideo, Primer Turno, Case No. 171/2008.

[52] The full Spanish original reference says:

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

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Hence, the Uruguayan Court of Appeals established that higher ordered principles inform the law. There also is a mandate of constitutional scope given to legislators and to judges to uphold the protective principle of work law. The constitutional mandate and the protective principle require that the judge decide a case or controversy even when the rules are silent about the issue at hand. In this case, even though the law was silent regarding the liability of principals towards the employees of its subcontractors, the principle of protection compelled the Court to find the principal liable. Otherwise the workers in the case would have been left unprotected and unpaid even though the Constitution and the legislature had a clear intent to protect workers from crass abuse.

E. Europe, from Which Work Law was Transplanted

The protective principle is not a South American invention. It exists, explicitly or implicitly, in work law in Europe. In Italy, for example, traditional work law doctrine has emphasized the need to protect the worker because of his or her weaker bargaining position and subordination to the employer. Renowned Italian Professor Gino Giugni argued that labor, social and protective legislation limited individual autonomy in order to restrict the more extreme forms of exploitation, such as that of children.[53] Another Italian Professor, Luisa Riva Sanseverino, argued that the employment contract touched upon an individual's personhood and humanity, which made the employment contract different from any other

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> solución de conflictos a través de la aplicación de las reglas del universo jurídico.

Id. (internal citations omitted).

[53] G. GIUGNI, LAVORO LEGGE CONTRATTI 252 (1989).

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type of contract, requiring special protections.[54] More recently, Professors Mattia Persiani and Giampiero Proia argued that work law balances worker protection and employer requirements for productivity and efficiency. Despite the competing interests of workers and employers, Persiani and Proia emphasized that the protection of workers is an essential foundation of any society that wishes to respect human values.[55]

In France, traditional work law doctrine also has emphasized the protective nature of work law. Professor Jean-Claude Javillier, for example, has argued that work law historically has been oriented towards protecting workers from all forms of social exploitation, particularly given workers' subordination to employers.[56]

Even in Great Britain, doctrine also makes reference to protection of the weakest, notwithstanding the deregulatory agenda since Prime Minister Margaret Thatcher's administration. For example, Professor Hugh Collins argues that British work law has been influenced by the European social model, which is based on social inclusion, competitiveness, and citizenry. As a result, British work law accepts the precept that labor is not a commodity.[57] As he argues:

> This concept of employment law suggests that at the beginning of the twenty-first century these three themes [social inclusion, competitiveness, and citizenry] provide the core of a distinctive European response to the puzzles presented by the cry that labour is not a commodity.[58]

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[54] L. RIVA SANSEVERINO, ELEMENTI DI DIRITTO SINDACALE E DEL LAVORO 78 (1980).
[55] M. PERSIANI, M. & G. PROIA, DIRITTO DEL LAVORO 126-127 (2008).
[56] L. JAVILLIER, J. DROIT DU TRAVAIL 51-53 (5th edition 1996). French professor Nadège Meyer also explains that the notion of "social public order" inherent to work law which seeks protection of the weaker party, in this case the worker. N. MEYER, L'ORDRE PUBLIC EN DROIT DU TRAVAIL 99 (2006); G. Vachet, *Le principe de faveur dans les rapports entre sources de droit*, LES PRINCIPES DANS LA JURISPRUDENCE DE LA CHAMBRE SOCIALE DE LA COUR DE CASSATION 79 et seq. (2008) (Explaining the application of the principle of favor in French jurisprudence).
[57] H. COLLINS, H., EMPLOYMENT LAW 25-26 (2nd edition 2010).
[58] *Id.* at 26.

In all, various European countries recognize something very much akin to the protective principle to which South American scholars explicitly make reference.

Finally, international work law is inherently protective as a matter of principle. As the International Labor Organization states in its constitution:

> Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;
>
> The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the

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> following Constitution of the International Labour Organization…[59]

In this manner, international labor standards aiming to regulate hours, wages, health and safety, migrant workers, equality, right to organize, training and other matters have as their purpose to protect workers from existing "injustice hardship and privation" which, according to the international community, has led to injustice, inhumanities and conflict. Work law is universally protective, as a matter of principle.

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

Latin American work law commonly alludes to the rule of *in dubio pro operario* –when in doubt, decide in favor of the worker -- as a fundamental manifestation of the principle of protection.[60] In essence, the rule states that when there are several possible interpretations of one rule, the judge must follow the one most favorable to the worker.[61] *In dubio pro operario* should be applied not only when the statutory law is

[59] International Labor Organization, Constitution, Preamble.

[60] This rule is an adaptation of *in dubio pro reo* in penal law. *In dubio pro reo* is manifested in private law by the rule of interpretation according to which doubtful cases must be resolved in favor of the debtor. See Plá Rodriguez, *supra* note __ at 85. In work law, the weak subject (the worker) is always the creditor when he sues, so the civil rule had to be turned on its head to consider the realities of employment relations.

Note, contrary to commonly held views of civil code countries where judges do not make law or interpret law, but "apply" the law, in South American law there is a general "principle of no excuse." M. VERDUGO MARINKOVIC ET. AL. DERECHO CONSTITUCIONAL 209 and 210 (1999). The principle of no excuse essentially means that the judge, if competent, must decide a case or controversy even when there is no specific rule resolving the dispute. *Id.* at 209 and 210. The only exception occurs in penal law, in which the law must establish the criminal conduct to be sanctioned. A BRONFMAN VARGAS ET. AL., CONSTITUCIÓN POLÍTICA COMENTADA 116 *et. seq.* (2012).

[61] M. Alonso García, CURSO DE DERECHO DEL TRABAJO 287 (1987).

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ambiguous or vague, but also when clauses in an individual employment contract or in the internal codes of employers are ambiguous or vague and require legal interpretation.[62] In order to apply the rule *in dubio pro operario*, there must be doubt about the scope of the rule in question. Doubts occur when the rule is (1) ambiguous or vague, (2) when there is a "gap" because the facts are so novel and unforeseeable that no rules are deemed to apply, or (3) when the strict application of the rule appears to be iniquitous.[63]

We must underline that the *in dubio pro operario* rule is mainly used to give meaning to the law, individual contract or company rule and not to interpret facts of a case.[64] We also must underline that the function of the rule *in dubio pro operario* is not to modify or amend a rule, but rather to determine its best meaning among several possible ones. The rule *in dubio pro operario* is often used by judges, not as a final decisive criterion in litigation, but merely as a supporting argument.[65]

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[62] The application of the rule of *in dubio pro operario* is debatable in the ambit of collective bargaining because, as some scholars have argued, labor unions bargain with employers at a relatively more equal level than that of the individual employee. Therefore, norms regarding the interpretation of civil contracts are more adequate in collective bargaining contract interpretation. Plá Rodriguez supra note __ at 96-97. However, for a dissident view see SERGIO GAMONAL C., DERECHO COLECTIVO DEL TRABAJO 448 (2nd ed. 2011) (Because collective bargaining agreements may provide norms that are applicable to all workers, the rule of in dubio pro operario should apply when there is an interpretative question of the collective agreement.)

[63] E. Barros Bourie, *Reglas y Principios en el Derecho*, 2 ANUARIO DE FILOSOFÍA JURÍDICA Y SOCIAL 276 (1984).

[64] The main exception to this view of the rule is Argentina. Article 9 of the Employment Contract Law of Argentina provides that the legal interpretation most favorable to the worker must be preferred when in doubt of the facts in concrete cases. D. Tosca, *Aplicación del Principio 'Pro Operario' en la Valoración de la Prueba en caso de Duda*, LA RELACIÓN DE TRABAJO 210-211, Mario E. Ackerman and Alejandro Sudera (eds.) (2009).

[65] Now, in practice and in borderline situations, judges avoid applying rules that they consider unfair to the particular case. In these situations, the labor judge should not lose sight of the protective nature of work law. The *pro operario* criterion, or simply, a motivation to protect the worker should govern the rationale of the judge when acting on equity to establish a rule for the case. A. Desdentado Bonete, *EL PRINCIPIO PRO*

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In Chile, the rule of *in dubio pro operario* has been discussed most often by scholars.[66] In Argentina, positive law has established the rule. It states that: "If the question depends on the interpretation or scope of the law, judges or other persons charged with applying the law must decide in the manner most favorable to the worker."[67] Although Uruguay has not established the rule of *in dubio pro operario* by statutory law, the rule has been widely disseminated by legal scholars[68] and by the courts. [69]

In Brazil, the Labor Court has used the rule extensively. For example, in one of its cases, the court had to decide whether an employer that had to provided performance pay to its workers. The internal regulations of the employer stated that it would provide performance pay. The employer argued that it did not have to continue giving performance pay to its workers because the law did not mandate performance pay; the employer had voluntarily granted it. The employer rested its argument on language in the *civil* law, which stated, "donations and waivers are to be interpreted restrictively."[70] It argued that as a voluntary payment that resembled a donation, the Court could not presuppose that the employer would indefinitely grant performance pay to all workers. The Court rejected the

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OPERARIO, LOS PRINCIPIOS DEL DERECHO DEL TRABAJO ___ (LUIS ENRIQUE DE LA VILLA GIL & LOURDES LÓPEZ, EDS. 2003).

[66] *See* Gamonal, *supra* note __ at 106-109.

[67] Argentina Employment Contracts Act, art. 9 ¶ 2. See also Ackerman *supra* note __ at 342.

[68] See Plá , supra note__ at 84 *et. seq.*

[69] As the Juzgado de Letras del Trabajo del Tercer Turno stated,

> …the rule of in dubio pro operario is applicable, which means that in case of doubt we should decide in favor of the worker's situation.

Caso 1032, Anuario de Jurisprudencia Laboral 1994-1995, cited in Plá Rodriguez, *supra* note __ at 99.

[70] Brazil Civil Code art 114 ("Os negócios jurídicos benéficos e a renúncia interpretam-se estritamente".)

employer's argument and held in favor of the workers. It held that the civil law

> could not be transposed uncritically into work law, which is ruled, inter alia, by the principles of protection and *in dubio pro operario*. Thus, if a particular standard –and the internal rules of the company are such- provides a particular benefit [to the workers], it is not a *prima facie* hindrance to provide the benefit [to the workers] in situations unforeseen by the [employer].[71]

The Brazilian labor court, therefore, clearly understood the difference between the principles of work law and civil law, and explicitly recognized the protective principle and the rule of *in dubio pro operario.*

III.A. *In Dubio Pro Operario* in Other Latin American Countries

Finally, in other Latin American countries such as Paraguay, Peru, Ecuador, Colombia, El Salvador and Guatemala, the rule of *in dubio pro operario* has been incorporated into statutory work rules.[72]

III.B. The European Close Kin: The Rule of Favor or Favorability

Germany and France also have somewhat similar rules that favor employees. While not a rule regarding *interpretation* of legal norms, the German "principle of favorability" is used by German courts to determine *which contractual terms* operate, those in a collective agreement or those

[71] Labour Court, 14 June 2012 (N ° TST-AIRR-127200-25.2007.5.03.0102) (emphasis added)
[72] Plá Rodríguez, *supra* note __ at 98.

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in an individual employment contract, when they are in conflict. According to the German rule, the judge must choose the term most favorable to the worker when there are conflicting terms.[73]

The French also have a "rule of favor," which implies that the conditions most favorable to the worker must be preferred when there is a conflict between rules. The rule becomes most relevant when work laws stipulate minima and the parties have modified those minima. The rule implies that minima can be repealed only in favor of the worker; modified rules can only improve the minimum benefits granted by the law.[74]

IV. A COMPARATIVE VIEW: USA

The protective principle also exists in US work law. The NLRA, for example, states the desirability to protect the right of employees to organize and bargain collectively in order to equalize and correct power asymmetries between employers and workers. As the text of the NLRA states:

> Experience has proved that *protection by law* of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[75]

However, different from the Latin American reasons for protection based on defense of workers' dignity and safeguarding them dehumanization when locked in unequal bargaining relationships with

[73] MANFRED WEISS AND MARLENE SCHMIDT, *supra* note __ at § 446. See also BLANPAIN ET AL, supra note __ at 587.
[74] J. PÉLISSIER ET AL., DROIT DU TRAVAIL 133-135 (24th ed. 2008).
[75] NLRA §1.

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employers, protection in the U.S. is instrumental to safeguard industrial peace and interstate commerce, or the market, as the Act clearly states. Legal and historical commentary on the why the United States undertook a more "commercial" perspective on the regulation of work and other social issues has centered on the constitutional legacy of *Lochner v. New York*[76] a Supreme Court case where the Court held that regulating the working hours of bakers was unconstitutional because it limited the rights of private parties to contract. Contractual rights, which touch on the capacity of individuals to transfer property, was seen at the time as constitutionally protected.[77] Given the legacy of *Lochner*, the drafters of the 1935 NLRA sought to resist constitutional challenges by basing constitutionality of the law on the commerce clause of the U.S. constitution, which enables Congress to regulate commerce. The drafters of the NLRA could have attempted to constitutionalize the Act on the thirteenth amendment, which gave Congress the power to protect free labor and individual freedom, but chose not to.[78]

The main reason why the New Dealers in charge of the Act preferred the Commerce clause over the 13th Amendment as the Act's constitutional base was because the framers wanted to enlarge the role of legislative power, the executive and expert policy makers in the workplace, rather than the courts.[79] William E. Forbath, with a eye close to the Act and a rich understanding of the era's New Dealers, also argued that the Act's framers wanted workers themselves, though self-

[76] 198 U.S. 45 (1905).
[77] See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUMBIA LAW REVIEW 873 (1987).
[78] James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of the Post-New Deal Constitutional Order, 1921-1950*, 102 COLUM. L. REV. 1 (2002).
[79] *Id.* at 17.

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organization, to defend their rights, rather than leaving the task to courts, known at the time for being hostile to workers.[80]

Even if the NLRA's protections of workers are a means to safeguard the market, it still protects workers. Section 7, the most important clause of the NLRA states that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection….[81]

In this manner, the NLRA protects workers' rights to engage in collective action, as a matter of principle.

The need to protect workers' right to act in concert for collective bargaining and mutual aid and protection was very recently stressed by the NLRB in *D.R. Horton, Inc.*[82] The NLRB decided that an employer

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[80] William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 175 (2001-2002). Forbath's view tracks closely the view of progressives such as Felix Frankfurter. See FELIX FRANKFURTER AND NATHAN GREENE, THE LABOR INJUNCTION (1930) (Progressive jurist decry the overuse of the courts to regulate industrial strife). The very influential comparative labor law scholar, Otto Khan Freund, also shared a similar view regarding the restricted role that courts should play in safeguarding workers rights given the way that courts historically favor employers. OTTO KAHN-FREUND, ET AL., KAHN-FREUND'S LABOUR AND THE LAW 12-13 (3D ED. 1983). Khan Freund, however, also thought that the real impact that law could have on workplace regulation was marginal given the realities of social power (employers against workers) and markets in industrial and employment relations. *Id.*

[81] NLRA § 7, 29 U.S.C. §§ 157.

[82] 357 NLRB No. 184 (2012). However, as of this writing some Federal Courts have refused to follow *D.R. Horton*. The ruling has been controversial because courts have questioned the NLRB's authority to interpret the Federal Arbitration Act, which creates the federal policy regarding arbitration of claims, even if it interrelates with the NLRA. See *Delock v. Securitas*, 883 F.Supp.2d 784 (E.D. Arkansas 2012) (*D.R. Horton* conflicts with the Federal Arbitration Act ("FAE") because the FAE only requires that employees have some forum, arbitral or judicial, to hear their claims.); *LaVoice v. UBS Financial Services, Inc.*, 2012 WL 124590 (S.D.N.Y. 2012) *6 (In the absence of explicit language in the FLSA providing an absolute right to join a class action, and given the expansive policy in favor of arbitration, there is no absolute right to collective action, despite *D.R.*

violates the NLRA if it compels an employee, as a condition of employment, to sign an agreement that precludes the employee from joining class or collective suits against employers in any forum, arbitral or judicial. In *DR Horton*, an employee had joined a collective action suit under the FLSA, not the NLRA. The employer attempted to bar the employee from joining the FLSA suit, alleging that the employee had signed an agreement with the employer promising not to participate in collective or class action suits of any kind.[83] The NLRB stressed that

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Horton), citing *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2012) (The "principal purpose" of the FAA is to "ensure[e] that private arbitration agreements are enforced according to their terms."); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 844 (N.D.Cal. 2012) (*D.R. Horton* comes in conflict with the Federal Arbitration Act and enforcing individual arbitration agreements in lieu of collective claims does not destroy workers' substantive rights under the work laws); *Carey v. 24 Hour Fitness USA, Inc.*, WL 4754726 (S.D.Tex. 2012) (The court did not follow *DR Horton* because other district courts failed to follow it, because the NLRB had no authority to interpret the Federal Arbitration Act, because no substantive statutory right was at play and because of the strong federal policy favoring arbitration).

Our response to all of these decisions is that to the extent individual arbitration agreements circumvent the NLRA's protections to workers, deciding in favor of arbitrability under the FAA is a clear derogation of the NLRA. The Court's misunderstanding of the protective principle inherent in the NLRA and the importance of workers' concerted activity needs to be corrected. To the extent the Courts do not have to defer to the NLRB's opinions regarding the NLRA's interrelationship with other laws that have a clear relationship with the NLRA, then US law requires institutional reconstruction. In Latin countries, for example, work law enforcement is done by generalist labor inspectorates with general enforcement duties of all work laws, which limits piecemeal and incoherent enforcement of work law. *See* Michael J. Piore, *Flexible Bureaucracies in Labor Market Regulation*, in THE IDEA OF LABOUR LAW 385, 388 (GUY DAVIDOV & BRIAN LANGILLE EDS., 2011). Perhaps it is time to generalize work law enforcement in the U.S. See also *infra at* __.

[83] The agreement signed by the employee stated in relevant part,

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

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Section 7 of the NLRA protects workers' rights to engage in concerted activities, be these traditional industrial actions such as strikes, pickets and similar job actions or judicially sanctioned collective and class actions under other laws, such as the FLSA.[84]

According to the NLRB, it has a long-standing tradition of protecting workers' rights to pursue collective grievances, including under other statutes such as the FLSA.[85] In fact, the Board argued that agreements barring workers from joining collective and class actions resemble the "yellow dog" contracts of yesteryears[86] when employers made workers sign agreements promising not to join a union, as a condition of employment. The Board not only recalled Section 7's protections of concerted activities for collective bargaining and mutual aid

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> with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

D.R. Horton, Inc., 357 NLRB No. 184 at *1.

[84] As the NLRB stated,

> It is well settled that "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."

Id. at *2, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

[85] As the NLRB stated in *DR Horton*,

> The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation. Not long after the Act's passage, the Board held that the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity, see *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942), as was an employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA, see *Salt River Valley Water Users* Ass'n, 99 NLRB 849, 853-854 (1952), *enfd. by* 206 F.2d 325 (9th Cir. 1953). In the decades that followed, the Board has consistently held that Section 7 protects concerted legal action addressing wages, hours or working conditions.

Id. at * 2 (internal citations omitted).

[86] *Id.* at *5.

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and protection, but reminded us that the Act underscores the unequal power relationship between employees and employers inherent in the employment contract, and the need to equalize such relationship through protection of concerted activity. As the Board stated, in enacting the NLRA, Congress expressly recognized and sought to redress,

> "[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association." …. Congress vested employees with "full freedom of association . . . for the purpose of . . . mutual aid or protection," in order to redress that inequality. … [87]

Because workers' rights to join unions or otherwise act in concert for collective bargaining and for mutual aid and protection could be effectively destroyed by the modern version of the yellow dog contract, the NLRB declared the contracts illegal and contrary to public policy.

D.R. Horton is a particularly insightful case regarding the manner in which the NLRA protects workers because the case deals with individual employee rights to engage in concerted activities, normally stemming from Section 7 of the NLRA. We underline that the NLRA does not explicitly state that collective claims pursued under a statute other than the NLRA are protected. However, the NLRB, with approval from the Courts, has declared that under the policy objectives and the language of Section 7, the NLRA protects employee collective claims brought under the FLSA and other statutes. In this manner, the NLRB has interpreted the NLRA in a way similar to that in which Latin American labor judges interpret the law under the rule of *in dubio pro operario*. In light of vagueness or ambiguities in the law, particularly over the meaning of "concerted action for collective bargaining and mutual aid and

[87] *D.R. Horton, Inc*., 357 NLRB No. 184 *3 (2012) (internal citations omitted).

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protection," the NLRB decided *DR Horton* in the way most favorable to the worker.

The U.S. Supreme Court also has argued that Section 7 rights provide broad support to employees seeking to act in concert for collective bargaining and for mutual aid and protection. The seminal case of *NLRB v. Washington Aluminum*[88] held that a group of employees who walked off the job because the workplace premises were too cold were protected by Section 7 of the Act. The Court held that the employer could not summarily terminate the employees for acting in concert, for collective bargaining and for mutual aid and protection, even if the employees violated company policies when they engaged in such concerted acts. The narrow question before the Court was whether the NLRA protected the employee walkout if the workers had not presented a demand to the employer, prior to walking out. According to the employer, the workers' failure to provide a demand made it impossible for the employer to resolve the issue, avoid industrial action and workers' violation of company policies. The employer sustained that the termination was "for cause" under the law and could not be declared an unfair labor practice. The employer argued that the NLRB, therefore, could not order reinstatement, back pay or other remedies in favor of allegedly aggrieved workers.[89]

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[88] 370 U.S. 9 (1962).
[89] According to Section 10(c) of the NLRA,

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

NLRA § 7, 29 U.S.C.A. s 160(c).

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

> The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to *protect the right of workers to act together to better their working conditions*. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively *nullify the right to engage in concerted activities which that section protects*. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could.[90]

Hence, even though the statute was unclear as to whether employees needed to present a demand to the employer prior to engaging in collective action, the Court determined, based on the purposes of the NLRA as defined by Section 7, that such a demand was not necessary. Any other interpretation of the NLRA would have been likely to render Section 7 rights ineffective, by placing obstacles in the way of workers' concerted actions. Here, vagueness or ambiguities in the law were resolved in favor of the employees. A similar logic would have followed under the Latin American protective principle and the rule of *in dubio pro operario*.

Similarly, Section 2 of the FLSA of 1938 states that the main goal of the FLSA is to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health,

[90] *Washington Aluminum*, *supra* note __ at 14 (emphasis added).

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efficiency, and general well-being of workers."[91] In one of the key FLSA cases, *Brooklyn Savings Bank v. O'Neil*,[92] the Supreme Court of the United States declared that:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress *to protect* certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between the employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose [,] standards of minimum wages and maximum hours were provided.[93]

Minimum wage standards, maximum hours, bars against child labor, all of which are essential elements of the FLSA are, indeed, geared towards protecting workers. The FLSA protects workers as a matter of principle.[94]

A protective principle inherent in the FLSA has been recognized very recently by the Supreme Court of the United States. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, [95] the Supreme Court determined that an employee who had complained to his employer about FLSA violations and was subsequently dismissed by the employer was protected by the statute's anti-retaliation provision. In his complaint, the

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[91] 29 U.S.C.A. § 202.
[92] 324 US 697.
[93] Id at 706-707 (1945). As the Court further substantiated, "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." Id. at 707, note 81 (internal citations omitted).
[94] As the NLRA, FLSA protection is a means to safeguard the market, but this does not render the statute un-protective. See *supra* note __.
[95] 131 S.Ct. 1325, 1329, citing USCA § 215(a)(3).

plaintiff-employee alleged that he orally complained to the employer about certain "time locks" put by the employer, which made it impossible for workers to charge the company for donning and doffing, activities that are compensable under the FLSA. The plaintiff alleged that he was fired shortly after making his complaint. The employer argued that the anti-retaliation provision did not apply to Kasten, the plaintiff, because an oral complaint to the employer did not rise to the level of "filing a complaint," to trigger protection under the statute.[96]

Both the trial court and the court of appeals agreed with the employer. The Supreme Court, after granting *certiorari*, in a 6-2 decision (Justice Kagan did not take part in the Court's decision) reversed the courts below.

The FLSA forbids employers from retaliating against employees who have filed any complaint alleging a violation of the FLSA. According to the law, an employer may not,

> discharge or in any other way discriminate against any employee because such employee *has filed any complaint* or instituted or cause to be instituted any proceeding under or related to [the Act] or has testified or is about to testify in such proceeding, or has served or is about to b serve on an industry committee.[97]

In reversing the courts below, Justice Bryer, writing on behalf of the Court majority, emphasized that the statute "protects employees who have 'filed any complaint.'"[98] After looking at dictionary definitions of the word "filed," the Court determined that a textual reading of the statutory provision could not settle the question of whether any "filed" complaint included written *and* oral complaints. The anti-retaliation

[96] *Id.* at 1130.
[97] 131 S.Ct. 1325, 1329, citing USCA § 215(a)(3) (emphasis added).
[98] *Id.* at 1130, citing USCA § 215(a)(3).

provision was open to competing interpretations.[99] To better interpret the statute, the Court's majority turned to the expressed intentions of the law, which are, under Section 202 of the FLSA to "prohibit labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[100] According to the Court, the FLSA protects workers by creating specific labor standards and by seeking enforcement of those standards through direct complaints from the workers. Congress put in place anti-retaliation protections to make the overall labor protections effective.[101]

Searching for Congressional purpose, the Court argued that there was no reason Congress might have wanted to limit enforcement of the FLSA's anti-retaliation provision to cases involving written complaints. First, when the law was enacted in the late 1930s, there was a high level of illiteracy among U.S. workers. Limiting enforcement to situations in which workers filed written complaints would have excluded from protection a very large segment of worker complaints, leaving unprotected

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[99]Justice Bryer started his analysis by first using dictionary definitions of the word "file" to determine if regular usage of the word was definite enough to make a determination about the matter. After looking at various dictionary definitions, he determined that some dictionary definitions would not limit the scope of "filing" to written communications.

Finding no consensus in dictionary definitions which can determine the common usage of the word "file" and determine its scope to include oral communications or not, Justice Bryer turned to manner in which legislators, administrators and judges use the term. Here he found that the these institutional actors used the terms in ways that sometimes included oral communications.

The Justice then remarked that while the law states "filing any complaint." "Filing" taken alone may be read restrictively to include only written communications, but the use of "any" broadens the scope of the three-letter phrase. The Justice determined that the three-letter phrase, on its own, "cannot answer the interpretative question." Usage of the term "file" in the rest of the FLSA also could not lead to a conclusive answer as to its meaning. Other statutes, such as the National Labor Relations Act, use different language, so they could also not serve as sources for definitive answers on the issue. *Id.* at 1131-1133.

[100] *Id.* at 1133, citing 29 USC § 202(a).

[101] *Id.* at 1333.

the most vulnerable employees and those most in need of FLSA protection.[102] Second, a limitation to written complaints would have prevented enforcement of the statute through hotlines, interviews and other oral methods of communications that are commonly used today. Third, because the Secretary of Labor consistently had held that the words "filed any complaint" in the above-quoted provision covered oral complaints, and that interpretation of the statute was rational the Court deferred to the agency's interpretation of the law.[103]

In *St. Gobain Performance Plastics* the Court chose the interpretation of the statute most favorable to workers after searching the words of the statute and the purposes of the law; it found that the Congressional purpose was to protect workers, and, as a result, determined that excluding oral complaints would have frustrated Congress' intentions.[104] In this manner, the Supreme Court's interpretative methodology closely resembles that suggested by the Latin American *in dubio pro operario* rule, inspired by the protective principle of work law.

In another recent FLSA controversy under the FLSA, *IBP, Inc. v. Alvarez,*[105] the U.S. Supreme Court considered whether the time spent by meat and poultry processing workers walking between locker rooms and the work area after donning and before doffing was compensable time under the FLSA. The Court decided unanimously that such time was

[102] *Id.* at 1333-1334.
[103] *Id.* at 1136.
[104] In his dissent, Justice Scalia (joined by Justice Thomas) argued that under a textual analysis, the word "complaint" in the statute applied only to formal, legal complaints, either at the administrative or judicial levels, or not to complaints presented to the employer, as was the case in *Saint Gobain*. Therefore, under a textual meaning of the law, the employee was not protected. *Id.* at 1337-1338. The Court majority found the dissent's arguments irrelevant because the question before the Court was not whether or not complaints filed with the employer rather than with the administrative or judicial forum were protected by the anti-retaliation provision of the FLSA. Rather, the question presented to the Court by the appellants was whether or not oral complaints were covered by such provision. *Id.* at 1334.
[105] 546 U.S. 21 (2005).

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covered by the law and was thus compensable. The legal controversy ensued because the employer argued that the under the so-called Portal-to-Portal amendments made to the FLSA by Congress in 1948,[106] walking time on the premises of the employer to the actual place of performance of the "principal activity" of the employee was not compensable. Moreover, activities that were "preliminary or posliminary" to such "principal activity" also were not compensable.[107] The court held that walking time after donning and before doffing was a principal activity and, therefore, was covered by the FLSA; the activities were not considered to be walking to the principal activity (i.e., work) because donning and doffing were an indispensible part of that principal activity. Neither were they merely preliminary or posliminary.

Reaching the decision in *IBP*, however, required statutory interpretation. First, the Court noted that the FLSA regulates "work" and the "workweek." As the Court stated,

> As enacted in 1938, the FLSA …required employers engaged in the production of goods for commerce to pay their employees a minimum wage of "not less than 25 cents an hour," … and prohibited the employment of any person for workweeks in excess of 40 hours after the second year following the legislation "unless such employee receives compensation for his employment in excess of [40] hours ... at a rate not less than one and one-half times the regular rate at which he is employed," ….[108]

However, nowhere does the statute define what is "work" or a "workweek."[109] Prior to the Portal-to-Portal Act, the Court defined

[106] See 29 USC § 251.
[107] *Id.* at 27.
[108] *Id.* at 25.
[109] *Id*. at 25.

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"work" very broadly, "given the remedial purposes" of the FLSA.[110] Hence, in one case, the Court included the time a miner walked from iron ore portals to underground working areas as part of "work" compensable under the FLSA.[111] It also stated that the statutory workweek should start when the employee must present him or herself at the employer's premises to work.[112]

However, the 1948, Republican-controlled Congress was not satisfied with the Court's expansive interpretation of the FLSA and amended the FLSA with the Portal-to-Portal Act.[113] The amendments excluded from coverage "walking … to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and "activities which are preliminary to or post-liminary to said principal activity or activities."[114] However, the Court argued that the Portal-to-Portal Act did not define "work" or "workweek," which were fundamental to understanding what are "principal activity or activities" and "preliminary in or postliminary" to those principal activities. In this manner, the Court's interpretation of "work" and "workweek" remained unchanged by Congress.[115]

In 1955, the Court confronted the issue of whether donning and doffing was compensable under the FLSA, as amended by the Portal-to-Portal Act. The Court determined in *Steiner v. Mitchell*[116] that the time workers spent donning and doffing, including putting on protective gear

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[110] *Id.* at 25. For a description of what are "remedial statutes" under U.S. law see *infra* at ___.
[111] Id. at 25, citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).
[112] *Id.*, citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).
[113] See 29 USC § 251.
[114] Id., citing 29 U.S.C. § 254(a).
[115] The U.S. Department of Labor, entrusted by Congress to enforce the law, had also reached a similar conclusion. Id. at 28.
[116] 350 US 247 (1956).

and showering after work to remove hazardous chemicals, were compensable under the FLSA because they were "an integral and indispensible part of the primary activities" that the workers had to perform. [117] The Court reached this conclusion because the workers in *Steiner*, who assembled batteries, faced important health and safety risks at work. They were required by law to don safety clothes and to shower after doffing to reduce those risks. The Court retained its expansive interpretation of "work", given *stare decicis* and the "remedial" [118] character of the FLSA, to hold that donning and doffing in *Steiner* was compensable.

In *IBP*, the employers, meat and poultry processing plants, argued that *Steiner* did not apply to their case because, while donning and doffing were "integral and indispensable" to workers' principal activity, the time spent walking to their actual place of work after donning and before doffing was not. The Court disagreed. It held that workers' donning of protective clothes was principal and indispensable to a principal activity which started the workday. Therefore, walking to the actual place where the employee had to work after donning, and walking from the place of actual work to where he or she had to doff was compensable. The Court bootstrapped its conclusion by stating that Congress could not have "intended to create an intermediate category of activities that would be sufficiently principal to be compensable, but not sufficiently principal to commence the workday."[119] The Court could have interpreted the statute as requested by the employer, but the statute's protective intentions compelled the Court to interpret the rule in the manner most beneficial to the workers.

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[117] *IBP*, *supra* note __ at 30, citing *Steiner supra* note __ at 256.
[118] See *infra* at __.
[119] *Id.* at 35.

Finally, in *IBP* the employer also argued that the Portal-to-Portal Act had repudiated prior Court jurisprudence[120] which had made walking to the actual place of work compensable under the FLSA. The employer argued that Congress's purpose was to exclude walking to work as a compensable activity. However, the Court found the employer's argument unpersuasive. The Court stated that its opinions, prior to the Portal-to-Portal Act, repudiated by Congress did not include situations, such as in *IBP*, where the workers had to don protective clothes and doff after work, which are principal, compensable activities under the FLSA. In jurisprudence prior to the Portal-to-Portal Act, workers were merely walking towards the place of their primary activity at work, without doing anything else necessary for the performance of that primary activity (other than walking).[121] The Court determined that because donning and doffing is compensable and starts the working day, walking time in that particular case also was compensable. Clearly, the Court interpreted the statue in the way most favorable to workers, based on its expansive interpretation of what "work" is under the FLSA. A similar conclusion likely would have been reached by a South American labor judge applying the protective principle and the rule of *in dubio pro operario*.

Title VII of the Civil Rights Act of 1964 does not have a clear statement of purpose nor Congressional findings related to the employment relationship, the workplace or power asymmetries, as the NLRA and the FLSA have. The Congressional findings section of the statute more explicitly relates to "civil rights," such as those pertaining to voting and access to places of public accommodations, such as hotels. As the 1964 Civil Rights Act states, its main purposes are,

[120] *IBP* referred to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)
[121] *Id.* at 524.

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> To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, *to establish a Commission on Equal Employment Opportunity, and for other purposes*.[122]

Hence, while the Civil Rights Act of 1964 "protects," constitutional rights in public facilities and public education, it does not state explicitly that it does so in private employment. Congress stated that the new law would also establish the EEOC and had "other purposes," but such statements are clearly inchoate as they relate to *employment* discrimination.

The operative clauses of the law, however, make it clear that the law protects workers from discrimination at work. As the law states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[123]

[122] Civil Rights Act of 1964, PL 88-352 of 1964 (emphasis added).
[123] 42 U.S.C.A. § 2000e-2 (a)(2).

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The Act bars discrimination at work based on specified categories: "race, color, religion, sex or national origin." After almost 50 years, these categories are now recognized as *protected* groups or classes.[124]

The notion that the law creates *protected* groups or classes is hardly debatable. No court case or treatise on the subject takes issue with the statement that Title VII protects certain groups or classes from discrimination. The basic "disparate treatment" test for intentional discrimination, developed in *McDonnell Douglas Corp. v. Green*,[125] established that the plaintiff must, "prove four elements: (1) membership in a *protected class*; (2) qualification for the job; (3) an adverse employment action; and (4) a causal connection between the adverse action and protected classification."[126]

McDonnell Douglas also established the "burden shifting" analysis of employment discrimination law. The burden-shifting test permits the Court to draw an inference of discrimination when "other likely nondiscriminatory grounds for the adverse action [have] been

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[124] See *Price Waterhouse v. Hopkins* 490 U.S. 228, 242 (1989) ("An employer may not … condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job.") (emphasis added); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988) ("This Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703. In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent) (emphasis added); *St. Mary's Honor Center v. Hicks* 509 U.S. 502, 527 (1993) ("In disparate treatment case the plaintiff must prove by a preponderance of the evidence that he was black and therefore a member of a protected class; he was qualified to be a shift commander; he was demoted and then terminated; and his position remained available and was later filled by a qualified applicant") (emphasis added).

[125] 411 U.S. 792 (1973).

[126] However, the prima facie case for disparate treatment may differ slightly in promotion, termination, hiring, and other scenarios. Pleading that the plaintiff is a member of a "protected class" is always, however, part of any prima facie case under Title VII. BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 2-12(5th Edition) (internal citations omitted) (emphasis added).

eliminated."[127] The burden-shifting test was intended to make it easier for employees to bring suit under Title VII, since it does not require of plaintiffs to provide all the evidence required to prove their case. Most of the relevant evidence to prove or disprove discrimination is normally in the hands of the employer, not the employee, hence why the burden of production shifts the employer once the employee has proven membership in a protected class and adverse employment action by the employer.[128] Given that Title VII has been construed to protected certain groups or classes against discrimination and that the law makes it easier for workers suing under it to make a prima facie case, Title VII protects workers as a matter of principle.

However, exactly what "protection" entails is a matter of debate. Supreme Court decisions defining the contours of anti-discrimination under Title VII and other anti-discrimination statutes started out with an "anti-subordination" perspective that aimed to eradicate caste and caste-like systems of domination in U.S. society. Some remarkable decisions decided under an anti-subordination view of discrimination, such as *Griggs v. Dukes Power Co.*,[129] broadened the scope of anti-discrimination law to make the law sensitive not only to intentional discriminatory practices, but also to those practices that have a discriminatory effect. In *Griggs*, for example, the Supreme Court determined that an employer with no discriminatory intent, but with a policy that had a discriminatory impact, violated Title VII. As the Court held in *Griggs*,

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes

[127] Zimmer, *supra* note __ at 419 note 43.
[128] *Id.*
[129] 401 U.S. 424 (1971).

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> cannot be shown to be related to job performance, the practice is prohibited.[130]

Griggs led to the development of so-called "disparate impact" theory. This theory significantly influenced employment discrimination law around the world under the term of "indirect discrimination."[131]

While the Warren (1953-1969) and Burger (1969-1986) Courts took on the anti-subordination view, the Rehnquist (1986-2005) and Roberts (2005-Present) Courts shifted to a merely "anti-classification" protective scheme. [132] This latter scheme aims only to eradicate the classification of individuals for employment purposes. [133] In *Wards Cove Packing Co. v. Antonio,* for example, the Court significantly narrowed *Griggs.*[134] Among other things, the Court reduced the employer's rebuttal obligations from a high bar of job-relatedness and business necessity to "a reasoned review of the employer justification." [135] The Court also

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[130] *Id.* at 431.
[131] For the case of Europe see Bob Hepple, *Equality at Work*, THE TRANSFORMATION OF LABOUR LAW IN EUROPE 129, 130, 148 (BOB HEPPLE AND BRUNO VENEZIANI, EDS. 2011).
[132] Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 428 (2012).
[133] Michael Zimmer, *supra* note __; David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 657 (2000); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 102-20 (2010); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142-43 (2002); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).
[134] 490 U.S. 642 (1989).
[135] MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 220 (7th Edition).

redefined the employer's rebuttal to include a burden of production and not persuasion.[136]

Restricted interpretation of Title VII and other anti-discrimination laws led Congress to enact new legislation to provide broader employment discrimination protections. It approved the Civil Rights Act of 1991, which provided attorneys' fees in discrimination suits, making it more economical for lawyers and plaintiffs to take discrimination claims to court. The 1991 amendments also significantly reversed the 1989 Supreme Court decision of *Wards Cove*, to reestablish the *Griggs* rule that facially neutral policies that have a disparate impact on protected classes must be related to the job and be necessary for the business.[137]

However, despite Congressional goals to strengthen employment discrimination law, the current Roberts Court has maintained the narrow, anti-classification bent in its Title VII and other equal opportunity jurisprudence.[138]

Hence, while Congress has remained adamant in increasing the scope of anti-discrimination law since 1964, the Court has not. Despite the pulls and tugs between Congress and the Courts, it remains true that Title VII protects workers from discrimination, as a matter of principle. The fact that the Court has narrowed Title VII against the purposes of Congress and its own precedent does not totally destroy the protective principles in favor of workers in the law.

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[136] MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 220 (7th Edition).

[137] Id. At 220. The U.S. Congress has also legislated further protections for pay equality, such as the Lucy Ledbetter Fair Pay Act of 2009, the American with Disabilities Act Amendments of 2008, and the Genetic Information Nondiscrimination Act of 2008, among others. BLANPAIN ET AL, supra note__ at 124.

[138] Professor Michael Zimmer has argued that Ricci v. DeStefano perhaps marked a watershed decision where the Court completely did away from the anti-subordination perspective of Title VII to fully embrace an "anti-classification" view of discrimination. Zimmer, supra note __ at __.

V. SOME LIKELY OBJECTIONS TO OUR POSITION REGARDING THE PROTECTIVE NATURE OF U.S. WORK LAW

We believe that the protective principle exists in American statutory work law. As in comparative work law, including Latin American work law, protection is the *raison d'être* of American work law. But while we very strongly believe that the protective principle exists in American work law, we also expect significant objections to our claim.

The objections will likely include the arguments that:

- The peculiar American doctrine of "employment at will," which exists in all U.S. states except Montana, underpins the entire edifice of U.S. work law, making American work law un-protective.
- The laws and cases that we have described here have been "cherry picked" to make our point and are not necessarily representative of American work law jurisprudence, which generally is restrictive of workers' rights. Of particular importance is the Taft-Hartley Act of 1947, which significantly amended the NLRA to protect employers from unions.
- The use of higher-ordered "principles" of work law rather than the text of the laws themselves will result in the invocation of ill-defined legislative "purposes" to determine cases, giving judges quasi-legislative powers that are in conflict with modern, democratic principles of governance.
- The use of principles of work law, namely the protective principle and something like the rule *in dubio pro operario*, is nothing more than a new name for the old American legal maxim that "remedial

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> statutes must be liberally interpreted." According to Justice Antonin Scalia and Professor Bryan A. Gardner,[139] the legal formulation that remedial statutes must be legally construed is "incomprehensible or superfluous" because all statutes must be *fairly* interpreted.[140] While traditional textualism "strictly" interpreted statutes, modern textualism prefers a "fair" construction.[141] Therefore, if "liberal" construction means "non-strict," then the maxim stating that remedial statutes must be liberally construed no longer has traction. If "liberal construction" means more than a "fair" construction of the words of the statute, then such a "liberal" construction will require looking at the purposes of the law, which is undemocratic and overreaching.

We rebut all of these objections below. American work law is protective in principle, albeit perhaps less so in practice, despite the doctrine of employment-at-will and conservative jurisprudence. Precisely because we understand that there are gaps between work law on the books and work law in practice, it is important to explicitly recognize the protective principles of work law. We agree that American work law jurisprudence needs to rectify its misunderstandings of the law. We also agree that the U.S. Congress should consider reforming institutional designs to better protect workers, but to do this we need to be clear about what work law is intended to do. Principles provide a compass to navigate the stormy seas of work law, including American work law.

We also argue that the brand of American textualism espoused by figures such as Justice Scalia is too narrow and is unhelpful given that legislators themselves expect courts to use legislative records and other

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[139] ANTONIN SCALIA AND BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF TEXTS 5084 (Kindle Ed. 2012).
[140] *Id.*
[141] *Id.*

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sources to understand the purpose of legislation, particularly when the legislation is ambiguous and vague. Moreover, legislative purpose and intent play a role in statutory construction to the extent the interpretation attained is reasonably supported by the text of the law, including sections containing legislative findings and policy pronouncements.

A. Employment-at-Will Does Not Make Work Law Un-Protective

Some may argue that the United States work law is not protective because the centuries old "employment-at-will" prevails in the U.S. The American employment-at-will doctrine, in its bare, traditional formulation, states that employers and employees may terminate their employment relationship for "good, bad or no reason."[142] In other words, unlike the law in all other industrial democracies and many other countries of the world, the U.S. employment-at-will doctrine does not require "cause" or "just cause" for termination of the employment contract. With zero protections afforded by what appears to be the baseline rule of American work law, how can American work law be protective? Even if some statutes such as the NLRA, FLSA and Title VII protect workers, these seem to be mere islands of protection in a wide, lonely sea of non-protection.

First, we do not consider the American common law rule of employment-at-will to be part of "work law." *Work law is statutory*. Work law derogates the common law (or the civil law in civil law jurisdictions) because of the common law's failure to adequately consider the subordination of employees in the employment relationship, and the caste and caste-like arrangements in society produced by racism, sexism and similar ideologies. By definition, we exclude employment-at-will

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

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from work law, as we saw above how the Uruguayan labor court excluded civil law principles from its jurisprudence.[143] American work law is not protective because of the employment-at-will doctrine.

Second, even if we include employment-at-will as part of American work law, we do not view the work-law statutes as islands of protections in a vast sea of non-protection. There is a law of "wrongful discharge"[144] in the U.S. that has derived from statutory protections against discriminatory and retaliatory discharges in the NLRA, Title VII and many other statutes.[145] The crude rule of employment-at-will under which "bad" reasons can justify termination is no longer the rule.[146] Scholars and social scientists have even shown how workplace protections against wrongful discharge are so widely recognized that many employers overzealously guard themselves against liability.[147]

But a related objection to our claims could also be derived from the work of Professor Cynthia Estlund who has argued that employment-at-will is the backdrop against which wrongful discharge causes of action are litigated. In such a backdrop employees, not employers, are the ones that must prove that a "bad" cause motivated the termination. Even with burden shifting tests under equal opportunity law, employees retain the final burden to prove their cases. The employment-at-will backdrop is different from "for cause" or "just cause" regimes because in for cause jurisdictions employers, not employees, must prove that the termination

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[143] See JOHN HENRY MERRYMAN, *supra* note _ at 152-153 (Explaining how micro-systems of law have developed in civil law countries which compete with the traditional civil law, rendering the traditional civil law as "residual.")
[144] Cynthia Estlund, *Wrongful Discharge Protections in an At-Will World,* 74 TEX. L. REV. 1655, 1662 (1995-1996)
[145] *Id.*
[146] *Id.* at 1656.
[147] Cynthia Estlund, *How Wrong Are Employees About their Rights and Why Does it Matter?,* N.Y.U. LAW REV. 6, 11 (2002).

was lawful.[148] Hence, professor Estlund argues that considerations regarding proof and correlative issues regarding delay and cost of the litigation to workers make it difficult for workers to bring suit and win cases even under statutory work laws that protect workers.

We agree with Professor Cynthia Estlund. However, our claim here has little to do with how law looks "in practice" as a result of its interaction with the institutional framework of litigation underpinned by employment-at-will doctrine and the very real obstacles that plaintiffs face. This article is explicitly about law "on the books" –about how to interpret and understand the statutory work law so that we can reverse decisions clearly in contradiction with the principles of work law, such as those where courts have undertaken a limited classification perspective on discrimination or *NLRB v. Mackay Radio & Telegraph Co*.[149] where the Supreme Court declared in *dicta* that employers could permanently replace striking economic workers regardless of the language stated in Section 7[150] and 13[151] of the Act and the protective principle embedded in that law, as argued here.[152] Knowing the law on the books matters because without understanding the principles on the books, advocating for institutional change to better implement work law becomes close to impossible.

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[148] *Id.* at 1691.

[149] 304 U.S. 333 (1938).

[150] See infra at __.

[151] Section 13 of the NLRA states,

> Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

42 U.S.C.A § 163. NLRA § 13.

[152] See JIM ATLESON, VALUES AND ASSUMPTIONS OF AMERICAN LABOR LAW Chapter 1 (1983).

B. Legal Scholars Must Educate the Courts About Work Law Principles Even in Spite of Setbacks in Worker Protections

We do not question claims that American courts have "de-radicalized" and otherwise hollowed-out work law, as scholars have already noted and the cases cited above relating to Title VII showed. James Atleson, for example, argued that hidden "values and assumptions" of American labor law stemming from the class biases of judges and the status assumptions that society makes of workers, which are engrained in the common law, helped to erode worker protective jurisprudence based on the NLRA.[153] These values and assumptions have been that employers have some right to maintain production, that employees will act irresponsibility if not controlled, that employees can only be minor partners in managing an enterprise, that the workplace is the employer's property, and that employee participation interferes with the inherent and exclusive managerial rights of employers.[154] According to Atleson, these values and assumptions run in the common law, where collective action by workers has been esteemed illegitimate and illegal, and where only rational, individual action, rather than collective and solidarity working class self-help can be justified by law. [155]

Similar to Atleson, Karl Klare argued that the a radical interpretation of the Wagner Act, which was reasonable at the time it was enacted, was hindered by the courts and other institutional actors who had to domesticate the statute so that it could buttress the capitalist workplace,

[153] James Atleson, supra note __ at 5.
[154] Id. at 8-9.
[155] James Atleson, Values and Assumptions of American Labor Law 5-9 (1980); See also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941, 62 MINN. L. REV. 265 (1978); ELLEN DANNIN, TAKING BACK THE WORKERS' LAW, HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 58-59 (2006).

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not undermine it.[156] According to Klare, the NLRA had six vaguely-stated but nevertheless cognizable goals: industrial peace, collective bargaining, equalization of bargaining power, worker free choice to join a union, rationalization of the market to stop underconsumption, and industrial democracy.[157] Of these goals, the more radical ones were rationalization of the market, which included wealth redistribution, equalizing bargaining power and industrial democracy.[158] These goals, however, "were jettisoned as serious components of national labor policy."[159] In turn,

> Industrial peace, collective bargaining as therapy, a safely cabined worker free choice, and some rearrangement of relative bargaining power survived judicial construction of the Act.[160]

Hence, while the Wagner Act's goals were vague, it could have been very reasonably interpreted in a more "radical" manner, but was not.

But even if the Act was domesticated, as we also saw in these pages happened to Title VII, this does not mean that the protective principle is absent form U.S. work law. To the extent Courts narrowed U.S. work law protections, courts can broaden them in future cases, to the extent we can prove that the law lends itself to such broader interpretations. Hence the importance of principles.

But related to judicial amendments of work law, there is also the argument that at least the NLRA has been significantly amended by the legislature, particularly through the Taft Hartley Act of 1947. Taft-Hartley amendments were decried at the time by organized labor as the

[156] Klare, supra note __ at __.
[157] Klare, supra note __ at 282-283.
[158] Id. at 293.
[159] Id. at 293.
[160] Id.

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"slave labor bill."[161] Its most anti labor provisions included the creation of labor union unfair labor practices,[162] most importantly banning secondary activity (including solidarity strikes and boycotts)[163], protecting employer speech during union elections,[164] excluded certain employees from labor law protections,[165] allowed states to enact legislation to permit employee free riding (so-called "right to work laws")[166] amended section 7 so that workers negative rights of association (to not join a union) would be enforced[167] among others.[168]

But the NLRA's protection of employees survived even through the Taft-Hartley amendments. As Professor Ellen Dannin has argued, values favoring worker collective action for their mutual aid and

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[161] FRANK W. MCCULLOCH & TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD (1974), reprinted in Dau Schmidt, supra note __ at 68.
[162] 42 U.S.C.A. § 8(b) et seq.
[163] 42 U.S.C.A. § 8(b)(4).
[164] *Id.* at § 8(c). For a review of pro-labor critiques of the employer speech rights clause see *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516-23 (1993) (Employers and workers are locked in unequal bargaining relationships and the union election model of the NLRA has fostered a wrong impression that unions and employers square off as equals in election campaigns, just as political parties in government elections); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832 (2005) ("When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact upon employees is likely to reflect their perceptions about the speaker's basic power over their work lives rather than the persuasive content of the words themselves. Captive audience speeches, oblique or direct threats to act against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline lawful techniques that have proven especially effective in diminishing union support or defeating unionization over the years.") (internal citations omitted); Roger C. Hartley, *Non-Legislative Labor Law Reform And Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 372-373 (2001) (Neutrality agreements can redress four disadvantages unions confront when organizing: employer intimidation, harmful delay, inadequate access to employees, and inability to secure a first contract.)

[165] 42 U.S.C.A. § 9 *et seq.*

[166] 42 U.S.C.A. § 14(b).
[167] Id. at § 7.
[168] See DAU SCHMIDT, supra note __ at 68-71.

protection was not changed by the Taft-Hartley amendments.[169] The Act still sanctions certain actions by employers who try to curb workers' collective actions. In fact, even assuming that the Taft-Hartley Act was enacted to protect employers, which is not totally correct since some sections of it arguably benefit both employees ad employers, such as negative rights of association, comparative work law has acknowledged that work law is, in fact, an instrument to reform capitalism and make it work relatively free of tumultuous industrial disputation, market failures, revolution, and the like.[170] The same purposes continued to be inscribed into the NLRA even after the Taft-Harley amendments. Certainly, statutory protections for employers were raised and lowered for workers by that Act. But the kernel of protection remains engrained.[171]

C. Principles Restrain Judicial Activism

We advocate for pro-worker interpretations of work law when the law's text is ambiguous and vague, not that judges and other adjudicators rule in favor of workers regardless of the text of the law. Yet, textualists, such as Justice Scalia, would argue that vague statutes do not require considerations of principles beyond those stated in the text. Statutory interpretation requires only reading the words of the statute and understanding their plain meaning at the time that they were written.[172] Purpositivists, who generally are contrasted with textualists, on the other hand, would consider purposes, consequences and legislative debates (the

[169] Ellen Dannin, supra note __ at 71.
[170] Otto Kahn-Freund, supra note __ at 14-15, 26-27.
[171] See Ellen Dannin, supra note __ at 71.
[172] SCALIA AND GARDNER, *supra* note __ at 573-587.

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legislative history) to understand statutes, in addition to a plain meaning and historically sensitive construction of the text.[173]

Here we take the side of purpositivism. Purpose is required to understand statutes when the main tools of interpretation-- the text, plain meaning, and knowledge of the historical context-- are insufficient to understand the meaning of the law.[174] Congress sometimes purposefully employs vague and ambiguous language because it may not be able to define every instance in which the law will be applied, and how it should be applied.[175] As Justice Bryer has argued, legislators expect that judges will use Congressional reports (legislative histories) to interpret and gap-fill the law.

D. Work Law Deserves Liberal Interpretation in Favor of the Worker

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

> those which are made to supply such defects, and abridge such superfluities, in the common law, as arise [from] either the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever.[176]

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[173] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 1661 (Kindle Ed.).
[174] Id.
[175] Id. at 1806.
[176] SCALIA AND GARDNER, *supra* note __ at 5069, citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 86 (4th ed. 1770).

Liberal construction generally has been said to mean that statues that are remedial and change the common law should not be construed "strictly."[177]

However, Justice Scalia and Professor Gardner have argued that *all* statutes change the common law and, as such, are "remedial." [178] Therefore, the maxim that remedial statutes deserve a liberal construction makes no sense. All statutes are remedial, so all statutes must be construed "liberally."[179]

Moreover, according to Justice Scalia and Prof. Gardner, modern textualism posits that all statutes deserve a "fair reading,"[180] not "strict construction." No modern jurist worth her salt would argue that statutes deserve only a "strict" construction. But if "fair" and "liberal" mean "not strict," then the legal maxim that remedial statutes require a "liberal" construction has, in addition to incomprehensible, become "superfluous."[181]

We do not believe that all statutes deserve the same type of "fair" reading. There is a difference between statutes that add to the common law and those that *derogate* –that in fact completely change-- aspects of the common law.[182] Work law is precisely this type of law that completely changes the common law. Work law particularly derogates aspects of employment-at-will and its freedom of contract principles. In

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[177] *Id* at 5090.
[178] *Id.*
[179] *Id.* at
[180] A fair reading requires "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research." SCALIA AND GARDNER, *supra* note __ at 814.
[181] SCALIA AND GARDNER, *supra* note __ at 5090.
[182] For a description of the distinction between remedial statutes and those that deregoate the common law see 3 SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2007)

this manner, work law needs more than a "fair reading." It requires judges to understand its peculiar protective bias in favor of a weaker party.[183] The maxim that one should give a "liberal" reading of the remedial statute, which parallels the rule of *in dubio pro operario*, makes significant sense to us. In any case, we would argue that a liberal reading of the statute is especially important when the statute is both remedial and in derogation of the common law. The common law maxim that remedial statutes must be liberally construed, and, therefore, the rule of *in dubio pro operario*, are neither incoherent nor superfluous.

VI. CONCLUSION

> *Labour law is chiefly concerned with this elementary phenomenon of social power. And—this is important—it is concerned with social power irrespective of the share which the law itself has had in establishing it. This is a point the importance of which cannot be sufficiently stressed. We are speaking about command and obedience, rule making, decision making and subordination. – Sir Otto Kahn Freund.*[184]

South American work law, coming from a civil law tradition, contains a body of systemic principles that have been developed by scholars. The principles can be gleaned from the constitutions, the positive law and their jurisprudence. These principles include the principles of protection, primacy of reality, non-waiver of statutory rights, employment stability and labor union autonomy, as elaborated above.

This article was concerned with the first principle, which the authors believe to be central, the principle of protection. It posits that the law must protect the worker because workers are the weaker party in

[183] See *id.*
[184] OTTO KAHN-FREUND ET AL., KAHN-FREUND'S LABOUR AND THE LAW 14 (3d. ed. 1983).

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employment contracts. Without protection, the worker would be turned into a commodity and his or her humanity would be threatened. Without protection, workers and society are sent back to the times of Blake's "Satanic Mills."

We also saw that the principle of protection has led to the development of the rule of *in dubio pro operario*, which means that a judge, when deciding cases that are "hard" because the law is vague, ambiguous, or silent, must interpret the relevant rule in the way most favorable to the worker. We saw that a different but similarly pro-worker rule exists in France and Germany, under the name of the rule or principle "of favor," and in Italy as the rule of *favor laboris.* While each rule or principle posits slightly different things, all show the same intent, to favor worker in hard cases.

We also saw that the principle of protection and something like the rule of *in dubio pro operario* exist in the U.S. under the legal maxim that remedial statutes should be interpreted liberally. Hence, while U.S. work law has been enacted in a "patchwork" fashion, as Professor Matt Finkin has argued, this does not mean that American work law is devoid of principles. U.S. work law, namely the NLRA and the FLSA, recognizes the intrinsic power asymmetries between workers and employers. Title VII also recognized race and sexual subordination at work, as we can glean from the legislative history and scholarship of Title VII. The underlying principles may not be known by or may be misunderstood by U.S. lawyers because those principles have never been systematized. This lack of systematization is in part due to the U.S.' common law tradition. However, ignorance or misunderstanding of principles does not mean that the principles do not exist.

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We hope that with this introduction to the South American principle of protection and our view of how it is expressed in U.S. work law can begin a conversation with and among U.S. work-law scholars and lawyers about the underpinnings of their own work law. Professor Michael Zimmer, for example, has already has sounded an alarm bell, cautioning against the soft codification of American employment law –stemming from the common law-- without first identifying the principles of American work law[185]. Our attempt here is to move the discussion in the direction of such a principled endeavor.

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[185] Zimmer, *supra* note __ at __.