

EMPLOYMENT REGULATION AND YOUTH EMPLOYMENT: A CRITICAL PERSPECTIVE

J.H. VERKERKE*

An important body of legal and economic scholarship considers whether, and to what extent, employment regulations increase firms' firing costs and reduce their demand for labor.¹ Researchers have debated this question for decades without reaching a definitive conclusion. In their contributions to this panel, Professor Heriot and Professor Epstein advance a decidedly anti-regulatory thesis.² They argue that U.S. employment laws harm American workers by significantly impairing the efficiency of U.S. labor markets. According to their account, firms would react to the repeal of existing labor regulations by hiring more workers, and, especially, by employing more young people.

In this brief essay, I offer a critical perspective on their hypothesis. First, the neoclassical economic theory on which they rely rests on several empirical assumptions that are at odds with the reality of contemporary labor markets. Indeed, no economic theory can provide a compelling *a priori* reason to repeal any of these regulatory measures. Second, concerns other than economic efficiency quite properly influence public policy. Plausible non-efficiency justifications support many current U.S. labor regulations and may trump the efficiency goals that Professors Heriot and Epstein wish to promote. Finally, the available empirical evi-

* Professor of Law and Director, Program for Employment and Labor Law Studies, University of Virginia School of Law.

1. See, e.g., Benoit Pierre Freyens, *Measuring Firing Costs: The Case for Direct Methods*, 149 INT'L LAB. REV. 287, 295 (2010). See generally J.H. Verkerke, *What We Know (and Don't Know) About Employment Protection Law*, in ENTERPRISE LAW: CONTRACTS, MARKETS, AND LAWS IN THE US AND JAPAN 53 (Zenichi Shishido ed., 2014); J.H. Verkerke, *Discharge*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 447 (Kenneth G. Dau-Schmidt et al. eds., 2009).

2. Richard Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL'Y 787 (2015); Gail Heriot, *Working Backwards: How Employment Regulation Hurts the Unemployed*, 38 HARV. J.L. & PUB. POL'Y 781 (2015).

dence casts considerable doubt on the argument that labor regulations in the United States dramatically reduce employment opportunities for young people, though most studies suggest that minimum wage laws modestly diminish youth employment.

I. ECONOMIC THEORY IS INCONCLUSIVE

Critics of employment protective legislation often rely on the neoclassical argument that these legal rules distort employers' decisions and interfere with labor market efficiency.³ This line of argument, however, rests on several contestable assumptions. The theory requires a perfectly competitive market, in which no one exercises either monopoly or monopsony power. Workers also need reasonably full information about the characteristics of jobs and firms, and they must be able to move freely between jobs, in order to impose market discipline on those firms that treat workers poorly or fail to pay them well enough. Finally, there must be no externalities arising from employment and no subsidies that distort labor supply or demand.

These conditions are rarely, if ever, satisfied. Although traditional company towns are now, admittedly, quite unusual, scarce job opportunities undoubtedly give the dominant employer in certain local areas at least some market power. More broadly, features common to every labor market significantly impede job mobility. Location-specific investments—such as homeownership, family ties, and spousal employment—prevent many workers from relocating to take advantage of better opportunities elsewhere. Moreover, the lock-in effect of company-provided health insurance has long deterred workers with pre-existing conditions from changing jobs, though provisions of the Affordable Care Act have now largely eliminated this problem.⁴

The other neoclassical assumptions fare no better. Information about firms can sometimes be adequate, but it is often incomplete and imperfect. And many subsidies and externalities influence both labor supply and demand. For example, the earned income tax credit, food stamps, and other income supports, as well as the charity care provided by most hospitals, distort

3. See, e.g., Juan C. Botero et al., *The Regulation of Labor*, 119 Q.J. ECON. 1339 (2004).

4. 42 U.S.C. § 300gg-3 (2012).

workers' labor supply decisions. These cash and in-kind transfer payments allow firms to pay lower wages than the market would require in the absence of such social insurance measures. Similarly, companies of all kinds receive a vast array of subsidies—both direct payments and tax incentives—that dramatically alter their demand for labor. Political actors are extremely unlikely to eliminate most of these payments regardless of which party controls Congress, the presidency, or both.

That real world labor markets depart so dramatically from the assumptions of neoclassical economic theory undermines the claim that employment regulations distort a preexisting, efficient, competitive equilibrium. Professor Epstein argues that repealing most employment regulations would move the market toward efficiency. According to the general theory of the second best, however, economic theory cannot tell us whether eliminating any specific policy measure will improve market efficiency.⁵ Theoretical reasoning alone is insufficient to sustain Professor Epstein's claim about efficiency. It is instead an empirical question how regulation affects the labor market. Thus, a more defensible economic analysis would acknowledge significant real-world market imperfections and recognize that we need persuasive empirical evidence to evaluate the efficiency consequences of any specific regulatory measure.

II. NON-EFFICIENCY GOALS ARE IMPORTANT

As we have seen, economic theory alone cannot guide us to an efficient legal regime. It is equally important to remember that public policy legitimately pursues goals other than economic efficiency. For example, an ongoing debate addresses the causes and consequences of income inequality in contemporary society.⁶ Many people believe that principles of distrib-

5. See, e.g., Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3 (1998); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189 (1998).

6. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); Jonathan Heathcote et al., *Unequal We Stand: An Empirical Analysis of Economic Inequality in the United States, 1967-2006*, 13 REV. ECON. DYNAMICS 15 (2010); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. ECON. 1 (2003).

utive justice require some form of social safety net. Others advocate far more aggressive redistributive measures.

Wherever one stands on these issues, legislators often act to protect dignitary interests or to express approval or disapproval of conduct on grounds that are unrelated to efficiency. Thus, for example, a compelling defense of employment antidiscrimination laws rests on the expressive function of these statutes.⁷ The goal of an employment discrimination statute may be, in part, to eliminate inefficient coworker discrimination—an efficiency motivation. But prohibiting employers from discriminating on the basis of race, sex, religion, age, disability, or sexual orientation also expresses social disapproval of those practices. Many advocates of these laws hope to shift social norms and transform our culture into one that rejects discriminatory attitudes and preferences. It follows that economic efficiency is neither a necessary nor a sufficient argument for any particular regulatory measure.

III. EMPIRICAL EVIDENCE

If neoclassical theory rests on implausible assumptions about labor markets and if the single-minded pursuit of efficiency neglects important social values, then perhaps the available empirical evidence can at least tell us how employment protective legislation affects youth employment. Some critics—such as Professor Epstein—condemn all forms of labor regulation, including age discrimination statutes, wrongful discharge protections, minimum wage laws, and legal protection for collective bargaining.⁸ Rigorous empirical work, however, tends to focus on one law at a time. For example, we might ask: What happens to youth employment when we adopt a statute outlawing both mandatory retirement and overt age discrimination?⁹

Sadly, no study has attempted to answer that question. Instead, empirical economists have investigated whether the enactment of

7. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

8. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

9. The provisions of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (2012)), impose both of these prohibitions on most U.S. employers.

the federal Age Discrimination in Employment Act¹⁰ helped *older* workers. Studies of age discrimination laws have found either no effect on, or at most a modest improvement in, the employment prospects of older workers.¹¹ If these laws failed to aid their intended beneficiaries, then we have good reason to doubt that they have adversely affected younger workers. But are we even correct to think about youth employment in this way? Does the labor market resemble a static zero-sum game, in which gains for older workers necessarily impose losses on younger workers? That is a question empirical economists have tried to answer.

An international comparative study of social security retirement incentives published in 2010 investigates whether encouraging older workers to leave the labor force expands job opportunities for young people.¹² Age discrimination laws, by contrast, primarily protect incumbent older workers from discriminatory discharge.¹³ If Professors Heriot and Epstein are correct, these antidiscrimination statutes should also reduce youth employment. This hypothesized effect on youth employment arises because age discrimination laws force employers to retain incumbent older employees that they would otherwise wish to terminate. But more generous social security benefits encourage those same older workers to retire. If the critics' theory is correct, then the retirement of older workers should affect youth employment in precisely the opposite direction—their exit from the labor market should make more jobs available for younger workers. Conversely, empirical evidence that greater retirement incentives fail to expand youth employment would undermine the claim that we can increase employment opportunities for young people by repealing age discrimination laws.

10. *Id.*

11. See Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211 (2002); David Neumark & Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. POL. ECON. 1081 (1999); David Neumark & Patrick Button, *Did Age Discrimination Protections Help Older Workers Weather the Great Recession?*, 33 J. POL'Y ANALYSIS & MGMT. 566 (2014); David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. PUB. ECON. 1 (2013).

12. Jonathan Gruber et al., *Introduction and Summary* to SOCIAL SECURITY PROGRAMS AND RETIREMENT AROUND THE WORLD: THE RELATIONSHIP TO YOUTH EMPLOYMENT 1 (Jonathan Gruber & David A. Wise eds., 2010).

13. See John J. Donohue III & Peter Siegleman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

In the study mentioned above, Professors Gruber, Milligan, and Wise ask whether job opportunities for the young expand when social security benefits induce older workers to leave the labor force.¹⁴ They find that the pattern of youth employment fails to support that hypothesis. The departure of older workers from the labor force in no way helps younger workers to obtain jobs.¹⁵ Indeed, these authors emphatically reject what they call the “lump of labor hypothesis”—a static, zero-sum model of the labor market.¹⁶ Instead, they find evidence for a more dynamic market in which increased employment for one group of workers need not come at the expense of other workers.

During the past 40 years, for example, global labor markets absorbed a huge influx of women who formerly did not participate in the paid labor force. Employing more women does not appear to have reduced employment opportunities for young people in any way. Analyzing a large sample of industrialized nations with diverse types of labor regulations, Gruber, Milligan, and Wise find no correlation between employment prospects for youth and the degree to which women increase their labor force participation.¹⁷ Instead, their evidence suggests that the level of aggregate demand in the national economy largely determines youth employment (as well as youth unemployment and the employment-to-population ratio for young people).

But perhaps the implicit economic model of critics is not that old people need to get out of the way and make room for younger workers. They sometimes claim instead that labor regulations increase firing costs and that those costs in turn damage labor market performance and significantly reduce employment.¹⁸ However, my recent review of the extensive economic literature on employment protective legislation casts doubt on this alternative hypothesis.¹⁹

14. Gruber et al., *supra* note 12, at 6.

15. *Id.* at 41–42.

16. *Id.* at 4.

17. *Id.* at 4–5.

18. Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q. J. ECON. 699 (1990); Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261 (1979).

19. Verkerke, *What We Know*, *supra* note 1.

Theoretical models produce conflicting and inconclusive results, and the available empirical evidence supports no definitive conclusions about how labor regulations affect youth employment. In some Latin American countries studied by Heckman and Pagés-Serra, for example, extremely stringent job security legislation appears to reduce youth employment by nearly ten percent.²⁰ In contrast, the unemployment rate for young people is exceptionally low in Germany, despite that country's notably strong legal protections for incumbent workers.²¹ Moreover, labor unions in Germany wield considerable power, and the German minimum wage far exceeds levels in the United States. According to the critics' hypothesis, these regulations should cripple efforts to employ young people. Instead, Germany's aggressive apprenticeship program²² appears to influence youth employment levels in that country far more than any of the regulatory measures that the critics would repeal.

In the United States, we have only mixed evidence on the effects of employment protective legislation. The best available estimates suggest that these laws may slightly diminish overall employment levels.²³ However, no study implies that U.S. labor regulations substantially reduce employment opportunities for young people. The magnitude of the measured effects is simply too modest to dramatically affect youth employment levels. Recall also that the cross-country evidence from Gruber, Milligan and Wise shows no tradeoff between employment of the young and the old.²⁴ Older and younger workers do not appear to be good substitutes for one another. The dynamics of the la-

20. See James J. Heckman & Carmen Pagés-Serra, *The Cost of Job Security Regulation: Evidence from the Latin American Labor Markets*, 1 *ECONOMIA* 109, 109–44 (2000).

21. Joseph Parilla & Alan Berube, *Lessons from Munich for America's Youth Employment Crisis*, BROOKINGS (Mar. 31, 2014, 4:35 PM), <http://www.brookings.edu/blogs/the-avenue/posts/2014/03/31-munich-americas-youth-employment-crisis-parilla-berube> [<http://perma.cc/2ARP-84BU>].

22. *Id.*

23. David H. Autor et al., *The Costs of Wrongful-Discharge Laws*, 88 *REV. ECON. & STAT.* 211, 211–31 (2006); David H. Autor et al., *The Employment Consequences of Wrongful Discharge Laws: Large, Small, or None at All?*, 94 *AM. ECON. REV.* 440 (2004). These and similar studies focus on how protective legislation affects employment and wage levels. I am unaware of any studies that investigate whether labor regulation affects the quality of jobs available in a given market.

24. Gruber et al., *supra* note 12, at 41–42.

bor market separate these two groups into distinct categories of workers who compete for different jobs.

We have seen that the available empirical evidence casts considerable doubt on the critics' assertion that U.S. labor regulation significantly impedes youth employment. But it also would be a mistake to read that evidence as fully validating existing regulations. As I have written elsewhere:

Despite a large body of . . . work on the subject, scholars can offer only tentative and equivocal conclusions, or quite commonly they make bold claims that collapse on closer examination. None of this work comes close to providing legal policymakers with definitive guidance about the net social welfare effects of adopting or repealing particular employment protection laws. Indeed, our knowledge also falls short of being able to predict how legal innovations are likely to affect worker and firm behavior.²⁵

Thus, our stance should be cautious. We can neither confidently condemn these laws on the basis of neoclassical economic theory nor be certain that employment protective legislation has no adverse effects. Instead, critics should acknowledge that they have no compelling empirical case for repeal, and advocates for regulation should accept greater responsibility for conducting rigorous studies of the laws they enact.

IV. THE SPECIAL CASE OF MINIMUM WAGE LAWS

Although no reliable empirical studies support the critics' general indictment of all labor regulation, their claim that minimum wage laws adversely affect youth employment rests on somewhat firmer ground. Orthodox neoclassical theory holds that minimum wages simply raise employers' cost of labor and thus discourage them from hiring.²⁶ In addition, employers may reduce the hours of incumbent workers or substitute less labor-intensive production methods and discharge unneeded employees. However, a competing narrative questions the inevitability of these adverse effects. Perhaps higher wages reduce employee turnover and elic-

25. Verkerke, *What We Know*, *supra* note 1, at 69.

26. See George J. Stigler, *Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946).

it greater productivity from incumbent workers.²⁷ When these minimum wage beneficiaries spend their increased income, it could bolster local demand for goods and services and partially offset any tendency for businesses to reduce employment. Finally, firms may be able to pass along at least part of the cost of a wage hike to consumers, whose demand could be less price sensitive than the conventional account hypothesizes.

Scholars have used a variety of techniques and datasets to investigate whether the orthodox or the revisionist story most accurately describes real-world labor markets.²⁸ The best available evidence suggests that state and federal minimum wages in the United States modestly reduce teen employment.²⁹ The estimated elasticity of -0.10 to -0.20 implies that a 10% increase in the minimum wage will cause a fall of between 1 and 2% in teen employment. The relatively small magnitude of these effects suggests that minimum wage laws are only a secondary cause of the current pattern of youth under-employment. A much larger increase—such as proposals for a \$15/hour federal minimum wage—could reduce youth employment by 10-20% or more. These job losses would most likely affect unskilled youth most severely. However, the real value of the minimum wage has fallen steadily since 1968, and there is no prospect of such a dramatic increase in the federal minimum wage in the foreseeable future.³⁰

At least in the United States, it must be primarily other factors that discourage young people from participating in the la-

27. See, e.g., Michael L. Wachter, *Neoclassical Labor Economics: Its Implications for Labor and Employment Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 20 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

28. Sylvia A. Allegretto et al., *Do Minimum Wages Really Reduce Teen Employment? Accounting for Heterogeneity and Selectivity in State Panel Data*, 50 INDUS. REL. 205 (2011); David Neumark et al., *Revisiting the Minimum Wage-Employment Debate: Throwing Out the Baby with the Bathwater?*, 67 INDUS. & LAB. REL. REV. 608 (2014).

29. David Neumark et al., *More on Recent Evidence on the Effects of Minimum Wages in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 20619, 2014).

30. Although the real value of the federal minimum wage will almost surely continue fluctuating in a narrow range near its present level, a few local governments have adopted or begun to consider increases more in line with the current national campaign for a \$15/hour minimum wage. See Andrew M. Cuomo, *Fast-Food Workers Deserve a Raise*, N.Y. TIMES, May 6, 2015, http://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html?_r=0 [<http://perma.cc/8JRQ-Y9JD>]; 15NOW.ORG, <https://15now.org/> [<https://perma.cc/2P4G-DVWP>]; *\$15 Minimum Wage*, OFFICE OF THE MAYOR OF SEATTLE, <http://murray.seattle.gov/minimumwage/#sthash.KsbSxU0y.dpbs> [<http://perma.cc/T3UL-46BY>].

bor force and that deprive them of job opportunities once they begin to search. Both domestic and international evidence suggests that inadequate aggregate demand in the local or national economy far outweighs the influence of any other potential cause in determining the level of youth employment and unemployment.³¹ In recent decades, the U.S. economy has also undergone dramatic technological change. That change has caused employers to shift their labor demand towards more skilled workers, and as a result, the wage gap between college-educated workers and those who merely complete high school has grown steadily. Employment opportunities have followed a similar pattern. However, U.S. labor regulation has played no significant role in this transformation of the labor market.

Nor does minimum wage legislation explain racial differences in youth employment. Walter Williams and Thomas Sowell have recently hypothesized that minimum wages especially harm young African-American workers and that repealing minimum wage laws would close the alarming racial gap in youth unemployment rates.³² But even a cursory examination of how minimum wages and youth employment have evolved demonstrates that this hypothesis is extremely implausible. The ratio of black to white unemployment rates reached 2:1 in the mid-1950s, and that lamentable statistic has now persisted throughout the past 60 years.³³ In contrast, the real value of the federal minimum wage reached its peak in 1968 and then fell steadily from the 1970s to the present. During the same period, however, the black-white ratio of unemployment rates has not budged. Nor has there been any significant change in the racial gap between blacks and whites for youth unemployment and youth labor force participation.³⁴ If minimum

31. Teresa L. Morisi, *The Early 2000s: A Period of Declining Teen Summer Employment Rates*, MONTHLY LAB. REV., May 2010, at 23.

32. WALTER E. WILLIAMS, RACE AND ECONOMICS: HOW MUCH CAN BE BLAMED ON DISCRIMINATION? 31–58 (2011); Thomas Sowell, *Ignoring Economics*, REAL CLEAR POLITICS (Nov. 15, 2005), http://www.realclearpolitics.com/Commentary/com-11_15_05_TS.html [<http://perma.cc/Q479-HW5K>].

33. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 216 (1970); see also PROQUEST, LLC, PROQUEST STATISTICAL ABSTRACT OF THE UNITED STATES 398 (2015).

34. ADRIENNE L. FERNANDES-ALCANTARA, CONG. RESEARCH SERV., R42519, YOUTH AND THE LABOR FORCE: BACKGROUND AND TRENDS 27 (2012).

wages were driving racial disparity in employment, we would expect this racial gap to respond as the stringency of the minimum wage has varied over time. We see instead no discernible relationship between these two quantities. In short, the seemingly independent movement of these economic variables contradicts Williams's and Sowell's proposed explanatory theory.

Although the historical pattern of minimum wages casts considerable doubt on the claim that these laws cause racial gaps in employment, that same history reveals a perverse political dynamic that surely disrupts labor markets and political discourse. Congress originally enacted the federal minimum wage in 1938 as part of the Fair Labor Standards Act.³⁵ The law specified the wage in nominal dollars per hour and omitted any provision that would adjust the statutory minimum for future wage and price inflation. Instead, Congress has periodically amended the statute to increase the nominal value of the required wage.³⁶ As a result, the real value of the minimum wage has followed a sawtooth pattern of sudden statutory increases followed by gradual inflationary erosion.³⁷ The legislated minimum thus constrains employers more or less stringently according to whether Congress has recently amended the statute.

Even more perversely, the periodic need to adjust the statutory minimum for inflation creates frequent fundraising opportunities for both opponents and proponents of these laws. Both political parties capitalize on these heated legislative debates by mobilizing constituents who feel strongly about this issue. Indexing the federal minimum wage would solve both of these problems—and bring federal law into line with statutes in the dozen states that have already adopted this measure.³⁸ It would

35. GERALD MAYAR ET AL., CONG. RESEARCH SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 1 (2013).

36. DEP'T OF LABOR, HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938-2009 (2010), available at <http://www.dol.gov/whd/minwage/chart.pdf> [<http://perma.cc/8DSM-SJN5>].

37. Drew Desilver, *5 Facts About the Minimum Wage*, PEW RESEARCH CENTER (Dec. 4, 2013), <http://pewresearch.org/fact-tank/2013/12/04/5-facts-about-the-minimum-wage/> [<http://perma.cc/EET6-HX5P>].

38. For a list of states that have enacted provisions indexing their minimum wage level to inflation, see STATE MINIMUM WAGES, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 24, 2015), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<http://perma.cc/9TUK-86FC>].

eliminate legislators' ability to use the more or less continuous threat of an unfavorable statutory change to extort campaign contributions. Indexing also would smooth the employment effects of the minimum wage and would avoid the disruptive economic effects of less frequent, but far larger, jumps in the nominal value of the statutory minimum.

V. HOW LEGAL RULES AFFECT HUMAN RESOURCES PRACTICES

It remains for us to consider how employment protective legislation affects corporate human resource practices. What determines a firm's hiring and firing decisions? How do legal rules interact with other factors that influence how employers size their workforce and manage employees? My discussion of these issues is more anecdotal and speculative, but it is an empirically informed speculation.³⁹

We should begin with employment termination because legal claims under discrimination statutes and other protective legislation tend to focus on wrongful discharge rather than on hiring.⁴⁰ How then would employers approach firing decisions in the absence of any legal regulation? In the era of modern human resources management, firms have embraced a norm of just cause for termination.⁴¹ That norm arose to maintain employee morale and to protect firms' valuable investments in personnel rather than in response to employment protective legislation. Even so, labor regulations undoubtedly impose some additional costs on employers. For example, well-counseled managers try to prevent wrongful discharge claims

39. In addition to hiring and firing, labor regulation undoubtedly influences business location decisions. When other factors are equal, companies deciding where to locate new plants often seek out jurisdictions in which they will face fewer legal constraints. However, this competition among jurisdictions raises issues that go far beyond the scope of this short essay. See generally Barry D. Baysinger & Henry N. Butler, *Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law*, 10 J. CORP. L. 431 (1985); Ronald B. Davies & Krishna Chaitanya Vadlamannati, *A Race to the Bottom in Labor Standards? An Empirical Investigation*, 103 J. DEV. ECON. 1 (2013); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

40. See Donohue & Siegelman, *supra* note 13.

41. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

by gathering more extensive documentation about employee performance and potential misconduct. Doing so surely forces companies to delay some discharge decisions and thus interferes with employee discipline. Defense costs and potential legal exposure to damages are additional burdens, but they affect only a very small fraction of all discharges.⁴²

What then is the net effect of discharge protections on employment opportunities for young people? No one knows for certain, but the available evidence suggests that firing more incumbent workers would not remedy the problem of youth unemployment. Instead, shortfalls in aggregate demand disproportionately harm young workers and explain most of the variability in youth employment. Technological change has also played a role, especially among less skilled workers, since even entry-level jobs increasingly require substantial education and training.⁴³ However, the predominant influence on job opportunities is aggregate demand rather than nuances of labor regulation. Global macroeconomic shocks—such as the Great Recession—dramatically depress labor demand for all demographic groups, but young people at the beginning of their careers are particularly vulnerable.⁴⁴ In Europe, for example, countries that suffer from very low aggregate demand also face high rates of youth unemployment. Although exceptionally stringent labor regulations have sometimes exacerbated employment problems in countries such as Greece, Italy, France, Spain, and Portugal, other countries with far more restrictive laws than the United States have fared comparatively well. For example, robust aggregate demand has sustained Germany's labor market even though its labor laws and collective bargaining regime impose constraints on employers far beyond those found in any U.S. jurisdiction.

Turning very briefly to hiring, firm behavior and the comparative economic performance of countries with varying regulatory regimes support similar conclusions. There can be no doubt that firing costs influence hiring decisions, but patterns of hiring and economic development suggest strongly that these costs are decidedly secondary. First, hiring has always followed a strongly

42. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1981).

43. See, e.g., James E. Rosenbaum & Amy Binder, *Do Employers Really Need More Educated Youth?*, 70 *SOC. EDUC.* 68 (1997).

44. See Morisi, *supra* note 31, at 23.

pro-cyclical pattern. Good economic times easily overcome employer reluctance to hire, and no amount of deregulatory fervor inspires employers to hire during severe economic downturns. Once again, aggregate demand appears to dominate any concern among employers about labor regulations.

Second, many jurisdictions with relatively stringent regulatory regimes have experienced robust growth despite imposing comparatively high firing costs on employers. Within the United States, for example, we would expect to find few employment opportunities in California, but we see many. Internationally, Germany should be in terrible shape, but their labor market is doing comparatively well, especially for young people. These outcomes suggest that labor regulations need not impede youth employment. Of course, government can regulate the labor market so stringently that legal rules chill economic activity and depress employment. But there is no convincing evidence that U.S. employment regulation is anywhere near that point.

I readily concede that greater labor market flexibility helps economies adjust more quickly to macroeconomic shocks,⁴⁵ though sometimes at the cost of imposing large losses on relatively vulnerable individuals. Restrictive labor laws in the southern tier of European countries almost certainly discourage employers from hiring new workers, even in good economic times. But U.S. labor regulation is lax compared to legal rules in certain other countries that have been equally or more successful at employing young people. It is easy to assert that this or that regulation severely burdens businesses and curtails employment opportunities. It is far more difficult to prove these alleged effects. For those who take a faith-based approach to these issues, my call for empirical evidence will surely fall on deaf ears.⁴⁶ However, when scholars make serious efforts to measure the effects of employment protective legislation in the United States, we find that these effects are surprisingly modest. None of these studies supports the critics' claim that repeal would substantially improve employment prospects for youth.

45. Rafael Di Tella & Robert MacCulloch, *The Consequences of Labor Market Flexibility: Panel Evidence Based On Survey Data*, 49 EUR. ECON. REV. 1225 (2005).

46. The "faith" to which I am referring here is emphatically not religious in nature. Instead, I have in mind an ideological commitment to deregulation that rests on prior convictions rather than systematic observation of outcomes.