

Sharing the Gains of the U.S. Global Economy

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Charlotte Garden
Editor

Samuel Estreicher
Series Editor

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Editor's Introduction

What will our work lives look like in the next generation? The chapters in this volume seek to grapple with that tantalizing question. As the volume as a whole reflects, a relatively utopian future is possible—one of increased leisure time and greater social equality. But this future is not guaranteed; it is also possible that the “gigification” of work will continue apace, with individual workers scrambling for ever-more-scarce jobs and resources. Which future we get will largely depend on what we are willing to demand from policymakers, regulators, and employers.

The first part of the book focuses on some potential barriers to an economy that works for most people, including the challenges of trade policy and automation. In Chapter 1, noted labor journalist and author Steven Greenhouse explores causes and consequences of rising income inequality in the United States. He then surveys key policy proposals to reverse this trend, many of which are explored in greater detail in later chapters in the book. In Chapter 2, Professor Alan O. Sykes explores recent changes to trade policy, and analyzes the legality of federal and state “buy American” and domestic-content policies under domestic and international law. Then, in Chapter 3, economists Josh Bivens and Ben Zipperer discuss the importance of periods of tight labor markets to raising low-income workers’ pay, as well as to narrowing racial wage and employment gaps. The next two chapters concern automation. First, in Chapter 4, Professor Cynthia Estlund explores what automation of work could mean for our current system of employment-based benefits, arguing that the “fortress of employment,” in which many rights and job protections are linked to workers’ status as employees, may ultimately be counterproductive. Then, Professor Milan Markovic focuses in Chapter 5 on whether lawyers’ work is likely to be automated and concludes—happily for many of the authors in this volume—that it is not.

Part II comprises the bulk of the volume, and it is solution-focused. The authors in this part explore responses to specific policy challenges, such as employment discrimination, or the gig economy. The first three chapters of this Part focus on ambitious social reforms that would respond to the risks of widespread job loss from automation, trade, or any other source. In Chapter 6, Professor Lori Kletzer discusses wage insurance—a proposal that enjoyed a moment in the policy spotlight when it garnered a mention in President Obama’s final State of the Union address. Then Professors Ari Glogower and Clint Wallace analyze four versions of an idea that was briefly popular several decades ago, and that is now enjoying a resurgence: universal basic income. But in Chapter 8, Professor Robert H. Frank raises concerns about whether universal basic income is politically sustainable, and offers an alternative in

the form of subsidized, guaranteed public employment. Next, series editor Professor Samuel Estreicher and Professor Clint Wallace also consider what our current politically polarized moment means for law reform, offering an optimistic take on the prospect of bipartisan reform of tax-advantaged health savings account to promote equitable outcomes.

The next three chapters ask how policymakers might respond to employment discrimination. First, in transcribed remarks, Equal Employment Opportunity Commissioner Victoria Lipnic gives an insider's look at the EEOC, discussing current agency challenges and priorities. Then, in Chapter 11, Professor Estreicher argues for more flexibility in certain aspects of anti-discrimination law in order to combat what he calls "chronic hiring aversion" — situations where employers routinely violate existing anti-discrimination law. This perhaps counter-intuitive response would offer incentives to hire people whom employers might otherwise avoid, such as subsidies or no-fault trial periods. Next, in Chapter 12, Professor Pauline Kim and attorney Sharion Scott take on a new frontier in anti-discrimination law: discrimination carried out via online platforms, which can allow employers to choose their audience for job advertisements based on impermissible criteria.

The final set of chapters address workplace "fissuring," and closely associated problems, such as the classification of workers as employees or independent contractors in the gig economy. To begin, Professor Andrew Elmore discusses the relationship of the franchise model to employment law violations committed by franchisees, and proposes new ways to think about franchisor liability in Chapter 13. Then, attorney and advocate Nayantara Mehta argues that states should empower cities to set the rules for how platform businesses can operate, particularly given that those businesses are concentrated in cities, which also tend to be more left-leaning than the states in which they are located. In Chapter 15, Professor Michael C. Harper proposes way of thinking about whether employers or workers should bear responsibility for employment benefits that is both new and old, focused on the common law of vicarious liability through *respondeat superior*. And last, former Deputy U.S. Secretary of Labor Seth D. Harris analyses several different approaches for classifying platform workers, ultimately concluding that the best option would be to create a category of worker — new to US law — that is between "employee" and "independent contractor."

Each chapter in this volume advances the debate over the future of work. Readers will find that the contributors vary in their methodological approaches, as well as the questions on which they choose to focus. The hope is that, taken as a whole, this volume offers readers a survey of the policy debates surrounding work in the modern economy.

About the Editors

Charlotte Garden is Professor at Seattle University School of Law, where she teaches Labor Law, Employment Law, Constitutional Law, Appellate Litigation, and Legislation & Regulation. Since 2017, she has been the Law School's Co-Associate Dean for Research & Faculty Development.

Professor Garden's scholarship focuses on the intersection of work law and constitutional law. Her articles have appeared or will appear in the *Pennsylvania Law Review*, *Emory Law Journal*, *Boston University Law Review*, *George Washington Law Review*, *Fordham Law Review*, *William & Mary Law Review*, *University of Chicago Legal Forum*, and *Harvard Civil Rights-Civil Liberties Law Review*. She is a co-author of two leading labor & employment law casebooks: *Modern Labor Law in the Private and Public Sectors*; and *Employment Law: Cases and Materials*. Cambridge University Press recently published her edited volume, *The Cambridge Handbook of U.S. Labor Law For The Twenty-First Century* (co-edited with Rick Bales).

Prior to joining Seattle University, Professor Garden was a teaching fellow in the Appellate Litigation Clinic at Georgetown University Law Center, where she also received her LL.M. Her legal practice experience also includes stints at Bredhoff & Kaiser, PLLC, Public Citizen, and the Children's Law Center. Professor Garden clerked for Judge Thomas L. Ambro of the U.S. Court of Appeals for the Third Circuit. She is graduate of NYU School of Law and McGill University.

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Samuel Estreicher has published more than a dozen books, including *Beyond Elite Law: Access to Civil Justice in America* (Cambridge University Press 2016) (with Joy Radice) and leading casebooks on labor law and employment discrimination and employment law; and authored more than 150 articles in professional and academic journals. He served as Chief Reporter for the Restatement of Employment Law (American Law Institute 2015). He is currently serving a four year term as a distinguished external jurist on the UN Internal Justice Council. After clerking for Judge Harold Leventhal of the US Court of Appeals for the DC Circuit, practice in a labor law firm, and clerking for Justice Lewis F. Powell Jr. of the US Supreme Court, Estreicher joined the NYU School of Law faculty in 1978. He is the former secretary of the Labor and Employment Law Section of the American Bar Association, and a former chair of the Committee on Labor and Employment Law of the Association of the Bar of the

City of New York. In addition, he maintains an active appellate and arbitration-mediation practice. The Labor and Employment Research Association awarded him its 2010 Susan C. Eaton Award for Outstanding Scholar-Practitioner. In recent years, Estreicher has published work in public international law and authored several briefs in the Supreme Court and US courts of appeals on international issues. Estreicher received his BA from Columbia College, his MS in industrial relations from Cornell University, and his JD from Columbia Law School, where he was editor-in-chief of the Columbia Law Review.