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Keynote Address: Envisioning Wage Justice

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Keynote Address: Envisioning Wage Justice

Ruben J. Garcia[†]

Abstract

In this Keynote address for the Minnesota Journal of Law & Inequality's Symposium, "Not Just Wages," held at the University of Minnesota Law School on April 11, 2025, I discuss the evolving concept of wage justice, using the lens of Critical Wage Theory and its origins in pioneering theories of race, labor and justice. The Article outlines the legal frameworks that have defined the content of wage justice in the twenty-first century, particularly for marginal workers. This Article raises the alarm about the impact of political change on low-wage workers, using case studies and analysis of administrative agency enforcement of rights for low wage workers in the recent past. The Article further mines the intersection of legal structures and wage justice, highlighting the gaps in protection that befall marginal workers. Arguing that a holistic approach to race and class is especially needed in these times fraught with political and organizing challenges, I argue for a continued re-envisioning of racial and wage justice.

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Table of Contents

Abstract	279
Introduction	281
I. Theoretical Context for These Times	282
A. Legal and Policy Challenges	285
II. The Legal Framework for Wage Justice	291
A. The Long View	292
B. Social Movements	298
III. Challenges Faced by Low-Income Workers	300
A. The Story of Maria Blanco	300
B. Tipped Workers, Retaliation, and Secure Scheduling	301
IV. Looking Forward	303
Conclusion	305

Introduction

I am honored to have this symposium dedicated to my book. I want to thank everyone who contributed and traveled to join us. It's a great chance to reconnect with friends and meet new ones. Thanks to the staff of the *Minnesota Journal of Law & Inequality* for organizing and running this Symposium.

In the current times, there are renewed discussions about the rule of law, and indeed the relevance of law at all.¹ In the ensuing four to ten years, we will likely witness changes which will have significant repercussions for labor movements and the enforcement of workplace law. The bigger question is the future of the rule of law in an environment where the legitimacy of law is questioned. The justification of draconian immigration restrictions, for example, under a faux conception of “rule of law” reminds us of the co-optation of the term “rule of law” for the legal defense fund of the “Stop the Steal” crowd, known as the “Rule of Law Legal Defense Fund.”²

The implications for safeguarding law and regulation remain uncertain. The disregard for legal norms that characterized the first Trump administration, and now the second administration, poses a substantial threat to workplace law.³ While the record of the Department of Labor in the first Trump administration continued a general trend of de-enforcement, in the second term that de-enforcement may accelerate faster.⁴

1. See, e.g., Debra Lyn Bassett & Rex Perschbacher, *The End of Law*, 84 B. U. L. REV. 1 (2004) (analyzing how traditional legal processes are fading away and the resulting negative consequences for society); Erwin Chemerinsky, *If Trump Defies Court Orders, Then What?*, N.Y. TIMES (Mar. 7, 2025), <https://www.nytimes.com/2025/03/07/opinion/trump-courts-judges.html> [<https://perma.cc/77V9-G3ZJ>].

2. See Steve Contorno, *Florida's Ashley Moody Worked with Group Linked to Capitol Insurrection*, TAMPA BAY TIMES (Jan. 11, 2021), <https://www.tampabay.com/news/florida-politics/2021/01/11/floridas-ashley-moody-worked-with-group-linked-to-capitol-insurrection/> [<https://perma.cc/L259-SWSC>].

3. See, e.g., Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. TIMES (Jan. 20, 2025), <https://www.nytimes.com/2025/01/20/us/politics/trump-pardons-jan-6.html> [<https://perma.cc/QC8R-S3HC>] (describing one such disregard for legal norms early in the second Trump administration).

4. See Robert Iafolla, *Trump Names GOP Labor Board Member as Agency Chair*, BLOOMBERG L. NEWS (Jan. 20, 2025), <https://news.bloomberglaw.com/daily-labor-report/trump-taps-gop-labor-board-member-kaplan-as-new-agency-chair> [<https://perma.cc/6FSL-PQZY>]; Robert Iafolla, *Trump Stymies Labor Board by Firing Democrat Gwynne Wilcox (2)*, BLOOMBERG L. (Jan. 28, 2025), <https://news.bloomberglaw.com/daily-labor-report/trump-terminates-one-labor-board-democrat-leaving-two-members> [<https://perma.cc/V2TV-AVB9>].

The victories won by social movements like Amazon and Starbucks workers' unionization campaigns may provoke a backlash from the dominant class.⁵ When workers gain greater influence, Critical Race Theory predicts retrenchment and backlash from the hierarchical structure.⁶ Certainly, with the advent of new organizing, there will be greater scrutiny of movements in the coming years. There exists a continuity between historical civil rights struggles and contemporary economic justice movements, including the emphasis on wage justice.⁷ It is imperative, however, to consider how we proceed after electoral setbacks at the national level.

In Part I of this Article, I will discuss the theoretical frameworks of *Critical Wage Theory* and wage justice. In Part II, I will examine the legal framework that is supposed to produce wage justice and how it often fails to do so. In Part III, I will explore the challenges faced by low-wage workers by looking at a case study of a domestic worker, Maria Blanco. In Part IV, I will discuss the potential solutions and the role of law in protecting workers.

I. Theoretical Context for These Times

My primary objective in *Critical Wage Theory* is to develop a theory of wage justice that is informed by racial justice.⁸ I assert that raising the minimum wage constitutes a matter of racial justice, particularly since I contend that economic implications should not be the sole foundation of wage justice. The book has both a theoretical and descriptive aspect. Defining wage justice is an ongoing project. The question that I will work to answer today is how much has changed in such a short time.

It has not yet been a year since I published *Critical Wage Theory* in June 2024. Nevertheless, the political landscape has been rapidly evolving in that short time.⁹ It is essential to understand

5. See Jenny Brown, *Strikes and Organizing Gains but Storm Clouds Loom*, LAB. NOTES (Dec. 29, 2024), <https://labornotes.org/2024/12/2024-review-strikes-and-organizing-score-gains-storm-clouds-loom> [<https://perma.cc/7D2Z-MXNW>].

6. See generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (providing an important analysis of the racism innate to the entrenched systems of hierarchy in the United States).

7. See, e.g., RUBEN J. GARCIA, *CRITICAL WAGE THEORY: WHY WAGE JUSTICE IS RACIAL JUSTICE* 2 (2024).

8. *Id.*

9. See, e.g., Linda Qiu, *Trump Repeats Inaccurate Claims in Inaugural Remarks: Fact Check*, N.Y. TIMES (Jan. 20, 2025), <https://www.nytimes.com/2025/01/20/us/politics/trump-fact-check-inaugural-address.html> [<https://perma.cc/QKR4-T9MN>].

how changes both globally and domestically are going to affect movements. The question posed in this Article is how to make Critical Wage Theory relevant in the diminished nature of our politics. The concept of wage justice, and justice itself, is currently highly contested. My purpose here is to envision wage justice in the present context and ways to further wage justice even in these times of retrenchment.

The enduring debate on whether justice is based upon fixed or flexible principles has captivated thinkers since Plato's *Republic* and Immanuel Kant's "categorical imperative."¹⁰ Prominent philosophers such as John Rawls and Robert Nozick have actively participated in this discourse.¹¹ I propose to employ these conceptualizations of justice to elucidate the nature of wage justice more effectively.

Wage decisions are the outcomes of multitudes of intricate human factors. They are influenced by a wide range of interrelated factors, including seniority, previous salary, educational attainment, race, and gender.¹² Critical Race Theory (CRT) emphasizes that these factors are highly contingent and loosely connected to notions of merit.¹³ Consequently, wage justice implies taking appropriate actions to rectify such disparities. Critical Race Theory (CRT) is currently at the forefront of politics. Politicians have used the backlash against racial justice to demonize CRT.¹⁴

Amid the current backlash against Diversity, Equity, and Inclusion (DEI), *Critical Wage Theory* posits the imperative of

10. See generally Plato, *The Republic* (depicting justice as based on fixed principles of virtue and rationality); see also *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (Sept. 26, 2017), <http://plato.stanford.edu/entries/justice-distributive> [perma.cc/M65M-DUR2] (describing Kant's "maxim to treat people always as ends in themselves and never merely as a means" as part of a more general philosophical discussion).

11. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1st ed. 1971) (positing a theory of justice based on liberal principles); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (forwarding a libertarian approach to justice that eschews state intervention).

12. See Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), <https://www.pewresearch.org/short-reads/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> [https://perma.cc/6A5E-T5QT].

13. See GARCIA, *CRITICAL WAGE THEORY*, *supra* note 7, at 8.

14. See, e.g., Stephen Sawchuck, *What is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [https://perma.cc/92PB-6D7A]; Tanya Kateri Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action*, 71 UCLA L. REV. DISCOURSE 282 (2024).

addressing racial wage disparities.¹⁵ My intention is to encourage a discourse on concepts of justice, not solely because the book's subtitle promises to show "Why Wage Justice is Racial Justice," but also because of John Rawls' theory of "justice as fairness."¹⁶ Rawls advocates for impartiality and fairness in societal structures, reconciling liberty and equality.¹⁷ This theory encompasses the original position, two principles of justice, and fair equality of opportunity.¹⁸

The Living Wage Movement, which advocates for wages that ensure a decent standard of living for government contractors, has faced challenges in expanding to the private sector.¹⁹ This raises questions about expectations of wage justice. Rawls' theory of justice provides insights into this matter. In the original position, individuals are placed in a hypothetical scenario where they are unaware of their own social status or preferences.²⁰ From this perspective, Rawls argues that a just society should be one where everyone has equal opportunities and resources.²¹ Matsuda, on the other hand, emphasizes the importance of considering the perspectives of those at the bottom of the economic hierarchy.²² By examining their experiences and needs, Matsuda argues that we can achieve justice.²³

A conception of wage justice that does not prioritize race could be sufficient.²⁴ Some may see the tragic murder of George Floyd, which took place in Minneapolis on May 5, 2020, as not connected to wage justice.²⁵ In *Critical Wage Theory*, I argue that Mr. Floyd's

15. See GARCIA, *CRITICAL WAGE THEORY*, *supra* note 7, at 10; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. 323 (1987).

16. RAWLS, *supra* note 11, at 3.

17. See *id.* at 4 ("[I]n a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.").

18. See generally *id.* (developing a morality-based theory of justice as an alternative to utilitarianism).

19. Jared Bernstein, *The Living Wage Movement*, ECON. POL'Y INST. (July 21, 2000), https://www.epi.org/publication/externalpubs_lwmovement/ [https://perma.cc/22HS-K5ZR].

20. RAWLS, *supra* note 11, at 12.

21. See *id.*

22. See Matsuda *supra* note 15, at 324.

23. *Id.*

24. See, e.g., SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* (2017) (discussing the varying degrees to which initiatives focused on different aspects of wage justice have found success).

25. See GEORGE SAMUELS & TOLUSE OLORUNNIPA, *HIS NAME IS GEORGE FLOYD: ONE MAN'S LIFE AND STRUGGLE FOR RACIAL JUSTICE* (2022) (providing a portrait of

murder is an example of why wage justice needs to be viewed as racial justice, and perhaps even survival.²⁶ Consequently, a more comprehensive approach to racial justice is necessary, considering labor and employment laws.²⁷ It is exactly because of the current conditions after January 20, 2025, the second inauguration of President Donald Trump, that abstract thought experiments devoid of current context are not a sufficient way of furthering racial justice.

A. Legal and Policy Challenges

One of the primary challenges facing advocates for wage justice is the incomplete nature of the federal Fair Labor Standards Act (FLSA). The FLSA contains various exemptions, some of which have been narrowed or eliminated over time.²⁸ Exemptions for live-in domestic service workers and certain types of employment, such as baby-sitting and newspaper delivery, have faced legal challenges and interpretations.²⁹ The impact of FLSA exemptions on employee welfare, particularly regarding minimum wage and overtime pay, remains a concern, with studies revealing a substantial portion of workers earning below the minimum wage.³⁰

The FLSA establishes a regular workweek and overtime pay for time worked beyond forty hours, but there are exceptions for certain types of pay and work arrangements.³¹ While commissions

George Floyd and the pursuit of racial justice following his murder by Minneapolis police).

26. See GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 6.

27. See RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTIONS 8–9 (2012) [hereinafter GARCIA, MARGINAL WORKERS] (discussing the failures of the political process to protect most workers).

28. See, e.g., *Domestic Service Final Rule Frequently Asked Questions*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/direct-care/faq> [<https://perma.cc/72SV-U7JH>] (discussing the narrowing of the definition of the companionship services exemption).

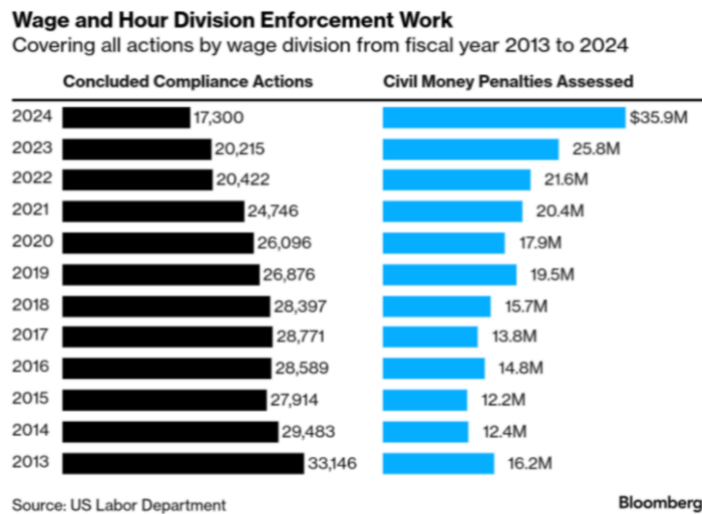
29. See, e.g., *NLRB v. Hearst Publ'ns., Inc.*, 322 U.S. 111 (1944) (analyzing the application of the National Labor Relations Act to newspaper delivery workers). Despite the exclusions in federal law, domestic and home care workers have banded together in unions and legislative campaigns for more than 30 years; see U.S. DEP'T OF LAB., FACT SHEET #79B, LIVE-IN DOMESTIC SERVICE WORKERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2013), <https://www.dol.gov/agencies/whd/fact-sheets/79b-flsa-live-in-domestic-workers> [<https://perma.cc/78LR-VFP2>].

30. See, e.g., Jeounghee Kim & Skye Allmang, *Wage Theft in the United States: A Critical Review* 3–4 (Ctr. for Women & Work, Rutgers, Working Paper No. 2021-1, 2020); see also Fair Labor Standards Act (FLSA), 29 U.S.C. § 201.

31. See 29 U.S.C. § 207 (detailing the FLSA's maximum hours provision and the range of exceptions applied to it); *id.* § 213 (detailing various exemptions to the FLSA).

and incentive pay are included in calculating the regular rate, profit sharing is not.³² The FLSA also permits compensatory time off instead of overtime pay, but this option is subject to specific requirements and limitations.³³

Less than a year has passed since I published *Critical Wage Theory*, but it is now possible to fully evaluate the last four years. During its tenure, the Biden Administration pursued numerous initiatives to enhance the working conditions for the millions of farmworkers who endure wage theft and subpar working conditions.³⁴ That does not necessarily mean that there are not examples of wage theft. This trend in enforcement levels is depicted in the accompanying graph:



Source: Bloomberg News Daily Lab. Rep. (Dec. 31, 2024).

32. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #56A: OVERVIEW OF THE REGULAR RATE OF PAY UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2019), <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate> [<https://perma.cc/M99F-5WW3>].

33. See, e.g., U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #7: STATE AND LOCAL GOVERNMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2011), <https://www.dol.gov/agencies/whd/fact-sheets/7-flsa-state-local-government> [<https://perma.cc/KW8U-7YTW>] (providing an explanation of compensatory time in the context of governmental workers).

34. See, e.g., *U.S. Dept. of Labor Obtains Judgment to Recover \$550K in Wages, Damages for 614 Shortchanged Construction Workers*, U.S. DEPT. OF LAB. (Sept. 17, 2024), <https://www.dol.gov/newsroom/releases/whd/whd20240917> [<https://perma.cc/662V-5ZCQ>].

Enforcement, as shown in the above graph, has generally decreased over decades, independently of the political party of the administration.³⁵ Litigation has largely become the province of a machinery that enriches both plaintiffs and defense lawyers.³⁶ As Derrick Bell has written in the context of school desegregation, the well-intentioned litigation meant to achieve racial balancing was not always in the best interest of the children.³⁷ Similarly, liberal legalism does well to reify the existing wage order without fundamental changes in how and what people are paid.³⁸ Without structural reforms, race and gender gaps will remain stubbornly persistent.

In the coming decade, how can wage justice be advanced, and what will it look like? While government intervention is undoubtedly necessary, what measures should we take if it is not forthcoming? What if, after four years, the federal minimum wage remains at \$7.25 per hour? It is imperative that we explore avenues for achieving greater equity among workers. Other initiatives for wage justice have been attempted in recent years. For example, the Department of Labor (DOL) proposed a rule to facilitate unionization for agricultural workers, but it encountered legal opposition from various industry groups and states.³⁹ The Georgia Fruit and Vegetables Growers Association and several states filed lawsuits to prevent the rule's implementation.⁴⁰ These lawsuits were successful in blocking the rule in seventeen states where attorneys general joined the litigation, leading to a federal court injunction.⁴¹ Given that many of the rules promulgated by the previous administration—and possibly all federal regulations⁴²—are being dismantled, this time presents an opportune moment to

35. See DAILY LAB. REP., BLOOMBERG NEWS DAILY (Dec. 31, 2024).

36. Margaret Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011) (discussing how fee-shifting provisions incentivize increase in litigation).

37. Derrick A. Bell, *Serving Two Masters: Client Interests and Integration Ideals in Desegregation Litigation*, 85 YALE L. J. 470 (1976).

38. See RAWLS, *supra* note 11, at 237–39 (discussing that laws codify issues that people may otherwise not recognize as such).

39. Kayla Googin, *Georgia Judge Federal Blocks Rule Allowing Migrant Farmworkers to Join Unions in 17 States*, *Courthouse News*, COURTHOUSE NEWS (Aug. 26, 2024), <https://www.courthousenews.com/georgia-judge-blocks-federal-rule-allowing-migrant-farmworkers-to-join-unions-in-17-states/> [https://perma.cc/2J4L-8YEB].

40. *Id.*

41. *Id.*

42. Matt Shuham, *Elon Musk Suggests Getting Rid of All Regulations in Midnight Call*, *YAHOO NEWS* (Feb. 3, 2025), <https://www.yahoo.com/news/elon-musk-suggests-getting-rid-212557557.html> [https://perma.cc/CJ8T-XGDN].

evaluate strategies for achieving wage justice without the help of federal agencies for a few years.

The current political climate poses significant challenges for social movements advocating for higher wages. While race remains a crucial aspect of many such movements, it is essential to consider how they will navigate an environment that places less emphasis on diversity, equity, and inclusion.⁴³ There is a possibility that social movements may eschew a focus on race, but this would be a mistake. It would belie the underlying dynamics of our society.

Case studies show wage justice advocates successful strategies. One notable example is the Fight for \$15 movement.⁴⁴ This movement is not just about \$15 per hour and a union, but about the fundamental principles of how our society distributes monetary rewards for work.⁴⁵ The COVID-19 pandemic served as a stark revelation of the challenges faced by workers in hazardous occupations.⁴⁶ It exposed the fact that wages are not necessarily correlated with merit and demonstrated that they are often

43. Geri Stengel, *Fearless Fund Lawsuit Spotlights Bias Against Black Female Founders*, FORBES (Aug. 11, 2023), <https://www.forbes.com/sites/geristengel/2023/08/11/fearless-fund-fights-lawsuit-standing-up-for-black-female-founders/?sh=5a6e7b295619> [https://perma.cc/5GJR-RGVR]; Isabel Gottlieb, *Trump's DEI Order Creates Dilemma for Federal Contractors*, BLOOMBERG GOV'T (Feb. 13, 2025, 10:00 AM), <https://www.bgov.com/news/trumps-dei-order-creates-dilemma-for-federal-contractors> [https://perma.cc/3DCR-NHP3].

44. Yannet Lathrop, Matthew D. Wilson & T. William Lester, *Ten-Year Legacy of the Fight for \$15 and a Union Movement*, NAT'L EMP. L. PROJECT (Nov. 29, 2022), <https://www.nelp.org/insights-research/10-year-legacy-fight-for-15-union-movement/> [https://perma.cc/QR7M-NJ8B]; see also Emmanuel Elone, *Two California Cities Announce 2025 Minimum Wage Rates*, BLOOMBERG L. DAILY LAB. REP. (Oct. 25, 2024), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X28FG0SG000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/F7GA-GCZ5]; Emmanuel Elone, *Half Moon Bay, California, Minimum Wage Rising to \$17.47 for 2025*, BLOOMBERG L. DAILY LAB. REP. (Oct. 15, 2024), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/XCL4964G000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/DDY4-HX4C]; Emmanuel Elone, *Albuquerque, New Mexico, Announces Minimum Wage Rates for 2025*, BLOOMBERG L. DAILY LAB. REP. (Oct. 21, 2024), <https://news.bloomberglaw.com/daily-labor-report/albuquerque-new-mexico-announces-minimum-wage-rates-for-2025?context=search&index=25> [https://perma.cc/4FQT-JN93].

45. Lathrop et al., *supra* note 44, at 1.

46. Andrew Oxford, *California Passes Bill That Places Child Labor Audits Online*, BLOOMBERG L. DAILY LAB. REP. (Aug. 27, 2024), <https://news.bgov.com/daily-labor-report/california-passes-bill-that-places-child-labor-audits-online?source=newsletter&item=read-text®ion=top-stories-digest> [https://perma.cc/5Y8W-3HBR].

inversely proportional to the inherent risks associated with the job.⁴⁷

Movements like the Fight for \$15 can be traced back to the living wage movement of the 1990s. Sociologists like Stephanie Luce were among the first to show that this movement was transforming conversations about the maldistribution of wealth in society.⁴⁸ Although the living wage movement and the Fight for \$15 have yet to achieve an increase in the federal minimum wage, their alignment with other social and racial justice movements is evident in many workers' stories.

One such example is Jorel Ware, who was a fast-food worker in New York at McDonald's earning \$8.75 an hour at the end of two and a half years.⁴⁹ He went from the Fight for \$15 to the fight for Black Lives Matter, immigration reform, and childcare.⁵⁰ In Jorel's words, those issues are "basically the same because everybody's going through them . . ."⁵¹ The living wage movement was not limited to fast food workers. Nail salon workers like Berta Chacon joined the movement to advocate for immigration reform because she saw fair wages as part of the rights and dignity of immigrant workers.⁵²

More than three decades have passed since the advent of the living wage movement, and like other social movements, it currently finds itself at a pivotal juncture within the prevailing political landscape.⁵³ As we will see in the coming days, there are many strategic choices to be made in these times. It remains to be seen whether the commitment to racial justice will endure among advocates.

The Department of Labor focused on several important priorities during the Biden Administration. While there was a focus

47. See GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 118–29; see also Peter Dorman & Les Boden, *Risk Without Reward: The Myth of Wage Compensation for Hazardous Work*, in UNEQUAL POWER, ECON. POL'Y INST. (2021), epi.org/217414 [https://perma.cc/XH2X-7GAE] (presenting evidence that many high-risk workers are poorly paid).

48. STEPHANIE LUCE, FIGHTING FOR A LIVING WAGE 33–34, 36 (2004).

49. Willa Frej, *These Are the Faces of the Fight For 15 Movement*, HUFFPOST (Nov. 10, 2015), https://www.huffpost.com/entry/faces-of-fight-for-15-movement_n_56424398e4b0411d3072cc3e [https://perma.cc/9KVV-NTG9].

50. *Id.*

51. *Id.*

52. *Id.*

53. See, e.g., Charles Homans, *The Trump Resistance Won't Be Putting on Pink Hats This Time*, N.Y. TIMES (Jan. 19, 2025), https://www.nytimes.com/2025/01/19/us/politics/trump-inauguration-protest-democrats.html [https://perma.cc/JD2C-ZT75].

on misclassification—which had worsened and languished, particularly in the gig economy—Europe made significant progress in many aspects of the gig economy.⁵⁴ Over the last four years, the DOL pushed ahead with some race conscious policies that were stymied in the courts.⁵⁵

Mandated wage increases would serve several purposes. First, they would be a market-driven approach to setting wages, ensuring fair compensation for workers. Second, they would encourage greater safety on the job, providing workers with a more secure and well-paying environment. However, there is also a chilling effect. Workers in stressful positions are susceptible to wage theft that they may not feel comfortable complaining about. If the workplace is subject to other lawless activities like illegal firings, sexual harassment, or other legally hostile environments, workers may feel even less inclined to complain.

Furthermore, there are intersectional gaps in protection. Many workers are experiencing intersectional harms. For example, immigrants are disproportionately represented in hazardous occupations such as construction and meatpacking.⁵⁶ As I discuss in my book *Marginal Workers*, there are gaps in protective measures that workers fall through.⁵⁷ The data I found indicated a lack of complaints—however, the absence of complaints may not fully capture the situation.⁵⁸ There could be a chilling effect in the workplace.

The critique of liberal reform has been exemplified in various contexts. For instance, in matters like integration and affirmative

54. European Parliament, *Gig Economy: How the EU Improves Platform Workers' Rights*, EUROPEAN PARLIAMENT NEWS, <https://www.europarl.europa.eu/news/en/topics/social-protection/workers-rights/gig-economy-platform-workers-rights> [https://perma.cc/8CKZ-A7YZ].

55. See David Hamilton & Alexandra Olson, *New Rule Tightens Worker Classification Standards; Uber, Lyft Say Their Drivers Won't Be Affected*, AP NEWS (Jan. 9, 2024), <https://apnews.com/article/gig-workers-new-labor-rules-independent-contractors-df8101d6d22d5d3eda6def345fe95106> [https://perma.cc/67SV-X5CX] (discussing how the Biden administration enacted a new labor rule to prevent the misclassification of workers as independent contractors, aiming to bolster legal protections and compensation for many in the U.S. workforce. However, the implementation and enforcement of these rules have faced challenges and mixed results).

56. See BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS, HUM. RTS. WATCH (2005), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants> [https://perma.cc/NYJ3-CBNF].

57. GARCIA, *MARGINAL WORKERS*, *supra* note 27, at 18–19 (discussing how diffused political coalitions lead to few results protecting workers).

58. *Id.*

action, liberal reforms have consistently failed to achieve significant progress over the years.⁵⁹ Therefore, there is reason to be skeptical. However, in the context of wages, there are immediate and pressing needs that demand liberal reformist interventions.

There is certainly room to debate about how far to go to achieve wage justice. This is akin to debates in criminal justice between abolitionists and reformists. There are numerous reforms that could improve the lives of many prisoners in the penal system, such as ending forced labor or sentencing reform. Abolitionists, particularly those aligned with Critical Race Theory, are more likely to advocate for significantly revamped approaches to defining crime.⁶⁰

II. The Legal Framework for Wage Justice

The FLSA established a national minimum wage and overtime pay to safeguard workers and foster economic growth. While the FLSA has undergone amendments and expansions over time, its influence on employment remains a topic of contention among economists. Some studies suggest a negative correlation between minimum wage increases and employment, while others indicate minimal or no effect, underscoring the intricacies of the issue.⁶¹

Critical Wage Theory advocates for stronger worker rights by highlighting existing legal limitations and promoting fundamental labor principles. One strategy that is often touted as a solution to the challenges posed by wage labor and job displacement due to technological advancements is basic income.⁶² While it may offer

59. See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (Jul.–Aug. 2016) (examining the limitations of conventional diversity programs and proposing alternative strategies based on data analysis); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998) (examining the long-term impact of race-conscious admissions policies in higher education, providing empirical evidence from a comprehensive study); see also DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (examining the limits of reforms to end racism in the United States).

60. See RUTH WILSON GILMORE, *GOLDEN GULAG, PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007) (discussing the implications of the growth of California's prison system); see also Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022) (reviewing Mariame Kaba, *We Do This 'Til We Free Us* (2021)) (advocating for change in policing practices).

61. Compare DAVID NEUMARK, & WILLIAM L. WASCHER, *MINIMUM WAGES* (2008) (discussing different studies about the correlation between wage increases and employment levels.), with DAVID CARD & ALAN KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* (1995) (suggesting that the effect of minimum wage increases on employment is minimal or even negligible in some cases, challenging traditional views on the subject).

62. GUY STANDING, *BASIC INCOME: AND HOW WE CAN MAKE IT HAPPEN* (2017) (describing the concept of basic income, and its potential effects on the economy, the

certain benefits to workers, it also raises concerns about accountability and fairness. Giving a cash transfer to all citizens may not do much to subsidize the primary beneficiaries of labor through government intervention.

While basic income could theoretically be equitably designed, it will not be a viable alternative to the current wage labor system very soon. In the end, wage justice necessitates a neutral arbiter like government to establish fair wages, as racial exploitation becomes more probable without such an institution. Recent examples include wage boards.⁶³

A. *The Long View*

As the New Deal is reaching ninety years old this year, there is fair amount of revisionist history happening. Franklin Delano Roosevelt passed the New Deal and became a folk hero to generations of unionists.⁶⁴ Harry Truman continued that legacy by vetoing the Taft-Hartley Act, even though his veto was overridden.⁶⁵ The election of John F. Kennedy in 1960 and ascension of his brother to the Attorney General of the United States led to renewed scrutiny of the labor movement through the Labor Management Reporting and Disclosure Act.⁶⁶

The history of government involvement in wages dates to the 1930s with the enactment of the Davis-Bacon Act of 1931.⁶⁷ This act applies to all jobs that involve public money and sets a minimum wage. The Department of Labor enforces prevailing wage laws, conducts investigations, and monitors payroll records to ensure compliance. State agencies also play a role in enforcing wage laws for state-funded jobs.⁶⁸

This interventionist approach has been proven effective over the past century. Prevailing wage laws, despite their origins in racial protectionism, have contributed to a higher standard of living

poor and the future of work).

63. See, e.g., Cesar Rosado Marzan, *Can Wage Boards Revive U.S. Labor? Marshalling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV 127 (2020).

64. *FDR and the Wagner Act, A Better Relationship Between Management and Labor*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, <https://www.fdrlibrary.org/wagner-act> [<https://perma.cc/AH7M-46C4>].

65. *Veto of the Taft-Hartley Bill*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/120/veto-taft-hartley-labor-bill> [<https://perma.cc/2SHR-QDZR>].

66. 29 U.S.C. § 401.

67. 40 U.S.C. § 3141.

68. For an example of state agency enforcement, see *Labor Commissioner's Office*, STATE OF CAL. DEPT OF INDUS. RELS., <https://www.dir.ca.gov/DLSE/dlse.html> [<https://perma.cc/CBF3-5XCH>].

for many immigrants and workers of color.⁶⁹ The question now is how the new regime will approach this intervention. On the one hand, they owe much of their victory to rank-and-file voters, but on the other hand, they are also beholden to their corporate masters and home builders. There is certainly a scenario where the status quo will prevail, and another where there will be active dismantling of prevailing wage laws.

The critique of merit as leading to wage justice can also be seen through the lens of Critical Race Theory. If wages were solely determined by merit and productivity, it could potentially serve as a viable concept of justice. Artificial intelligence may bring us closer to achieving this goal through surveillance, monitoring, and keystroke technology. Employers utilize this technology to minimize time spent on tasks, potentially reducing wages to the minute or in six-minute increments.⁷⁰ While this system may be effective for large law firms, it remains uncertain whether workers would derive any benefits from such a system. In this way, the critique of merit may also guard against invasive surveillance.

Another aspect of wage justice that has recently been curtailed by the Supreme Court's decision in *Epic Systems v. Lewis* is the procedural aspect.⁷¹ In *Epic Systems*, the court ruled that wage injustice is not a matter of concerted activity protection, and therefore, class and collective actions can be curtailed by mandatory arbitration.⁷² This means that when there is systemic wage injustice, it becomes more challenging to remedy it. In March 2022, Congress enacted a law limiting mandatory arbitration for sexual harassment claims,⁷³ and so we can hope, someday, similar limits will be extended to help people of color and immigrants.⁷⁴

69. See GARCIA, CRITICAL WAGE THEORY, *supra* note 7 (discussing stories of successful organizing around prevailing wage laws).

70. See Max Freedman, *Time Clock Rounding Best Practices*, BUS. NEWS DAILY (Jan. 22, 2024), <https://www.businessnewsdaily.com/16113-time-clock-rounding.html> [<https://perma.cc/T6KQ-Q35G>] (explaining what time-clock rounding is).

71. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 516 (2018).

72. *Id.* at 519.

73. See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402; Deborah Anne Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, AM. BAR ASS'N (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/resources/magazine/archive/new-law-limits-mandatory-arbitration-cases-sexual-assault-harassment/ [<https://perma.cc/8DCN-6VW7>].

74. See, Ruben J. Garcia, *Arbitration Law and Labor Law at the Margins: Workers of Color Caught Between Collective and Individual Visions of Alternative Dispute Resolution*, in THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND

One of the defining characteristics of Critical Race Theory (CRT) is its challenge to the notion of merit.⁷⁵ Critical Race theorists have compellingly demonstrated that the concept of merit in education and employment is overdetermined and often hinders other racial justice goals.⁷⁶ The CRT approach aims to destabilize the notion of merit to achieve a more equitable society.⁷⁷

While there is much to discuss about the current political climate, my goal here is not to get bogged down in political contingencies, especially since we have been through this before. In this era of repression, we must be realistic about the possibilities that lie ahead. The current era is characterized by assaults on the very foundation of liberalism, encompassing issues like press freedom and free trade.⁷⁸ To confront these challenges, we require a concept of wage justice that is adaptable yet unwavering in its commitment to core values. These values encompass ensuring fair wages for the lowest-paid workers and acknowledging the redistributive and reparative role that wage justice plays in society.⁷⁹

Wage justice can be understood in various ways. Here is where the Rawlsian liberal paradigm is incomplete. Liberal theory posits a universal desire for fair treatment, even for those at the bottom of the economic ladder.⁸⁰ This aligns with traditional liberal principles, but it is not the foundation of Critical Wage Theory. Rawls's theory serves as a template for liberalism, emphasizing the importance of equal treatment for all, regardless of their economic status.⁸¹ This is grounded in the original position thought experiment, which suggests a society organized around two key principles: addressing inequalities and benefiting the least advantaged.⁸² These principles are chosen from a position of

A ROADMAP FOR REFORM (Richard Bales & Jill Gross eds. 2025).

75. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 105–07 (2001).

76. *See id.*

77. *See id.*

78. Edward Helmore, *Trump Sharpens Attacks on US Media as Voice of America Employees Put on Administrative Leave*, GUARDIAN (Mar. 15, 2025), <https://www.theguardian.com/us-news/2025/mar/15/trump-media-attacks> [<https://perma.cc/XW6Z-5UZ4>]; Fred P. Hochberg, *Tariffs Won't Make America Great Again: Export-Import Bank's Former Chairman and President*, FORTUNE (Mar. 17, 2025), <https://fortune.com/2025/03/17/tariffs-trade-trump-us-economy/> [<https://perma.cc/QU9E-49T5>].

79. *See* Crenshaw, *supra* note 6, at 1352.

80. RAWLS, *supra* note 11, at 4.

81. *Id.*

82. *Id.* at 13.

ignorance, ensuring justice for all members of society.⁸³ The difference principle, based on these ideas, allows for inequalities that benefit the least advantaged, while the opportunity principle guarantees their access to positions.⁸⁴ While Rawls's theory has been criticized for prioritizing utility over natural rights,⁸⁵ it remains a central focus for discussions on justice, equality, and the role of institutions in society.

Another conception of wage justice is simply moral desert, or "to each entitled to their abilities."⁸⁶ This notion of the meritocracy and the liberal order is one of the aspects that Critical Wage Theory rejects.⁸⁷ Instead, it advocates for higher wages as a matter of justice, rather than as a definition of economic merit.⁸⁸

Rawls's theory emphasizes impartiality and fairness in societal structures, aiming to reconcile liberty and equality.⁸⁹ It includes the original position, two principles of justice, and fair equality of opportunity.⁹⁰ The problem with the liberal paradigm is that it fails to consider the social conditions of racism in society. This is why critical theory counts these realities through the story telling of workers.

The current workplace and legal system crisis of legitimacy arises from unchecked capitalism's diminishing of law's significance.⁹¹ Presenting this unsettling notion to law students,

83. *Id.* at 17.

84. *Id.* at 62, 65.

85. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (Blackwell Publishers Ltd., 1974) (arguing for a libertarian approach to justice that eschews state intervention).

86. RAWLS, *supra* note 11, at 310–315; *see also* *Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHIL., Winter 2017, <https://plato.stanford.edu/entries/justice-distributive/> [<https://perma.cc/M65M-DUR2>] (explaining "Rawls' Difference Principle approach, that those with unequal natural endowments should receive compensation. For instance, people born with disabilities, or ill-health, who have not brought these circumstances upon themselves, can be explicitly compensated so that they are not disadvantaged by their economic prospects").

87. *See* DELGADO & STEFANCIC, *supra* note 75, at 105–07.

88. *See* RAWLS, *supra* note 11, at 7.

89. *See* *Justice as Fairness: John Rawls and His Theory of Justice*, 23 BILL OF RIGHTS IN ACTION, no. 3, Fall 2007, <https://teachdemocracy.org/online-lessons/bill-of-rights-in-action/bria-23-3-c-justice-as-fairness-john-rawls-and-his-theory-of-justice> [<https://perma.cc/UU28-P74Y>].

90. *See* Julian Lamont & Christi Favor, *Distributive Justice*, in STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta, ed., 2017), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-distributive> [<https://perma.cc/2XT4-MMN3>] (discussing Rawls' theory of justice).

91. *See* Randy Albelda, Book Review, *The Gloves-Off Economy*, 48 BRITISH INT'L J. INDUS. EMP. REL. 201, 222 (2010) (reviewing *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET*, in *LABOR AND EMPLOYMENT SERIES* (Annette Bernhardt et al. eds., 2008)).

professors, and attorneys is challenging, but new justice concepts are urgently needed. Despite societal disparities, we need fresh reasons for expanding opportunity and equity amidst regressive political trends. Growing attacks on diversity, equity, and inclusion necessitate reevaluating worker justice principles.⁹² Will this era be another familiar cycle or a profound transformation? Several indicators suggest it is merely a continuation: the same president that was in office in 2017 was once again elected in 2025, Republicans once again hold a narrow majority in Congress, and the Supreme Court maintains a conservative majority. However, structural shifts suggest otherwise.

The perspective of the employers in this current moment should be considered. In their eyes, justice emerges as the most practical outcome, considering the constraints imposed by the market and our own psychological inclinations. While everyone strives for this ideal, as we delve into some of the movements that emerged during the most tumultuous periods of the past century, approaching the centennial and potentially the culmination of the New Deal, it is imperative to redefine wage justice. In this Article, I argue that wage justice encompasses a substantive component that extends to racial justice.

In my work, I have highlighted the stories of marginalized workers, including low-wage workers organizing unions and farmworkers struggling with misclassification. Despite protective labor laws, significant gaps persist, especially affecting farmworkers and domestic workers. Labor law, employment, and international labor law are fragmented and siloed, primarily focusing on statutes and common law. The goal of Critical Wage Theory is to bring together disparate elements of workplace protection for the benefit of marginalized workers.

Advocates of social justice hope for ongoing efforts to raise the minimum wage at the state and local levels.⁹³ Many individuals still

92. *Dismantling DEI: A Coordinated Attack on American Values*, MOVEMENT ADVANCEMENT PROJECT (July 2024), <https://www.mapresearch.org/2024-dei-report> [<https://perma.cc/N5TX-624U>]; Shari Dunn, *It's Time That Corporate Attorneys Shifted from Defense to Offense on DEI*, HILL (Mar. 19, 2025), <https://thehill.com/opinion/5202409-corporate-america-dei-strategy/> [<https://perma.cc/4JPP-U487>].

93. See, e.g., McKenna Ross, *Nevada Home Health Workers Seek \$20 Minimum Wage*, L.V. REV. J. (Jan. 30, 2025), <https://www.reviewjournal.com/life/health/nevada-home-health-workers-seek-higher-minimum-wage-3272833/> [<https://perma.cc/5DK5-DWCC>]; Colton Lochhead & Bill Dentzer, *Nevada Bill Would Allow College Athletes to Profit*, L.V. REV. J. (Mar. 12, 2021), <https://www.reviewjournal.com/news/politics-and-government/carson-city-journal/nevada-bill-would-allow-college-athletes-to-profit-2302358/>

struggle with financial insecurity. One pernicious aspect of low-wage earner treatment is the social construction of poverty.⁹⁴ The future is uncertain, but there is a genuine possibility that fundamental New Deal safeguards may be repealed in the coming years.⁹⁵

Workers' narratives reveal the dynamic interplay between legal frameworks and social movements, showcasing diverse outcomes in their pursuit of rights. These stories prompt us to reevaluate legal strategies for safeguarding low-wage workers. However, Work Law courses often focus solely on legal doctrines, neglecting this broader perspective. To address this gap, I propose a novel approach that reclaims narrative space and explores alternative strategies for protecting vulnerable workers.

Employers significantly influenced the development of legal bodies, leading to statutory gaps that exploit workers.⁹⁶ Understanding this role can shed light on how laws are shaped and why protection may be potentially uneven across sectors. Alternative strategies, such as grassroots organizing, collective bargaining, public awareness campaigns, and corporate social responsibility initiatives, could have been employed instead of relying solely on legal mechanisms. By evaluating these approaches, stakeholders can identify more effective ways to advance wage justice and protect workers' rights.

We must continue to explore the commonalities between workers' rights movements and other relevant social movements to achieve wage justice. We must continue to recognize the connection between wage injustice and the effects of slavery that have persisted for nearly two centuries.

[<https://perma.cc/9TGG-4M9Z>]; Glen Meek, *Inmate Wages Not 'Slave Labor,' Nevada High Court Rules in Dismissal*, L.V. REV. J. (Aug. 10, 2022), <https://www.reviewjournal.com/news/politics-and-government/inmate-wages-not-slave-labor-nevada-high-court-rules-in-dismissal-2621234/> [<https://perma.cc/T7ZH-XG6Y>].

94. Lathrop et al., *supra* note 44.

95. See John Tarleton, *The Right Wing's Goal of Repealing the 20th Century is Now Within Reach. Who Will Stop Them?*, INDYPENDENT (Feb. 13, 2025), <https://indypendent.org/2025/02/the-right-wings-goal-of-repealing-the-20th-century-is-now-within-reach-who-will-stop-them/> [<https://perma.cc/MX98-7HMY>]; see also NATALIE FOSTER, *THE GUARANTEE: INSIDE THE FIGHT FOR THE NEXT ECONOMY* (2024) (discussing strategies for the protection of New Deal such as economic and retirement security).

96. See LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., *EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS* (2020), <https://files.epi.org/pdf/215908.pdf> [<https://perma.cc/RU9W-G9KG>] (explaining that the decline of unionization was due to "a combination of employer tactics and weaknesses in the law").

B. Social Movements

Critical Wage Theory delves into the Los Angeles Living Wage Ordinance, requiring businesses to pay a specific wage above the California minimum.⁹⁷ Community activists successfully implemented these ordinances, like efforts in Pasadena and Santa Monica,⁹⁸ where I provided pro bono legal assistance. These campaigns paved the way for progressive change in several cities, but their impact was limited. For instance, the Santa Monica ordinance extended its coverage to the “Coastal Zone,” making it more broadly applicable but also more controversial.⁹⁹ It faced legal challenges and was eventually repealed.¹⁰⁰ Despite these efforts being around for years, minimum wage legislation remains contentious.

Constitutional litigation has also provided inadequate remedies,¹⁰¹ and court decisions often prioritize individual worker rights over collective rights, discouraging union membership.¹⁰² Recent rulings have also compromised unions’ ability to pursue political objectives and preserve their integrity, including interference with communication and democratic participation.¹⁰³ While the concept of “political power” is relative, so is the term “generous wages.” Many workers in the private sector struggle with reduced wages and benefits.¹⁰⁴

97. L.A., CAL., CHARTER & ADMIN. CODE § 10.37 (2024) (Living Wage Ordinance).

98. PASADENA, CAL., MUN. CODE § 4.11.010 (2025); SANTA MONICA, CAL., CODE OF ORDINANCES §4.65.010 (2025).

99. Stephanie Luce, *Living Wage Movement: An Update*, AGAINST THE CURRENT, Jan./Feb. 2001, <https://againstthecurrent.org/atc090/p1533/> [<https://perma.cc/9ZNG-N84D>] (discussing the expansion of the coastal zone as a grassroots movement). For an excellent discussion on the controversy surrounding the original version of the Santa Monica Living Wage Ordinance, see Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California*, in CAUSE LAW. & SOC. MOVEMENTS 249 (Austin Sarat & Stuart A. Scheingold, eds. 2006).

100. Compare Michael Reich, *Living Wage Ordinances in California*, in U. CAL. INST. LAB. & EMPL., THE STATE OF CALIFORNIA LABOR 202 tbl.6.1 (2003), with SANTA MONICA, CAL., CODE OF ORDINANCES §4.65.010 (2025).

101. See, Ruben J. Garcia, *Politics at Work After Citizens United*, 49 LOY. L.A. L. REV. 1, 24–25 (2016).

102. See, e.g., Janus v. American Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (requiring non-member public sector employees represented by a union to pay union dues violates the First Amendment); Knox v. Service Emps. Int’l Union, Local 1000, 567 U.S. 298 (2012) (holding that public sector unions must provide notice to employees every time assessments are made for political mobilization).

103. See *id.*

104. Bryan Robinson, *The Wage Crisis of 2025: 73% of Workers Struggling*, FORBES (Jan. 24, 2025), <https://www.forbes.com/sites/bryanrobinson/2025/01/24/the-wage-crisis-of-2025-73-of-workers-struggling/> [<https://perma.cc/YLG2-CS6X>]

Now, we must find and define the unfulfilled promises of law. We must explore how the structure and content of law contributes to its ineffectiveness. And yet we must also see how collective action can overcome these shortcomings. I witnessed this firsthand in the case of *Michael's Painting*, which I discuss in *Critical Wage Theory*. This action involved immigrant painters who sought to be paid accurate prevailing wages and the recognition of their union.¹⁰⁵ The NLRB found that the workers were unlawfully terminated for organizing a union.¹⁰⁶ The employer directly stated the reason for firing, aiding unionization, without fear of legal repercussions.¹⁰⁷ The employer's actions effectively communicated that unionizing was not an option.¹⁰⁸

In debates about amending and enforcing statutes, theories of justice and foundational labor principles are often overlooked. This book reveals how statutes create gaps that workers exploit.¹⁰⁹ I aim to strengthen arguments for workers' rights protection, fostering common ground on fundamental principles despite disagreements about their scope. Ultimately, I envision workers' rights recognized alongside critical issues like climate change, financial collapse, and healthcare, leading to improved conditions for workers. That is a long-term vision.

My objective is to develop a theory of wage justice and show why raising the minimum wage is racial justice. This is complex, especially since I have argued economic consequences aren't primary.¹¹⁰ To address this issue, we must consider three distinct concepts of justice: (1) egalitarianism, which emphasizes equality; (2) focusing on the most vulnerable individuals; and, (3) most importantly, combining the first two approaches to treat the least privileged.¹¹¹ This concept also aligns with how our society distributes monetary rewards for work.

The neoclassical model of labor economics, while influential, faces strong critiques that align with legal arguments for regulating employment relationships. Regulation of the labor market, particularly regarding wages and hours, has a long history, with

(indicating through a study that rising living costs and stagnant wage are affecting not just low-wage earners).

105. *Michael's Painting, Inc.*, 337 N.L.R.B. 860 (2002), *enfd.*, 85 F. App'x 614 (9th Cir. 2004).

106. *Id.* at 860–62.

107. *Id.*

108. *Id.*

109. GARCIA, *CRITICAL WAGE THEORY*, *supra* note 7, at 25.

110. *Id.* at 26.

111. *Id.* at 118–19.

examples going back centuries.¹¹² The Great Depression catalyzed a shift in U.S. labor law, with the Supreme Court upholding minimum wage legislation and paving the way for broader labor protections.¹¹³

III. Challenges Faced by Low-Income Workers

A. *The Story of Maria Blanco*

The recent Eleventh Circuit opinion of *Blanco v. Samuel* provides another example of the many areas in which immigrants and people of color are often most in need of wage justice.¹¹⁴ The FLSA governs overtime pay for nannies, with exemptions for those residing in the household where they work.¹¹⁵ Maria Blanco, a domestic worker for the Samuel family, worked seventy-nine hours a week, primarily overnight shifts, and asserted her entitlement to overtime pay under the FLSA.¹¹⁶ The parents contended that Blanco was exempt from overtime pay due to the live-in service exemption, asserting that she resided in their household.¹¹⁷

Blanco's extensive time spent at the Samuels' house was not sufficient to establish residency, as evidenced by her maintaining a separate address, spending time away from the house, and not having a key.¹¹⁸ The Samuels' arguments, including occasional sleepovers and the display of personal items, were insufficient to meet the residency criteria.¹¹⁹ Even considering DOL regulations, Blanco's work schedule and living arrangements did not align with the criteria for residency.¹²⁰

The Eleventh Circuit Court of Appeals ruled that Blanco was entitled to overtime pay under the FLSA. The court found that Blanco did not "reside" at the employer's premises, as defined by the Department of Labor, and thus did not qualify as a live-in domestic worker and was entitled to overtime compensation.¹²¹ The court also

112. See, e.g., Peter Stabel, *Labour Time, Guild Time? Working Hours in the Cloth Industry of Medieval Flanders and Artois (Thirteenth-Fourteenth Centuries)*, 11 TIJDSCHRIFT VOOR SOCIALE EN ECONOMISCHE 27 (2014) (discussing the debate on labor time in the medieval industries).

113. *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937).

114. *Blanco v. Samuel*, 91 F. 4th 1061 (11th Cir. 2024).

115. See U.S. DEP'T OF LAB., FACT SHEET #79B, *supra* note 29.

116. *Blanco*, 91 F.4th at 1065.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1071.

121. *Id.*

identified a genuine dispute of material fact regarding who should pay Blanco's overtime wages.¹²²

Although the story of Maria Blanco is one of many examples of marginal workers seeking justice in the face of a challenging legal framework, her story shows the path for many whose stories we do not know. The story also reminds us of the need for collective action, particularly in this industry with a high number of immigrant and women workers.

B. Tipped Workers, Retaliation, and Secure Scheduling

The tip credit formula, established in 1996, permits employers to pay tipped employees a lower minimum wage, relying on tips to make up the difference.¹²³ However, this system faces interpretive challenges, particularly regarding the distinction between tips and service charges and the legality of tip pooling.¹²⁴ While the FLSA sets a federal minimum wage, state laws often provide more robust protections for tipped workers, including higher minimum wages and restrictions on tip credit practices.¹²⁵ In the next four to ten years, the movement organization One Fair Wage will continue to advocate for the end of the tipped minimum wage in the FLSA, but will likely be faced with the simplistic retort of "No Tax on Tips."¹²⁶

122. *Id.*

123. DAVID H. BRADLEY, CONG. RSCH. SERV., R43445, TIP CREDIT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA): IN BRIEF 2 (2015); Sylvia Allgretto, *Here's a Tip: Tips Are Not Always a Gratuity*, CTR. ECON. & POL'Y RSCH. (May 20, 2024), <https://cepr.net/publications/heres-a-tip-tips-are-not-always-gratuity/> [<https://perma.cc/385F-E66X>].

124. BRADLEY, *supra* note 123, at 1 n.2; U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2024), <https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa#:~:text=An%20employer%20must%20pay%20a,is%20currently%20%247.25%20per%20hour> [<https://perma.cc/T4AA-JT5Z>].

125. BRADLEY, *supra* note 123, at 7–9. For example, the tipped minimum wage in Oregon varies by region, but is \$13.70 per hour in the non-urban counties. See *Minimum Wages for Tipped Employees*, U.S. DEP'T OF LAB. (Jan. 1, 2025), <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped> [<https://perma.cc/YD98-XN8M>].

126. Kevin Sheridan, *Rosen, Cortez Masto Help Introduce Bill Exempting Tips from Federal Income Taxes*, FOX 5 LAS VEGAS (Jan. 16, 2025), <https://www.fox5vegas.com/2025/01/16/rosen-cortez-masto-help-introduce-bill-exempting-tips-federal-income-taxes> [<https://perma.cc/UX7W-LM7Q>]; see also Jessica Hill, 'A Tip is a Gift, Not a Guarantee': *Horsford Bill Aims to End Taxes on Tips, Subminimum Wage*, LAS VEGAS REV. J. (Feb. 14, 2025), <https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-lawmaker-boosts-tips-act-to-end-taxes-on-tips-subminimum-wage-3304311/> [<https://perma.cc/2HJY-GX6W>].

Employers oppose eliminating the tip credit, fearing it will reduce employment and potentially lead to restaurant closures.¹²⁷ However, proponents argue that a two-tiered wage system is unfair and advocate for raising or eliminating the tip credit, citing successful examples of states with equal treatment policies.¹²⁸ Enforcing the FLSA presents challenges, including limited resources, employee reluctance to complain due to fear of retaliation, and reliance on incomplete or inaccurate employer records.¹²⁹

Low-wage workers frequently encounter precarious work schedules, necessitating legislation to establish comprehensive scheduling standards.¹³⁰ While some states have enacted laws addressing volatile job schedules,¹³¹ many workers still lack adequate protection. Historical child labor practices in the United States, characterized by exploitation and hazardous conditions, led to the formation of organizations like the National Child Labor Committee, ultimately resulting in federal regulations such as the FLSA.¹³² Many of these workers are women and people of color.¹³³

127. *The Fight Against Tip Credit Elimination Across the Country*, MINIMUM WAGE FACTS & ANALYSIS (Mar. 17, 2023, 2:19 PM), <https://minimumwage.com/2023/03/the-fight-against-tip-credit-elimination-across-the-country/> [<https://perma.cc/8J5L-HB49>] (discussing workers who are mobilizing in favor of the two-tier wage system).

128. SARAH JAVAID, NAT'L WOMEN'S L. CTR., ONE FAIR WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS 1–2 (2024), <https://nwlc.org/wp-content/uploads/2024/06/Tipped-Workers-FS-2024.6.12v1.pdf> [<https://perma.cc/5E5C-6QUV>]; see also L.A., CAL., ADMIN. CODE §§ 10.37 (2024).

129. *Enforce Labor Law Protections to Improve Workers' Lives*, NAT'L EMPL. L. PROJECT, <https://www.nelp.org/explore-the-issues/enforcing-labor-laws/> [<https://perma.cc/E9XE-7UUY>].

130. NAT'L WOMEN'S L. CTR., COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW WAGE JOBS AND THEIR CONSEQUENCES (2017) <https://nwlc.org/wp-content/uploads/2017/04/Collateral-Damage.pdf> [<https://perma.cc/MVP7-FMFM>] (discussing the 21.6 million workers in low-wage jobs that are affected by insecure schedules).

131. *Secure Scheduling Ordinance: Questions and Answers*, SEATTLE OFF. LAB. STANDARDS (Feb. 27, 2023), https://www.seattle.gov/documents/Departments/LaborStandards/SS%20QA_FINA_L_02272023%20comprehensive.pdf [<https://perma.cc/8AXG-J837>]; KRISTEN HARKNETT, DANIEL SCHNEIDER & VERONIQUE IRWIN, U.S. DEP'T LAB., EVALUATING THE IMPACTS OF THE SEATTLE SECURE SCHEDULING ORDINANCE (2021), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/LRE_Harknett-EvaluatingImpactsSeattleSecureSchOrdinance_December2020.pdf [<https://perma.cc/VY84-EKXC>] (examining the effects of Seattle's Secure Scheduling Ordinance, highlighting improvements in schedule predictability for workers).

132. See, e.g., VINCENT DIGIROLAMO, CRYING THE NEWS: A HISTORY OF AMERICA'S NEWSBOYS (2019) (discussing the history and labor conditions of newsboys in the United States).

133. See NAT'L WOMEN'S L. CTR., *supra* note 130.

Secure scheduling has not saved the day because it just provides notice and not a stable schedule.

In a future where race and diversity are actively deemphasized, there are several potential remedies that do not explicitly prioritize race but could still be beneficial. One such approach is to impose risk premiums on wages. For instance, “dangerous jobs” could be rated and indexed based on past injuries and fatalities, and then a risk premium of 15–20% of the minimum wage could be charged for these occupations. This strategy would be particularly advantageous to many immigrants and people of color who work in hazardous industries.

IV. Looking Forward

The Thirteenth Amendment aimed to prevent forced labor in the United States, as evidenced by Congressional debates and case law involving debt-based contracts as faux-entrepreneurship.¹³⁴ Many of the arrangements that are being revived in the gig economy are framed as worker-friendly approaches, but are benefiting putative employers more than the laborers themselves.¹³⁵ What we need are real solutions, such as a higher minimum wage and the elimination of the tipped minimum wage.

Wage transparency laws are being passed, but they are not enough.¹³⁶ There are other considerations. In environments where

134. U.S. CONST. amend. XIII. Debt peonage contracts kept workers bound to the land until they paid their debts. The Supreme Court held these to be a violation of the Thirteenth Amendment. *Pollock v. Williams*, 322 U.S. 4 (1944). For more information about the Congressional debate leading to the passage of the FLSA, see Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 24–28.

135. See Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL. INST. (June 1, 2022), <https://www.epi.org/publication/gig-worker-survey/> (finding that gig workers face poor working conditions, earning less than minimum wage and facing food insecurity, technological glitches, and unpaid bills).

136. See, e.g., *Staying Ahead of the Curve: A Guide to California’s Pay Transparency Laws*, FARELLA BAUN + MARTEL (Feb. 18, 2025) <https://www.fbm.com/publications/staying-ahead-of-the-curve-a-guide-to-californias-pay-transparency-laws/> [<https://perma.cc/6M68-SE8Y>] (explaining California’s wage transparency law, § 432.3 of the California Labor Code); *Equal Pay for Equal Work Act*, COLO. DEPT OF LAB. & EMPL., <https://cdle.colorado.gov/labor-law-stats/labor-laws-by-topic/equal-pay-for-equal-work-act> [<https://perma.cc/Q6GL-5MVD>] (explaining Colorado’s pay transparency law, Part 2 of the Equal Pay for Equal Work Act); WASH. REV. CODE § 49.58.110 (2025); *Connecticut Law to Require Provision of Wage Ranges to Applicants and Employees*, Morgan Lewis (June 30, 2021), <https://www.morganlewis.com/pubs/2021/06/connecticut-law-to-require-provision-of-wage-ranges-to-applicants-and-employees> [<https://perma.cc/JV9D-RFT4>]

workers fear retaliation, labor and employment law have long been closely intertwined with the struggles of economically vulnerable workers. Despite the progress made by New Deal and progressive reformers, significant gaps persist, particularly affecting farmworkers and domestic workers. These workers often face misclassification and lack of statutory protections.¹³⁷ This paper delves into the historical context and current challenges, proposing innovative strategies for advocacy and education.

When examining the historical context of labor laws in the United States, it is crucial to consider the legacy of the New Deal and the progressive reforms of the early twentieth century. These initiatives were pivotal in shaping the labor landscape by introducing a series of laws aimed at safeguarding workers' rights and enhancing working conditions. Despite these advancements, substantial gaps remain, particularly impacting low-wage and vulnerable workers. These gaps are often the consequence of enduring systemic issues and policy oversights that have failed to adequately address the needs of these groups.¹³⁸

Further, the role of interest group politics has been a pivotal factor in the evolution of labor legislation. Interest groups, such as labor unions and business organizations, have historically wielded considerable influence over political decision-making processes.¹³⁹ Their lobbying efforts can significantly impact the passage and implementation of labor laws, often reflecting the priorities and agendas of these powerful entities. This dynamic has, at times, contributed to the persistence of economic gaps,¹⁴⁰ as competing interests and power imbalances may overshadow the concerns of the most vulnerable workers. Understanding these historical and political contexts is essential for comprehending the current state

(explaining Connecticut's wage transparency law, Connecticut Public Act 21-30).

137. See BLOOD, SWEAT, AND FEAR, *supra* note 56.

138. See ADEWALE MAYE, ECON. POL. INST., CHASING THE DREAM OF EQUITY: HOW POLICY HAS SHAPED RACIAL ECONOMIC DISPARITIES (2023), <https://files.epi.org/uploads/270308.pdf> [<https://perma.cc/DE7V-L95D>] (arguing that failure to address economic demands after the Civil Rights Movement "has adversely impacted the economic security of people of color and exacerbated many of the long-standing racial disparities in economic outcomes present today").

139. See Garcia, *Arbitration Law and Labor Law at the Margins*, *supra* note 74, at 1.

140. See VALERIE WILSON & WILLIAM DARITY, JR., ECON. POL. INST., UNDERSTANDING BLACK-WHITE DISPARITIES IN LABOR MARKET OUTCOMES REQUIRES MODELS THAT ACCOUNT FOR PERSISTENT DISCRIMINATION AND UNEQUAL BARGAINING POWER (2022), <https://files.epi.org/uploads/215219.pdf> [<https://perma.cc/9KXY-4AZB>] (outlining the economic gaps between Black and white workers, including unemployment and pay disparities).

of labor laws and the challenges that persist in ensuring equitable protections for all workers.

Contemporary labor law challenges demand significant reforms, particularly in economic justice and integrating diverse theoretical perspectives. The stagnant federal minimum wage in the United States since 2009 has sparked a broader debate on economic justice and the shaping of new labor law.¹⁴¹ This persistent stagnation has fueled grassroots advocacy movements for wage increases, reflecting a collective effort to address income and living standards disparities.¹⁴²

An innovative approach to understanding these challenges lies in the emerging field of Critical Wage Theory. This theory examines the intersections of labor law and racial justice, arguing that achieving economic equity requires addressing racial disparities within the labor market.¹⁴³ It offers novel insights into crafting inclusive and equitable wage policies. Critical Wage Theory is both a normative and descriptive book.¹⁴⁴ I am describing the techniques that many movements are using to push for economic justice. I also argue normatively that this is needed to achieve true wage justice.

Conclusion

In this Keynote Address, I have emphasized the need to rethink labor and employment law justice. By adopting a broader educational perspective that includes historical lessons and coalition-building, we can develop more effective strategies for protecting vulnerable workers. The intersection of labor law with other social justice movements offers a rich terrain for exploration and potential reform.

As I have argued, the neoclassical analysis of employment regulation fails to acknowledge the realities of the modern workplace. The economic analysis posits that labor market

141. See Kimberly Sanchez Ocasio & Leo Gernter, *Fighting for the Common Good: How Low Wage Workers Identities Are Shaping Labor Law*, 126 Yale L.J. 503 (2017) (analyzing the role of workers in organizing campaigns for increased minimum wages and other workplace inequalities).

142. There are several examples of grassroots organizations that prioritize racial justice in their advocacy for economic rights. These include E.A.T. in Chicago (Black workers), Fe y Justicia in Houston (immigrant workers), and the South Asian Workers Center in Boston (South Asian low-wage immigrant workers). See Kenya Evans, *13 Nonprofits Fighting for Workers' Rights in America*, PHILANTHROPY TOGETHER (Aug. 29, 2024), <https://philanthropytogether.org/13-nonprofits-fighting-for-workers-rights-in-america/> [https://perma.cc/AGT7-GQ8F].

143. GARCIA, CRITICAL WAGE THEORY, *supra* note 7.

144. See *id.*

regulations, such as minimum wage laws, are inefficient within the neoclassical framework and result in higher costs for employers and lower wages for employees.¹⁴⁵

The neoclassical model oversimplifies the employment relationship, ignoring human elements and market imperfections like monopsony, transaction costs, and information asymmetry, leading to suboptimal outcomes for workers of color. Regulation can address these issues, potentially boosting wages, employment, and efficiency for all, while also improving the macroeconomic factors like economic cycles and human capital disinvestment emphasize the need for government regulation of wages for long-term economic growth and stability.

In the end, though, wage justice is less about economics than it is about how society values those who work. The minimum wage is one of the only vehicles in which we as a democracy puts value on labor.¹⁴⁶ When the monetary value of an hour of labor is irrationally low, the inference must be that the value of the person doing the work is also being undervalued. The intersection of race, gender and immigration status with that devalued labor only further highlights the suspicion that low wages and wage theft are part of the structural disadvantages that many people of color face in society today. With the attacks on diversity, equity and inclusion, the need for wage justice as racial justice is as great as ever. As Senator Edward “Ted” Kennedy said in 1980, at the cusp of another inflection point in the nation’s politics: “[t]he work goes on, the cause endures, the hope still lives”¹⁴⁷ To paraphrase Senator Kennedy’s concluding words at the 1980 Democratic National Convention, the dream of wage justice “shall never die.”

145. *See supra* Part II.

146. *See id.*

147. Senator Edward M. Kennedy, Address to the Democratic Nat’l Convention (Aug. 12, 1980) (transcript available at <https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/edward-m-kennedy/edward-m-kennedy-speeches/address-to-the-democratic-national-convention-new-york-city-august-12-1980> [https://perma.cc/7CJC-CLWX]).