

**TOWARD A JUST WORK LAW:  
EXIT OPTIONS, RELATIONSHIPS, AND REGULATION**

by

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## CHAPTER ONE

### INTRODUCTION

#### **Section I: Motivating Questions**

Should the state intervene in the bargains struck between employers and employees, using the law to regulate working conditions and mandate or prohibit certain terms of employment? The short, obvious answer is, “Yes.” You currently either believe or should believe that the state should prohibit slavery. Therefore, you cannot (or at least, should not) consistently hold that the state must never intervene in matters involving employers and employees. You might also believe that the state should prohibit indentured servitude, child labor, prostitution, or other sorts of work, in which case you could believe that there are other “easy answers” to this question. However, most of the questions in this neighborhood tend to be contested and difficult to resolve, and in this dissertation, I hope to contribute to our ongoing attempts to achieve resolution of work-related issues by offering a perspective that frames work more as an important relationship between parties rather than as an impersonal contract.

The more difficult questions in this area include both broad questions, such as those concerning the extent of normatively required or permissible state intervention and what must be considered in justifications of interventions, and narrow ones, such as those concerning specific proposed laws, regulations, or policies. My research is largely focused on the former, broader sorts of questions, but I hope that my answers to these questions will imply answers to the more specific ones, or at least provide helpful perspectives from which to consider them.

When questions concerning state intervention and its justification arise, we are often encouraged to frame the debates as a struggle or balancing act between two extremes: paternalism and liberty of contract. Any adequate discussion of the normative requirements of work law must consider the common criticism that minimum-wage, maximum-hour, and workplace-safety laws constitute nothing more than paternalistic and unjust constraints on individuals' freedom of contract. Proponents of this critique typically appeal to a robust conception of liberty, which implies that competent adults should be free to enter contracts without restriction. Moreover, critics argue that attempts to justify state intervention by reference to citizens' best interests constitute unacceptable paternalism because they assume that competent adults are not capable of making rational decisions for themselves.

However, framing the debate in this way oversimplifies and obscures it, and my project in this dissertation is to challenge, in three distinct ways, the popular but misguided view that so long as workers are permitted to make their own free choices regarding what work to accept, the law need not – and according to some, *should* not – “protect” them from certain types of employment contracts.

## **Section II: Summary of Substantive Chapters**

My dissertation comprises the following three inter-related Chapters, all of which explore the nature and purpose of work law and critically analyze the prevalent emphasis on matters of contract in discussions of work law:

### *Chapter Two: The Escape Plans of Mill and Jefferson*

I discuss herein the similar “escape plans” proposed by John Stuart Mill and Thomas Jefferson as legal interventions to minimize the need for wage work. Mill predicted and advocated

the adoption of cooperative, worker-owned and -managed firms, while Jefferson proposed abandoning wage labor in favor of claiming and farming on the vast American frontier. Neither theorist's prediction was realized. I explore the normative question whether either plan could have satisfied the demands of justice. I first describe these thinkers' respective proposals and their supporting arguments, and then discuss what was problematic about them. Finally, I argue that the most serious normative problem with such proposals arises when other theorists mistakenly assume that so long as the law provides alternatives to wage labor, it can justly leave wage labor relationships in an unregulated, Dickensian state. In reply, I contend that we have no just alternative to engaging in the messy and difficult task of regulating the workplace.

### *Chapter Three: Revising the Roles of Master and Servant*

In this Chapter, I critically examine the claim that work law is best conceived as part of contract law, arguing that it is neither descriptively nor normatively instructive. Rather than understanding work law as a set of restraints on freedom of contract, we should see it as creating and defining special relationships, much like the codified definitions of marriages and business partnerships. I trace the development of work relationships through the common law of "master and servant" and their more recent statutory modification. I argue that the history and present form of work law are not consistent with the contract-centered view of work law as "interfering" with an otherwise free labor market. In addition, I set the stage for a future research project in which I will advance the positive argument that since work relationships permit employers' exercising authority over workers, a just body of work law should permit only legitimate exercises of authority while minimizing overreaching by employers.

#### *Chapter Four: Competing Ideologies and the End of the Lochner Era*

This Chapter further explores the ideology underlying the “contract law” view I criticize in the first two Chapters. I examine Howard Gillman’s critique of the received view that Supreme Court Justices in the early 20<sup>th</sup> Century (aka the “*Lochner* era” after *Lochner v. New York*, a 1905 case striking down a law setting maximum working hours for bakers on the grounds that it violated “liberty of contract”) decided cases based on policy preferences rather than principled legal interpretation. Gilman challenges this “attitudinal” account of the *Lochner* era by reconstructing a principled legal ideology to which the Justices could have been committed. Gilman thus undermines the argument that *Lochner*-era justices had no principled legal basis for their decisions and therefore *must* have been deciding cases according to their laissez faire policy preferences. However, Gilman further claims that the Justices who dissented in *Lochner* and eventually overruled the “liberty of contract” regime in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), had no principled basis for *their* decisions and therefore *must* have decided cases according to their policy preferences. In response, I defend the *West Coast Hotel* opinion by reconstructing the principled legal ideology to which the justices who struggled against and ultimately defeated the *Lochner* era’s “liberty of contract” regime were committed. In addition, I sketch a normative argument to the effect that *West Coast Hotel* was not only based on a plausible interpretation of early-20<sup>th</sup> Century constitutional law, but also constituted the best possible move – with respect to justice, at least, and perhaps also, derivatively, with respect to the law – for the Court to make at that point in its history.



## CHAPTER TWO

### THE ESCAPE PLANS OF MILL AND JEFFERSON:

### WHY THE LAW MUST DO MORE FOR WORKERS

#### Section I. Introduction

In a particularly ambitious chapter of his seminal *Principles of Political Economy*, titled “On the Probable Futurity of the Labouring Classes,”<sup>1</sup> John Stuart Mill predicts that in the foreseeable future wage workers would – and importantly, should – be increasingly likely to join together in cooperative firms in order to escape oppressive wage-labor relationships. Mill also argues that the move to cooperative firms would provide substantial benefits to the cooperating worker-managers themselves,<sup>2</sup> as well as to society as a whole.<sup>3</sup> However, Mill’s prediction seems to have been dismally inaccurate, and in a recent paper, Prof. Justin Schwartz explores the interesting and important question why Mill turned out to be so wrong on this point.<sup>4</sup> In his paper, Schwartz

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1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 752 (W.J. Ashley ed., Longmans, Green & Co. new ed. 1909, reprt. 1915) (1848).

2 *Id.* at 789 (“From the progressive advance of the co-operative movement, a great increase may be looked for . . . In the first place, the class of mere distributors, who are not producers but auxiliaries of production, . . . will be reduced to more modest dimensions”).

3 *Id.* at 789-90 (“It is scarcely possible to rate too highly this material benefit, which yet is as nothing to compared with the moral revolution in society that would accompany it: the healing of the standing feud between capital and labour; the transformation of human life, from a conflict of classes struggling for opposite interests, to a friendly rivalry in pursuit of a good common to all; the elevation of the dignity of labour; a new sense of security and independence in the labouring class; and the conversion of each human being’s daily occupation into a school of the social sympathies and the practical intelligence”).

4 Justin Schwartz, *Where Did Mill Go Wrong?: Why the Capital-Managed Firm Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies*, 73 OHIO ST. L.J. 219 (2012); see also Justin Schwartz, *Voice Without Say: Why More Capitalist Firms Are Not (Genuinely) Participatory*, 18 FORDHAM J. CORP. & FIN. L. 963, 967 (2013)

examines the explanations offered by three leading analysts of worker cooperatives – namely N. Scott Arnold, Henry Hansmann, and Gregory Dow – argues that each analyst’s account is problematic in one or more respects, and then presents his own proposed explanation for cooperative firms’ failure to thrive to anywhere near the extent that Mill predicted they would.<sup>5</sup> Prof. Schwartz’s discussion of Mill’s unrealized prediction for workers’ “futuraity” is clearly a valuable contribution, but my focus differs from that of Prof. Schwartz, who concentrates on Mill’s *prediction* and the reasons for its inaccuracy. I propose, instead, to engage in a critical evaluation of the normative merits of Mill’s *prescription* for workers. That is, Mill not only predicted that workers would be *likely* to form cooperatives but also argued that workers had at least a prudential – and perhaps also a moral or aesthetic<sup>6</sup> – duty to eschew wage labor in favor of realizing their productive energies through worker-managed cooperative firms.

Moreover, as one reads Mill’s discussion it becomes clear that he believes that once a given society’s legal system creates and maintains the institutions and laws necessary to permit the formation of such cooperative firms, it has done all for workers that justice requires. In other words, Mill holds that once the law offers workers an alternative to – i.e., an “escape” or “exit option” from – the indignity and poverty of wage labor, this will satisfy the law’s duty of justice to

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(exploring the related questions “[w]hy have the few capitalist firms that do give workers real say not become, through competition and imitation[,] the prevalent organizational form? Why does authoritarian hierarchy persist as the main form of enterprise organization even in firms with some form of employee participation?”) (citing Armen E. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950) *reprinted in* ARMEN ALCHIAN, *ECONOMIC FORCES AT WORK* 15, 25, 28-30 (1977)).

5 Schwartz, *Where Did Mill Go Wrong?: Why the Capital-Managed Firm Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies*, *supra* note 4 219, at 223-24 (citing, *inter alia*, N. SCOTT ARNOLD, *THE PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM: A CRITICAL STUDY* 1-49 (1994); N. Scott Arnold, *Market Socialism*, 6 *CRITICAL REV.* 517, 534-36 (1992); HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 89-98 (1996); GREGORY K. DOW, *GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE* 236-38 (2003)).

6 Mill’s theories of the aesthetic virtues require a great deal of exegesis and are, in any case, beyond the scope of this paper. For my purposes, I will merely point out that it is widely acknowledged that Mill emphasized the importance of living a life of aesthetic as well as moral value much more than most other Utilitarians, especially his contemporaries.

alleviate the plight of workers. This normative conclusion is, I will argue, a serious mistake that is regrettably common in social, political, and legal thinking.

For example, it is interesting to compare Mill's view to that of his near-contemporary Thomas Jefferson. Like Mill, Jefferson was appalled by workers' increasing reliance on wage labor, but Jefferson, like Mill, had an "escape plan" in mind for the laboring classes.<sup>7</sup> Jefferson's plan relied on the availability of land on the vast American frontier: he was confident that legal provisions providing for the prospect of staking valid claims on free plots of land offered workers an appealing alternative – indeed, all that justice required – to the wage labor that was becoming increasingly prevalent in the nascent U.S. industrial labor market.<sup>8</sup> Jefferson, like Mill and many of their 19<sup>th</sup> century contemporaries, disapproved of wage labor on the grounds that it was a degrading way to earn a living, both for those who performed such labor and the society which relied upon it.<sup>9</sup> Jefferson's position also resembles Mill's in that he strongly believes that his favored alternative to wage labor – i.e., staking a claim on the frontier and working the land – would both further the interests of workers and contribute to the moral quality of the nation.<sup>10</sup>

Sadly, neither theorist's prescription truly panned out, and to this day, the dominant form of work in England, the U.S., and other Western democracies continues to be the sort of wage labor

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7        However, he was probably unlike Mill in being relatively unconcerned about the plight of the wageworkers themselves, since his primary focus was on what was good or bad for the nation as a whole.

8        *See, e.g.*, THOMAS JEFFERSON, 4 THE WORKS OF THOMAS JEFFERSON 84 (Paul Leicester Ford ed., G.P. Putnam's Sons 1904) (1782).

9        *Id.* at 86 (“[L]et our work-shops remain in Europe. It is better to carry provisions and materials to work-men there, than bring them [here], and with them their manners and principles. The loss by the transportation of commodities across the Atlantic will be made up in happiness and permanence of government. The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body.”).

10       *Id.* at 85-86 (“Those who labour in the earth are the chosen people of God, . . . whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phenomenon of which no age nor nation has furnished an example. . . . [G]enerally speaking the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption.”).

that both Mill and Jefferson abhorred. In Parts II and III of this paper, I will describe these thinkers' respective proposals and their arguments in support of their desirability. In Part IV I will aim to identify what is problematic about these two thinkers' similar prescribed solutions to the problems associated with the move to an industrial wage-labor economy in the 19<sup>th</sup> century. Finally, in Parts V and VI, I will argue that the most serious normative problem with the sort of approach favored by Mill and Jefferson is that it mistakenly assumes that so long as the law provides an alternative to wage labor, it can then justly leave wage labor relationships in an unregulated, Dickensian state. In other words, I contend that even if either Mill's or Jefferson's prediction *had* been more accurate, we should not follow their reasoning and conclude that the law would have therefore done all for workers that justice requires. Instead, we must eschew the tempting thought that policymakers need not engage in the messy and difficult task of regulating the workplace. No alternative "escape" from wage labor that the law could create, facilitate, or encourage would make it just to relegate wage laborers to a *laissez-faire*, unregulated "race to the bottom."

## **Section II. Mill on the "Co-operative Principle"**

### *A. Mill's Arguments for Cooperative Firms*

In Book IV, Chapter I, of his *Principles of Political Economy*,<sup>11</sup> Mill argues that the essential distinction between the "civilized" and the "savage" person is the former's superior "capacity for co-operation."<sup>12</sup> Mill explains that although humans in a "rude state of society" possess many adaptive abilities that more civilized humans lack, they are not so capable of seeing the advantages of long-term planning and engaging in cooperative endeavors.<sup>13</sup> In the same passage, Mill suggests that the

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11 MILL, *supra* note 1, at 695. (Book IV is titled *Influence of the Progress of Society on Production and Distribution*, and Chapter I bears the title *General Characteristics of a Progressive State of Wealth*).

12 *Id.* at 698.

13 *Id.* at 698-99.

possibility for cooperation offers the best hope for progress and improvement in modern industrial societies.

In Chapter VII of Book IV,<sup>14</sup> Mill advances a compelling discussion of what would and should happen in the future of work relations – titled “On the Probable Futurity of the Labouring Classes” – in which he predicts, firstly, that workers’ increasing access to the franchise, education, and the freedom to choose how they will arrange their working lives will eventually lead to a proliferation of worker-owned and -managed cooperative firms.<sup>15</sup>

In this chapter, although Mill initially appears principally concerned with *predicting* the probable nature of future working relationships, it becomes clear that he also strongly *prescribes* and *endorses* the move toward the predominance of this form of cooperative association, which he argues would be in the best interests of workers and society as a whole. Mill offers three main arguments in support of this prescription.

First, Mill argues that the standard model of industrial production, in which capitalists employ wage laborers, is damaging to the interests and character of both the employers and the workers they employ. Mill begins by noting the widespread agreement that “the state of the labouring people” was not “what it ought to be,” and then describes two opposing theories one might entertain as to the best means to address this problem. The first of these he calls the theory of “dependence and protection” – i.e., the paternalistic view that the poor should be dependent on the rich, who would willingly and charitably offer their “protection” – and he refers to the second,

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14 *Id.* at 752.

15 *Id.* at 772-73 (“The form of association, however, which if mankind continue to improve, must be expected in the end to predominate, is not that which can exist between a capitalist as chief, and workpeople without a voice in the management, but the association of the labourers themselves on terms of equality, collectively owning the capital with which they carry on their operations, and working under managers elected and removable by themselves.”).

opposed theory as that of “self-dependence,” according to which the poor would become increasingly reliant on their own efforts and capabilities to attain better lives for themselves.<sup>16</sup>

Although Mill recognizes the appeal – to the rich, at least – of the idealistic notion that the wealthy and powerful would gladly and reliably provide the sort of guidance and protection for the laboring classes envisioned by the theory of dependence and protection, he rejects this notion as an obvious fantasy, asserting that “[a]ll privileged and powerful classes, as such, have used their power in the interest of their own selfishness, and have indulged their self-importance in despising, and not in lovingly caring for, those who were, in their estimation, degraded, by being under the necessity of working for their benefit.”<sup>17</sup>

From Mill’s derisive tone throughout this discussion, we can reasonably infer that he agrees that the laboring classes are thusly “degraded” by their dependence upon the wealthier classes. However, he emphatically denies the possibility of improving the lot of the working poor by an increased emphasis on protection by the rich. Moreover, Mill contends that whether or not the rich could be induced to act in the best interests of the poor, the ever-increasing access to education and expansion of political rights that is characteristic of progressive societies would bring about changes in the laboring classes which would lead them to reject any scheme of paternalistic “protection.”<sup>18</sup>

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16 *Id.* at 753 (“According to the former theory, the lot of the poor, in all things which affect them collectively, should be regulated *for* them, not *by* them. They should not be required or encouraged to think for themselves, or give to their own reflection or forecast an influential voice in the determination of their destiny. . . . The relation between rich and poor, according to this theory (a theory also applied to the relation between men and women) should be only partly authoritative; it should be amiable, moral, and sentimental: affectionate tutelage on the one side, respectful and grateful deference on the other. The rich should be *in loco parentis* to the poor, guiding and restraining them like children.”).

17 *Id.* at 754.

18 *Id.* at 756 (“Of the working men . . . it may be pronounced certain, that the patriarchal or paternal system of government is one to which they will not again be subject. That question was decided, when they were taught to read, and allowed access to newspapers and political tracts; when dissenting preachers were suffered to go among them . . . ; when they were brought together in numbers, to work socially under the same roof; when railways enabled them to shift from place to place, and change their patrons and employers as easily as their coats; when they were encouraged to seek a share in the government, by means of the electoral franchise. The working classes have taken their interests into their own hands, and are perpetually showing that they think the interests of their employers not identical to their own, but opposite to them.”).

Mill clearly approves of the increasing independence and autonomy of the laboring classes, but he does not blame all the ills of the wage-labor relationship on the employers.

Instead, Mill holds that employer and worker are equally likely to behave inappropriately or inefficiently within traditional wage-labor relationships. Mill seems to consider it unacceptably authoritarian for employers to dictate job requirements to their employees in minute detail, but he nonetheless assumes that most wage workers will not work without stern and constant supervision, since he holds that they are typically unwilling to do an honest day's work for honest pay.<sup>19</sup> Although Mill recognizes that workers get much less out of the arrangement than do their employers, he also believes that the wage-labor relationship brings out the worst in both employer and employed.

Second, Mill argues that the move to cooperative associations would lead to an improvement in productive efficiency. However, he has a particular notion of "improvement" in mind, as he argues that to aim at "the mere increase of production" is to embrace a "false ideal of human society." Instead, a society should focus its efforts on realizing the two desiderata of "improved distribution, and a large remuneration of labour." In other words, once a society reaches a certain level of aggregate production, "neither the legislator nor the philanthropist need feel any strong interest" in further increases in production, "but, that it should increase relatively to the number of those who share in it, is of the utmost possible importance."<sup>20</sup> Accordingly, Mill's conception of what is desirable for society seems to be motivated by some markedly egalitarian intuitions.

Although he is interested in discovering the ways in which we, as a society, can be more productive, his main concern in this regard – at least, as evidenced in this chapter – is to ensure that

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19 *Id.* at 761 ("The total absence of regard for justice or fairness in the relations between the two, is as marked on the side of the employed as on that of the employers. We look in vain among the working classes in general for the just pride which will choose to give good work for good wages; for the most part, their sole endeavor is to receive as much, and return as little in the shape of service, as possible.")

20 *Id.* at 752.

whatever is produced can be shared by more and more members of society. For example, Mill argues in support of the desirability of industrial production as follows:

Labour is unquestionably more productive on the system of large industrial enterprises; the produce, if not greater absolutely, is greater in proportion to the labour employed: the same number of persons can be supported equally well with less toil and greater leisure; which will be wholly an advantage, as soon as civilization and improvement have so far advanced, that what is a benefit to the whole shall be a benefit to each individual composing it.<sup>21</sup>

Although the advantages of industrial production can be partially realized in standard capitalist enterprises employing wage laborers, Mill argues that cooperative industrial firms would be even more productive. Since workers in a cooperative enterprise would have a share in the profits and thus a direct interest in the firm's success, they would be motivated to work more diligently and make their firms more productive.<sup>22</sup>

This increased production would, in turn, result in improvements in Mill's proposed desiderata of increased distribution of income and wealth throughout society and a large remuneration of labor, since workers in cooperative associations would share in their highly productive firms' profits. As I will discuss in Section IV, below, Mill's confidence in this competitive advantage has proven to be largely misplaced, but his view was reasonable at the time, as he based it on some compelling contemporary examples of successful cooperative firms.<sup>23</sup>

Third, Mill argues that the changes in society that would accompany the increasing predominance of cooperative firms – both those changes that make such cooperation possible and those brought about by the prevalence of cooperative associations – would be extremely beneficial for society as a whole. Whereas wage labor tends to bring out the worst traits in both employers

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21 *Id.* at 762.

22 *Id.* at 789 (“The other mode in which co-operation tends, still more efficaciously, to increase the productiveness of labour, consists in the vast stimulus given to productive energies, by placing the labourers, as a mass, in a relation to their work which would make it their principle and their interest – at present it is neither – to do the utmost, instead of the least possible, in exchange for their remuneration.”).

23 *Id.* at 765-72 (citations omitted).



and employed, cooperative associations would foster communal relations among all members of society.<sup>24</sup>

Accordingly, Mill concludes that both capitalists and workers would benefit from the move to cooperative firms – or at least those in which workers have some share in the firm’s profits. More importantly, Mill forecasts even more significant moral and social improvements as a consequence of the widespread adoption of the cooperative principle.<sup>25</sup>

### B. *Three Observations*

Mill’s optimistic forecast for the future of labor and society is appealing, and his arguments may well strike us as *prima facie* persuasive, but it would be worthwhile to clarify of what Mill does and does not aim to persuade us. In particular, we should note that although Mill’s arguments for the social value of cooperative associations might seem to support the notion that society should *only* permit the incorporation of democratic workplaces – i.e., those in which workers have at least some influence over the management of the firm and/or share in the firm’s profits – this is clearly *not* what Mill has in mind. Instead, Mill advocates competition between traditional capitalist firms and cooperative firms and predicts that the competitive advantage afforded by the diligence of workers

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24 *Id.* at 762-63 (“[I]n the moral aspect of the question, which is still more important than the economical, something better should be aimed at as the goal of industrial improvement, than to disperse mankind over the earth in single families, each ruled internally, as families now are, by a patriarchal despot, and having scarcely any community of interest, or necessary mental communion, with other human beings. . . . [I]f public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured.”).

25 *Id.* at 791 (“Eventually, and in perhaps a less remote future than may be supposed, we may, through the co-operative principle, see our way to a change in society, which would combine the freedom and independence of the individual, with the moral, intellectual, and economical advantages of aggregate production; and which, without violence or spoliation, or even any sudden disturbance of existing habits and expectations, would realize, at least in the industrial department, the best aspirations of the democratic spirit, by putting an end to the division of society into the industrious and the idle, and effacing all social distinctions but those fairly earned by personal services and exertions.”).

who are directly interested in their cooperative firms' success will eventually result in the predominance of such firms.<sup>26</sup>

In this passage, Mill suggests both that the move to the predominance of cooperative associations will be a contingent outcome of competitive market processes and that the *universal* adoption of cooperative ownership and management would not be a requirement of justice. Later passages in this chapter confirm this reading, as Mill argues, in opposition to “Socialist writers,” that competition is “indispensable to progress,” such that “every restriction of it is an evil, and every extension of it, even if for the time injuriously affecting some class of labourers, is always an ultimate good.”<sup>27</sup> Moreover, Mill also implies that even in the ideal future he envisions, there will still be some – i.e., “the least valuable work-people” – who work for wages in non-cooperative firms. This would not be possible if a state’s business organization or other laws made workplace democracy mandatory, so Mill neither predicts nor requires a society in which traditional wage labor is legally precluded. Accordingly, it seems likely that Mill would strongly resist any suggestion that states should make workplace democracy mandatory via regulation rather than letting market processes determine the relative successes of capitalist and cooperative firms, even if the continued existence of traditional wage labor relationships would be detrimental to the interests of some workers.

It is also noteworthy that Mill repeatedly expresses contempt for those workers who would choose to work for wages instead of taking advantage of the option to form or join cooperative ventures to their fates on the hired labor market. In addition to the above-cited passages in which

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26 *Id.* at 790-91 (“[I]t will be desirable, and perhaps for a considerable length of time, that individual capitalists, associating their work-people in the profits, should coexist with even those co-operative societies which are faithful to the co-operative principle. . . . When, however, co-operative societies shall have sufficiently multiplied, it is not probable that any but the least valuable work-people will any longer consent to work all their lives for wages merely; both private capitalists and associations will gradually find it necessary to make the entire body of labourers participants in profits.”).

27 *Id.* at 793.

Mill claims that hired laborers are too selfish and unprincipled to “give good work for good wages”<sup>28</sup> and suggests that in future, only “the least valuable work-people” will work for “wages merely,”<sup>29</sup> Mill also suggests that only those who lacked “understanding” and virtue would forgo the cooperative option in favor of wage labor.<sup>30</sup>

Similarly, Mill argues elsewhere that “there can be little doubt that the *status* of hired labourers will gradually tend to confine itself to the description of work-people whose low moral qualities render them unfit for anything more independent.”<sup>31</sup>

It is striking that Mill, who demonstrates great concern for the plight of “the labouring classes” and optimism for their potential, also expresses such disdain for any who would choose to work as hired laborers despite having the option to form or join cooperative associations. What could be the source of Mill’s condescension, and why does he think it a sign of “low moral quality” or a lack of understanding and virtue for a worker to eschew cooperative labor? We will return to this question later, but for now, note that since most workers still do not work in cooperative associations, Mill’s remarks imply that most of us are foolish, selfish, and vicious, unless he could appeal to some alternative explanation for our refusal to embrace the cooperative principle.

Finally, given that Mill does not advocate making workplace democracy mandatory, what, if anything, does he think the state should do to enable and/or encourage the formation of cooperative associations? Mill notes that “[h]itherto there has been no alternative for those who

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28 *Id.* at 761.

29 *Id.* at 791.

30 *Id.* (“Associations like those which we have described, by the very process of their success, are a course of education in those moral and active qualities by which alone success can be either deserved or attained. As associations multiplied, they would tend more and more to absorb all work-people, except those who have too little understanding, or too little virtue, to be capable of learning to act on any other system than that of narrow selfishness.”).

31 *Id.* at 763–64.

lived by their labour, but that of labouring either each for himself alone, or for a master.”<sup>32</sup>

However, recent “necessary alterations in the English law of partnership were obtained from Parliament,”<sup>33</sup> which were sufficient to afford the laboring classes an alternative:

Until the passing of the Limited Liability Act, it was held that [cooperative associations] would have been impossible in England, as the workmen could not, in the previous state of the law, have been associated in the profits, without being liable for losses. One of the many benefits of that great legislative improvement has been to render partnerships of this description possible, and we may now expect to see them carried into practice.<sup>34</sup>

Of course, this change in the law only removes one significant obstacle to the feasibility of cooperative associations, and as Mill recognizes, cooperative firms face significant financial challenges, as workers who wish to form them often find it difficult to secure sufficient capital to equip their fledgling enterprises with tools and facilities.<sup>35</sup>

Mill notes that in the case of some early French cooperative firms, “loans of capital were made to them by the republican government,” but he seems to regard this as unnecessary, since these associations are “in general by no means the most prosperous.”<sup>36</sup> Indeed, instead of arguing that governments should take steps to make capital more available to workers – e.g., by intervening in capital markets in their behalf or by offering government-sponsored loans to cooperatives – Mill seems to hold that it is best for all concerned if the workers succeed *in spite* of the fiscal challenges they face.<sup>37</sup>

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32 *Id.* at 763.

33 *Id.* at 783.

34 *Id.* at 771.

35 *Id.* at 773–76.

36 *Id.* at 774.

37 *Id.* at 773–74 (“[M]any working people [have resolved to] free themselves, at whatever cost of labour or privation, from the necessity of paying . . . a heavy tribute for the use of capital; that they would extinguish this tax, not by robbing the capitalists of what they or their predecessors had acquired by labour and preserved by economy, but by honestly acquiring capital for themselves. . . . The capital of most of the [French] associations was originally confined to the few tools belonging to the founders, and the small sums which could be collected from their savings, or which were

Mill proceeds to give several accounts of contemporary cooperative associations which had succeeded through such laudable feats of “labour and privation.” Given his approbation of these efforts and his above-quoted comments that competition is “indispensable to progress” and “always an ultimate good,”<sup>38</sup> it seems that Mill does not hold that the state is morally required to do anything more to encourage cooperative firms than to render them *possible* by removing any existing legal impediments to their creation and feasibility.

### **Section III. Jefferson and the American Frontier**

A few decades earlier, in the “New World,” Thomas Jefferson and other framers of the U.S. Constitution were developing and arguing for a view that is interestingly comparable to Mill’s proposed “escape plan” for wage workers, which I described in the preceding section. On this Jeffersonian view, government intervention on behalf of workers would be unnecessary because the vast American frontier offered the option of freehold plots of land for any wage worker who was dissatisfied with the job offers available in the open labor market. If employers paid too little or demanded too much, workers could simply decline the proffered jobs and stake their claims on the frontier. One happy result of this availability of land, on this view, would be improved terms of employment for those workers who chose to work for employers – since workers had the bargaining power afforded by the option to withhold their labor and depart for the frontier, employers wouldn’t find any willing workers if the terms and conditions of employment they offered were truly terrible. Furthermore, where this option is available, we can conclude that those who accept wage

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lent to them by other workpeople as poor as themselves. . . . [T]he most striking instances of prosperity are in the case of those who have had nothing to rely on but their own slender means and the small loans of fellow-workmen, and who lived on bread and water while they devoted the whole surplus of their gains to the formation of capital.”).

38 *Id.* at 793.

labor have freely chosen to do so, and that government intervention on their behalf would therefore be neither necessary nor justified.<sup>39</sup>

Jefferson expresses this view with a combination of resistance to governmental intervention, a celebration of independence, and a particular fondness for the virtues he associates with agrarian living. Jefferson argues that the European reliance on industrial manufacturing to provide jobs and economic growth is regrettable and should not be repeated in America:

In Europe the lands are either cultivated, or locked up against the cultivator. Manufacture must therefore be resorted to, of necessity, not of choice, to support the surplus of their people. But we have an immensity of land courting the industry of the husbandman. . . . Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. . . . Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition. This, the natural progress and consequence of the arts, has sometimes perhaps been retarded by accidental circumstances: but, generally speaking the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption. While we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff.<sup>40</sup>

Jefferson's reliance on the liberating potential of the frontier is, I suggest, interestingly analogous to Mill's endorsement of cooperatives. Both thinkers believed that the increasing prevalence of wage labor was problematic in many ways, and each believed he had found an

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39 HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 21 (1993) ("If, as the framers argued, the market was essentially harmonious and liberty loving, and if the almost endless access to the freehold on the American frontier ensured that those who might happen to find themselves in pockets of dependency would always be able to escape these conditions and become free and independent citizens, then there was little justification for allowing the government to intervene in the conflicts that arose among groups competing in a free market.").

40 JEFFERSON, *supra* note 8, at 85–86. Years later, Jefferson clarified his intended meaning in the foregoing passage in a January 4, 1805, letter to manufacturing proponent and pamphleteer John Lithgow as follows: "I had under my eye when writing, the manufactures of the great cities in the old countries . . . with whom the want of food and clothing necessary to sustain life, has begotten a depravity of morals, a dependence and corruption, which renders them an undesirable accession to a country whose morals are sound. . . . As yet our manufactures are as much at their ease, as independent and moral as our agricultural habits, and they will continue so as long as there are vacant lands for them to resort to; because whenever it shall be attempted by the other classes to reduce them to the minimum of subsistence, they will quit their trades and go to laboring the earth." *Id.* at 86–87, n.1. See also GILLMAN, *supra* note 39, at 25 ("[M]any took faith in the belief that the problem could be handled without direct government interference in group or class conflict by simply improving access to the freehold for dependent laborers and promoting free-trade policies that would provide markets for industrious farmers and cheap goods for consumers. As Benjamin Franklin put it, 'no man who can have a piece of land of his own, sufficient by his labour to subsist his family in plenty, is poor enough to . . . work for a master.'" (citing DREW MCCOY, *ELUSIVE REPUBLIC* 51, 68 (1996)).

attractive alternative that would minimize or eliminate the problems associated with wage work. Both emphasized the evils of “dependence” and the virtues of “self-dependence,” and they were opposed to all but the most minimal forms of government intervention in the market. Like Mill, Jefferson did not hold that his favored alternative to wage labor should be made mandatory – i.e., he did not envision a society in which wage work was prohibited – but he expected the availability of freehold land to draw the majority of workers to the frontier, forcing employers to offer good wages and working conditions if they hoped to hire any of the remaining laborers.

#### **Section IV. Problems with the Prescriptions**

Unfortunately, neither of the alternative options Mill and Jefferson respectively prescribed was quite the panacea they predicted. In the case of Jefferson’s “immensity of land” on the boundless frontier, the problem was obvious: land is finite. It is perhaps unsurprising that Jefferson could imagine otherwise, as he was strongly influenced by John Locke’s theory of property right,<sup>41</sup> which seems to rely on assumptions of boundless land and other resources – despite the fact that Locke lived and wrote in *England*.<sup>42</sup> Locke argued that it is fair to appropriate unowned property for one’s private use and benefit so long as one leaves “enough and as good” for others to appropriate: Nor was [the] *appropriation* of any parcel of *land*, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man ... who had a whole river of the same water left him

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41 SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* 47 (1986).

42 England is not a large country, especially with respect to land area.

to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.<sup>43</sup>

Locke provides an encouraging and vindicating apologetic for those who wish to appropriate land with a clear conscience, but sadly, whenever some amount of a finite resource such as land is appropriated, there is *always* and *necessarily* “the less left for others.” Moreover, if several appropriators take the best available plots of land, the remaining land is clearly *not* “as good” as what was taken. Although these are obvious criticisms of Locke – and the obvious response on Locke’s behalf is that we cannot charitably read him as holding that land and water are *literally* infinite – we might nonetheless be somewhat willing to excuse Jefferson for imagining that the truly, inconceivably *vast* American frontier was somehow inexhaustible. But he was wrong nonetheless.

As Samuel Bowles and Herbert Gintis explain, the inspiring possibilities Jefferson envisioned for the frontier “proved to be ephemeral,” for “abundant land proved to be a temporary blessing. The vistas opened up by ‘free soil’ were to be quickly shuttered, ironically by the very same vibrant commercial expansion that Jefferson had sought to promote.”<sup>44</sup> Huge tracts of land were claimed by railroad companies, and rapacious land speculators tied up much of the remaining “freehold.” By the early 19<sup>th</sup> century, the “safety valve” of the frontier already seemed out of reach.<sup>45</sup>

Labor activist and organizer Orestes Augustus Brownson offered a similar analysis in 1840:

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43 JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 21 (C.B. Macpherson ed., Hackett Publishing Co., 1980) (1690). Of course, rivers aren’t inexhaustible resources, either.

44 BOWLES & GINTIS, *supra* note 41, at 49.

45 GILLMAN, *supra* note 39, at 43–44 (As workers’ advocate George Henry Evans wistfully observed in 1834, “[l]and speculation kept [workers] from taking up vacant land near by or in the West. If they could only get away and take up land, then they would not need to strike. Labor would become scarce. Employers would advance wages and landlords would reduce rents.”) (citing John R. Commons, *Horace Greeley and the Working Class Origins of the Republican Party*, in 24 *POLITICAL SCIENCE QUARTERLY* 478 (1909)).



The wilderness has receded, and already the new lands are beyond the reach of the mere laborer, and the employer has him at his mercy. ... There must be no class of our fellow men doomed to toil through life as mere workmen at wages.<sup>46</sup>

Sadly, Evans and Brownson were right in thinking that American workers were at the mercy of employers, but their dreams – like Jefferson’s – of the liberating possibilities of the frontier were never realized. According to Bowles and Gintis, by the late 19<sup>th</sup> century, “the evolution of the U.S. class structure had reduced the number of owners of productive property to roughly a third of the population.”<sup>47</sup>

Nonetheless, it is worth noting that although the possibility of homesteading receded significantly, it never entirely disappeared. The federal Homestead Act of 1862 was not repealed until 1976, and some U.S. states still offer free plots of land to those who are willing to build on and improve them, albeit in areas that are very difficult to farm.<sup>48</sup> Does the current availability of free land in South Dakota or Kansas increase the bargaining power of the wage worker in Michigan or Pennsylvania? I suspect it doesn’t. Did it in Jefferson’s time? Perhaps it did, to some extent, but only for those who were both willing and able to succeed in the difficult business of claiming, clearing, and cultivating a plot of land on the frontier. In any case, I will assert here that, *contra* Jefferson, farming isn’t for everyone.

Turning now to Mill’s prescription, we should first note the apparent advantage of his view in comparison with those of Locke and Jefferson. While the latter two thinkers seem mistakenly to rely on an endless supply of a finite resource, Mill suggests an alternative for workers that is, in principle, inexhaustible. So long as there is work to do and demand for the products of that work, workers can choose to form or join cooperatives; pool their labor, capital, and ideas; and reap the

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46 GILLMAN, *supra* note 39, at 44 (citing Orestes Augustus Brownson, *The Laboring Classes* (1840), reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825-1850* 301, 309 (Joseph L. Blau ed., Liberal Arts Press, 1954).

47 BOWLES & GINTIS, *supra* note 41, at 49.

48 See, e.g., John Ritter, *Towns Offer Free Land to Newcomers*, USA TODAY, Feb. 9, 2005, at 1A.

benefits of their cooperative endeavors. Of course, these intrepid workers must still overcome the obstacle of breaking into a market system dominated by capitalist producers and succeeding in competition with them. However, Mill is content that cooperative firms would enjoy a decisive competitive advantage because of the “vast stimulus given to productive energies, by placing the labourers, as a mass, in a relation to their work which would make it their principle and their interest” to work as hard as possible for the firm’s success.<sup>49</sup>

Mill correctly predicts that cooperatives would be more difficult to manage, but he does not foresee the full significance of the problems that cooperatives typically face. Professor Henry Hansmann, who has written extensively about the advantages and disadvantages of cooperative businesses,<sup>50</sup> offers lukewarm support for Mill’s optimism by citing substantial empirical evidence “suggesting but not confirming that there may be modest productivity gains from partial or full worker ownership.”<sup>51</sup> However, these modest gains are mitigated, in most cases, by substantial costs of ownership, which Hansmann groups under the headings of (1) raising capital, (2) risk-bearing,

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49 MILL, *supra* note 1, at 789–90. Nonetheless, Mill tempers his enthusiasm with a few caveats: “But to attain, in any degree, these objects, it is indispensable that all, and not some only, of those who do the work should be identified in interest with the prosperity of the undertaking. Associations which, when they have been successful, renounce the essential principle of the system, and become joint-stock companies of a limited number of shareholders, who differ from those of other companies only in being working men; associations which employ hired labourers without any interest in the profits . . . are, no doubt, exercising a lawful right in honestly employing the existing system of society to improve their position as individuals, but it is not from them that anything need be expected towards replacing that system by a better. Neither will such societies, in the long run, succeed in keeping their ground against individual competition. Individual management, by the one person principally interested, has great advantages over every description of collective management. Co-operation has but one thing to oppose to those advantages – the common interest of all the workers in the work.” *Id.* at 790.

50 Hansmann’s discussion concerns firms with what he defines as “direct employee ownership,” i.e., “in which ownership of the firm is entirely in the hands of some or all of its employees.” Henry Hansmann, *Employee Ownership of Firms*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 43 (Peter Newman ed. Stockton Press 1998).

51 *Id.* at 44 (citing J. Blasi and D. Kruse, THE NEW OWNERS: THE MASS EMERGENCE OF EMPLOYEE OWNERSHIP IN PUBLIC COMPANIES AND WHAT IT MEANS TO AMERICAN BUSINESS (1991)); *but see* Schwartz, *supra* note 4, at 231 (“A review of eleven economic studies of the effect of worker decision making on productivity in labor-managed firms found that the ‘relationship was positive in seven cases, negative in two, and zero in two.”) (citing GREGORY K. DOW, GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE 43, 183 (2003) (citing Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed Firms and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 58-77 (1995))).

and (3) collective decision-making. Mill anticipates each of these, to some extent, and he appears to understand the first two costs of ownership reasonably well.<sup>52</sup>

However, if Hansmann's analysis is accurate, Mill fails to appreciate the substantial limitations imposed by the costs associated with collective decision-making, which Hansmann summarizes as follows:

Employees' interests can diverge concerning many aspects of a firm's operations. Most obviously, employees are likely to differ among themselves concerning the relative wages they are to be paid. Likewise, employees may differ concerning working conditions, the kind and amount of work each is assigned, and – when things go poorly – which jobs are to be eliminated and who is to be laid off. ... These and other differences of interest among a firm's employees are likely to grow, moreover, as the division of labour and diversity of tasks within a firm increase. ... The resulting costs ... appear to play a crucial role in determining when and where employees participate in firm governance, suggesting strongly that these costs commonly dominate the other costs and benefits of employee ownership surveyed here.<sup>53</sup>

As a result, Hansmann notes that “[i]t is very rare to see a cooperative in which ownership is shared by a group ... that exhibits any substantial diversity,” and “[t]his suggests, in turn, that homogeneity of interest among investors of capital, rather than risk-bearing or even the need to accumulate capital, may be the real reason that modern economies are so heavily dominated by investor-owned firms.”<sup>54</sup>

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52 MILL, *supra* note 1, at 752. With respect to capital, *see id.* at 774, some of which is cited above. With respect to risk-bearing, *see id.* at 790-91, in which Mill notes: “Unity of authority makes many things possible, which could not or would not be undertaken subject to the chance of divided councils or changes in the management. A private capitalist, exempt from the control of a body, if he is a person of capacity, is considerably more likely than almost any association to run judicious risks, and originate costly improvements. Co-operative societies may be depended on for adopting improvements after they have been tested by success, but individuals are more likely to commence things previously untried.” *See also* Robert Mayer, *Is There a Moral Right to Workplace Democracy?*, 26 SOCIAL THEORY AND PRACTICE 301, 324 (2000) (noting that “[e]ven staunch proponents [of workplace democracy] like Samuel Bowles and Herbert Gintis admit that ‘the major weakness of the democratic firm [is] its tendency to engage in insufficient levels of risk-taking and innovation’”) (quoting Samuel Bowles and Herbert Gintis, *A Political and Economic Case for the Democratic Enterprise*, in THE IDEA OF DEMOCRACY 375, 377 (DAVID COPP, JEAN HAMPTON, AND JOHN ROEMER eds. 1993).

53 Hansmann, *supra* note 50, at 45-46.

54 Henry Hansmann, *Cooperative Firms in Theory and Practice*, 4 FIN. J. OF BUS. ECON. 387, 395 (1999); *see also* Henry Hansmann, *Worker Participation in Corporate Governance*, 43 U. TORONTO L.J. 589, 596-97 (1993) (“No matter how large the potential benefits of worker ownership may seem in any given setting, it rarely appears if the workers who would share ownership have diverse interests in the firm. ... The other costs associated with worker ownership – in particular, poor diversification of risk and the difficulty of assembling capital – do not appear to be particularly serious.”).

We might respond, on Mill's behalf, that Mill clearly *is* aware of the crucial importance of ensuring that workers share common interests in cooperative associations, as he holds that this would be their sole competitive advantage over capitalist firms. However, Mill argues that this advantage could be realized so long as the associated workers were all "identified in interest with the prosperity of the undertaking" and "the common interest of all the workers in the work."<sup>55</sup> In practice, it appears that although these shared interests are necessary, they are far from sufficient for the success of a cooperative firm.

As Hansmann outlines in the above-cited passage, worker-owners also tend to have many *unshared* interests and face considerable challenges in agreeing upon the appropriate wages to be paid for differing tasks, skills, and experience, the kind and amount of work each worker must perform, and all the myriad decisions necessary for running a successful business. If Hansmann is correct that cooperative firms require extreme homogeneity in order to function successfully, this requirement seems not only to limit the number of cooperative associations that could be formed from a heterogeneous population, but also to discourage the fostering of individuality among workers, which Mill would presumably consider singularly unappealing.

Moreover, as the above-described difficulties illustrate, co-managing a cooperative enterprise is extremely difficult work that requires a particular set of skills and abilities. Managing a business – much like farming on the frontier – isn't for everyone. Not everyone is able to do that sort of work effectively, and – perhaps more importantly – not everyone wants to do it. Managing a business often involves relentless worries and nagging problems, and many workers would rather simply perform their tasks, pick up their paychecks, and not give a further thought to work after they leave for the day. Are such people necessarily weak-minded and lacking in virtue – as Mill suggests – if

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55 MILL, *supra* note 1, at 790.

they would refuse to endure the stress of co-managing a firm in order to further the cooperative principle? We will return to this question in Section VI.

### **Section V. Exit Options**

Jefferson and Mill argued, respectively, that the frontier and the cooperative association could solve the problems they associated with wage labor. In part, they were impressed by the virtues they saw in their prescriptions, and just as importantly, they thought it best to limit the extent to which government intervened in competitive market processes. Mill and Jefferson thought such intervention would be unnecessary, since most workers would opt for the superior careers they prescribed, but they were wrong. What resonance, if any, could this nineteenth-century error have for those of us who are concerned about the oppressive nature of wage labor in the 21<sup>st</sup> century?

First, we should note that although Jefferson and Mill were incorrect about the extent to which the availability of their prescribed options would empower workers and improve their lives, they did correctly realize – and may have been somewhat ahead of their time in doing so – that *some* sort of empowerment was a necessary component of a meaningful “exit option.” In contrast to their insight in this regard, the fantasy that workers and employers could negotiate fair bargains “at arm’s length” was very influential in the 19<sup>th</sup> century, and its hold on our imagination persists today. For example, it is still relatively common to find interlocutors who would glibly respond to arguments concerning the desirability of, say, minimum wage regulations as follows: “If they don’t want to accept a job at that rate of pay, they don’t have to; nobody’s holding a gun to their heads.” This is correct, so far as it goes. However, the mere *absence* of armed coercion falls far short of offering a meaningful choice to workers whose only alternatives are to accept demeaning work for poverty-level wages or starve.

To their credit, Jefferson and Mill each recognized that merely ensuring that workers are formally or legally entitled to the “exit option” of withholding their labor – e.g., by eliminating slavery and serfdom – does little to improve their bargaining position if they are otherwise without the means of subsistence. In other words, we might think that the “gun to their heads” is the brute fact that they will die if they cannot obtain the food, shelter, medical care, and other goods they need to live. This fact belies Locke’s blithe assertion that the man who encloses land does no injury to the rights of others on the grounds that “there was never the less left for others because of his inclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all.”<sup>56</sup> Although Locke did not advocate – and probably did not foresee – the excesses of the enclosure movements and their consequences for the poor of Europe, it is clear that each piece of property appropriated from what had been “the commons” incrementally divested humankind of what they had theretofore considered their birthright, namely, the right and ability to acquire their means of subsistence from the land.

Thomas Paine argues, based on the widely accepted belief that the earth was originally owned in common by all humankind,<sup>57</sup> that those who have profited most from the enclosure movements and other causes and consequences of the move from “primitive” to “civilized” forms of life owe a “ground rent” to those whose material circumstances have been worsened by this move:

Civilization ... has operated two ways: to make one part of society more affluent, and the other more wretched, than would have been the lot of either in a natural state. ... [T]he first

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56 LOCKE, *supra* note 43, at 21.

57 THOMAS PAINE, 3 THE WRITINGS OF THOMAS PAINE 329 (Moncure Daniel Conway ed., G.P. Putnam’s Sons 1895) (1797) (“It is a position not to be controverted that the earth, in its natural uncultivated state was, and ever would have continued to be, *the common property of the human race*. In that state every man would have been born to property. He would have been a joint life proprietor with the rest in the property of the soil, and in all its natural productions, vegetable and animal.”); *see also* LOCKE, *supra* note 56, at 21 (“God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated.”).

principle of civilization ought to have been, and ought still to be, that the condition of every person born into the world, after a state of civilization commences, ought not to be worse than if he had been born before that period. . . . Cultivation is at least one of the greatest natural improvements ever made by human invention. . . . But the landed monopoly that began with it has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, an indemnification for that loss, and has thereby created a species of poverty and wretchedness that did not exist before.<sup>58</sup>

We need not accept Paine’s assertion that the earth was or is owned in common to feel the force of his argument. Indeed, if we accept, instead, what Prof. Elizabeth Anderson calls the “egalitarian point of view” that all “property rights are artificial, *all the way down*,”<sup>59</sup> we have just as much reason to reject any given artificial arrangement of property rights that is manifestly unjust. On either view of the source of property rights, we can endorse Paine’s objection to arrangements in which some citizens become outlandishly wealthy and powerful by exploiting the advantages of living in civilized society, while others are left to suffer the indignities of poverty and homelessness or afforded no better option than that of trading abject obedience for borderline subsistence.<sup>60</sup>

If workers still had the right to “live off the land,” they would have the robust “exit option” of withholding their labor and living in the commons until the available job offers were more to their liking. Jefferson’s prescription to depart for the frontier approximates an attempt to return this option to the people – or at least, to the freeborn white male people – but it was not sustainable in the face of the class struggles and resulting consolidation of land, wealth, and power in 19<sup>th</sup> century America.<sup>61</sup> Moreover, as Mill recognizes, however much we may yearn to return to a simpler time, “a people who have once adopted the large system of production, either in manufactures or in

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58 PAINE, *supra* note 57, at 328-31.

59 Elizabeth S. Anderson, *How Should Egalitarians Cope With Market Risks?*, 9 THEORETICAL INQUIRIES IN LAW 239, 242-43, n. 4 (2008).

60 I borrow the phrase “trading obedience for subsistence” from Prof. Anderson, who has used it in discussions with me.

61 See BOWLES & GINTIS, *supra* note 41, at 49.

agriculture, are not likely to recede from it.”<sup>62</sup> Similarly, Paine argues that the greatly increased populations that have resulted from modern agriculture and production methods could not be sustained if many people attempted to live off the land.<sup>63</sup>

Furthermore, as I argued in the preceding section, not everyone would want to go “back to nature” or take up a freehold and become a farmer. Remaining in the “civilized” state of production and agriculture while adopting measures to move to a more egalitarian distribution of income and wealth could offer significant advantages to every member of society. Indeed, we can recognize that workers need some sort of meaningful “exit option” without falling back on the radical “exit” of removing oneself from one’s community and familiar mode of life and depositing oneself on an unimproved plot of land somewhere on the lonely frontier. A just society would make it possible for workers to find dignified ways to work for their means of subsistence without having to resort to the extreme measure of abandoning their communities.

Returning to our would-be employee with a Dickensian job offer and no *actual* gun to her head, if she consents to work for sub-poverty wages, does her consent foreclose the possibility of making a claim of justice on her behalf? As Prof. Robert Mayer notes, “only Thomas Hobbes believes that coerced contracts are valid,” while “[t]he rest of us think that consent must be voluntary in order to create binding obligations.”<sup>64</sup> Does the absence of an *overt* threat suffice for voluntary consent? As jurist Learned Hand argues, justice might require us to intervene whenever leverage of *any* kind gives one party to a putative contract an unfair advantage:

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62 MILL, *supra* note 1, at 752.

63 Paine, *supra* note 57, at 328-29 (“It is always possible to go from the natural to the civilized state, but it is never possible to go [back]. The reason is, that man in a natural state, subsisting by hunting, requires ten times the quantity of land to range over to procure himself sustenance, than would support him ... where the earth is cultivated. When, therefore, a country becomes populous by the additional aids of cultivation, art and science, there is a necessity of preserving things in that state; because without it there cannot be sustenance for ... its inhabitants. The thing, therefore, now to be done is to remedy the evils and preserve the benefits that have arisen to society by passing from the natural to ... the civilized state.”).

64 Robert Mayer, *Is There a Moral Right to Workplace Democracy?*, 26 SOC. THEORY & PRAC. 301, 318 (2000).



For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result.<sup>65</sup>

Although Mill and Jefferson recognize the important truth in this passage, namely, that we have reason to “make more just and equal” the relative bargaining power of capitalists and workers, they hoped that legislation could be avoided by pointing to the empowering nature of their respective prescribed “exit options.” To their credit, they do not ask us to accept that *any* voluntary choice is justifiable based on consent alone. Instead, the Mill-Jefferson view seems to suggest that so long as an agent has at least one good option available to her, it is morally unobjectionable to permit her to choose a relatively bad option. Since workers could form cooperatives (according to Mill) or take up a freehold on the frontier (according to Jefferson), and these are *good* options, neither the worker nor anyone else can have any moral complaint if the worker chooses instead to accept, say, a job in a factory or coal mine.

## Section VI. Two Intuitions

The Mill-Jefferson view, as I have described it herein, seems to trade on the apparent appeal of two intuitions, and in this final section, I will critically examine these intuitions and argue that neither carries much normative weight. The first intuition is the notion that so long as we, as a society, provide a sufficiently attractive option for workers, we don’t owe them anything further. For example, suppose you work 100-hour weeks in a coal mine, for which you receive barely enough pay to provide for your subsistence. In addition, your supervisor sexually harasses you, and you are

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65      Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 506 (1908).

developing black lung. Nonetheless, your job is the best you can find. You describe your situation to me, and I am so deeply moved that I immediately offer you *the job of your dreams*.

What is the significance of this offer? Before I make the offer, your situation inspires sympathy and seems to cry out for justice, but once you receive the offer, you are to be envied, are you not? After all, you now have an offer to take up the *job of your dreams*. What more could you want, and how could anyone suggest that you deserve more? And if you chose, for some unfathomable reason, to turn down my offer and return to the coal mines, who would have any sympathy for you? It would be difficult to make a compelling claim of justice on your behalf if you deliberately turned down a *great* opportunity in favor of your miserable life in the coal mines.

In response, we should first ask how good an option needs to be in order to rule out any further claims of justice on behalf of those to whom the option is available. That is, even if we accept the intuitive force of the “job of one’s dreams” hypothetical I sketched in the preceding paragraph, we need not accept that it extends to anything significantly less attractive than the job of one’s dreams. For example, if you were a lifelong resident of Boston and someone offered you an otherwise fantastic job in New Mexico, do you deserve nothing more than what the local labor market offers, no matter how dismal, if you were unwilling to leave your family, friends, and hometown to accept the “fantastic” job offer? Mill and Jefferson argue that their proposed options are so good that no sensible or virtuous person could turn them down, but as we saw in Section IV, these options are *not* universally appealing. Not everyone has the necessary skills to be a frontier farmer or to co-manage a cooperative firm, and not everyone would consider either option sufficiently attractive to embark upon it. The latter point seems especially important with respect to the intuitive pull, if any, of the “job of one’s dreams” hypothetical. If someone offered you the job of *my* dreams, and you didn’t share my enthusiasm for it, you wouldn’t think the offer had much normative significance.

Moreover, we should be suspicious of the intuition to the extent that it relies upon considerations of *pity* and *envy*. In the hypothetical I sketched above, when you tell me about your miserable job in the coal mines, my sympathy for your *pitiabile* situation inspires me to offer you a great job. Once I do so, your situation becomes *enviable*, and I suggested that this might lead us to think that justice would not require any further claims on your behalf. Perhaps we *would* feel this way about people who turn down what we perceive to be fantastic job offers, but this seems reflective of something other than our intuitions about justice.

To the extent that we aim at a more just society, we would not want to offer better options to workers languishing in miserable jobs out of *pity*, but because our abandoning them to their fate would show insufficient concern for their interests. As Anderson argues, “[p]ity is incompatible with respecting the dignity of others. To base rewards on considerations of pity is to fail to follow principles of distributive justice that express equal respect for all citizens.”<sup>66</sup> Similarly, we would err if we thought we owed you nothing further once you received my great job offer because you were thenceforth to be *envied*.<sup>67</sup>

The obvious implication of the foregoing discussion for the Mill-Jefferson view is that their respective prescriptions would need to be *extremely* good before we would be willing to say that we have done all that justice could possibly require, at least with respect to the provision of career opportunities. Since their proposed “exit options” turned out to be a great deal less feasible, attractive, and empowering than they predicted, we can readily conclude that the mere possibility of freehold farming and cooperative labor – both of which still “empower” workers today – do not carry much normative weight. It seems likely that Mill, at least, would concede that such

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66 Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 306 (1999).

67 *Id.* at 307 (“Envy’s thought is ‘I want what you have.’ It is hard to see how such wants can generate *obligations* on the part of the envied. To even offer one’s own envy as a reason to the envied to satisfy one’s desire is profoundly disrespectful.”) (emphasis added).

considerations constitute a serious – if not decisive – objection to his prescription. Although Mill often seems scornful of workers who would fail to see the attractiveness of cooperative labor, he is fundamentally committed to equal concern for the interests of all:

Now, society between human beings, except in the relation of master and slave, is manifestly impossible on any other footing than that the interests of all are to be consulted. Society between *equals* can only exist on the understanding that the interests of all are to be regarded equally.<sup>68</sup>

Accordingly, although Mill incorrectly thought that forming or joining cooperative firms would be more universally feasible for workers than it has proved to be in practice, we should view his error in this regard as principally factual rather than normative. If he had fully understood *all* the obstacles workers face in forming cooperatives, he would almost certainly have revised his normative conclusions about the intelligence and virtue of people who eschew cooperative labor in favor of wage labor. In other words, if he had learned that society's standing offer to workers to form cooperatives wasn't as fantastic as he initially thought it was, he would have insisted that the interests of all – including wage workers – be considered.

The second intuition upon which the Mill-Jefferson view arguably trades is the suggestion that certain kinds of work or modes of working require and nurture virtues that are especially valuable to society, and that we should only encourage and reward those who engage in these particularly valuable and praiseworthy sorts of work. Jefferson makes his evaluative commitments especially clear when he claims that “[t]hose who labour in the earth are the chosen people of God,” and this probably motivates his desire to rely on this as the sole liberating option for those who might otherwise accept positions as hired laborers. Since reliance on manufacturing work leads to

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68 JOHN STUART MILL, *UTILITARIANISM* (1863), *reprinted in UTILITARIANISM AND OTHER WRITINGS* 251, 285 (Mary Warnock ed., 1962); *see also* JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 82 (Longmans, Green, Reader, and Dyer, 4th ed. 1878) (1869) (“Though the truth may not be felt or generally acknowledged for generations to come, the only school of genuine moral sentiment is society between *equals*. The moral education of mankind has hitherto emanated chiefly from the law of force, and is adapted almost solely to the relations which force creates. In the less advanced states of society, people hardly recognise any relation with their *equals*.”) (emphasis added).

dependence and moral decline, why do anything to make such jobs more tolerable? If we permit the unrestricted labor market to conduct its customary race to the bottom, more workers will take the laudable option of farming on the frontier.

Similarly, Mill not only argues that it is in workers' interests to form cooperative associations, but also implies that workers have a positive *obligation* to improve society by advancing the "cooperative principle." He asserts that "in the moral aspect of the question, ... something better should be aimed at as the goal of industrial improvement" than the economic prosperity of individuals and their families. Instead, "if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured."<sup>69</sup> Although we might agree that these are laudable and desirable goals, we might hesitate to concede Mill's further assertion that *only* those who work in cooperatives *deserve* success: Associations like those which we have described, by the very process of their success, are a course of education in those moral and active qualities *by which alone* success can be either deserved or attained. As associations multiplied, they would tend more and more to absorb all work-people, except those who have too little understanding, or too little virtue, to be capable of learning to act on any other system than that of narrow selfishness.<sup>70</sup>

Which, exactly, are these "moral and active qualities"? If all Mill has in mind is the willingness to perform "an honest day's work for honest pay," few would challenge him, but he is well aware that the formation and management of cooperative enterprises requires not just hard work, but entrepreneurial initiative and intelligence. To the extent that Mill implies that only those who are sufficiently intelligent and entrepreneurial deserve to be rewarded for their efforts, we should resist this seeming elitism.

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69 MILL, *supra* note 1, at 762-63.

70 *Id.* at 791 (emphasis added).

We see further hints of the value judgments underlying Mill's view in his strong approval of those cooperative associations which flourish "at whatever cost of labour or privation," without loans from capitalists or their government.<sup>71</sup> We, too, might marvel at the pluck and determination of workers who succeed in cooperative endeavors against all odds, but our approval of their success should not lead us to conclude that only those who are capable of succeeding in a similarly impressive manner *deserve* success. Mill's view is probably not quite *that* extreme, but it is clear that he is at least somewhat persuaded that it is good for humans to be prodded and enticed to do what is best for them:

It is the common error of Socialists to overlook the natural indolence of mankind; their tendency to be passive, to be the slaves of habit, to persist indefinitely in a course once chosen. Let them once attain any state of existence which they consider tolerable, and the danger to be apprehended is that they will thenceforth stagnate; will not exert themselves to improve, and by letting their faculties rust, will lose even the energy required to preserve them from deterioration.<sup>72</sup>

This may simply reflect my own dissimilar value judgments, but I do not apprehend any particular "danger" in the prospect of workers attaining a "state of existence which they consider tolerable." For one thing, workers who are content to labor in relatively simple jobs will not necessarily "stagnate," as they could pursue educational, artistic, recreational, and family activities outside work. Many such workers view their jobs as little more than sources of the means to support themselves and do what they really enjoy – once they leave work for the day, they don't give it another thought until the following morning. What could be wrong with this familiar view of the value of work?

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71 *Id.* at 773 ("So long as this idea [of worker-owned cooperatives] remained in a state of theory . . . it may have appeared . . . incapable of being realized . . . unless by seizing on the existing capital, and confiscating it for the benefit of the labourers. . . . But there is a capacity of exertion and self-denial in the masses of mankind, which is never known but on the rare occasions on which it is appealed to in the name of some great idea or elevated sentiment.").

72 *Id.* at 793.

Mill puts his cards on the table, so to speak, in a letter to his friend and correspondent

Thomas Carlyle, in which he aims to explain his idiosyncratic utilitarian commitments:

Though I hold the good of the species (or rather of its several units) to be the *ultimate* end, (which is the alpha & omega of my utilitarianism) I believe with the fullest Belief that this end can in no other way be forwarded but by ... each taking for his exclusive aim the development of what is best in *himself*.<sup>73</sup>

This passage may elucidate what Mill means by the “selfishness” of workers who refuse to form or join cooperative firms. Such endeavors require workers to display intelligence, entrepreneurial spirit, and stirring feats of “labour and privation,” all in furtherance of both the “co-operative principle” and increased productivity in society. In contrast, Mill sees working for wages to obtain the means of subsistence as “selfish” because it aims only at one’s own needs and those of one’s dependents. When there is no cooperative alternative available, this sort of “selfishness” is not blameworthy, but when it becomes feasible for workers to form cooperatives, thereby benefiting society as a whole, *all* workers – except, of course, those “whose low moral qualities render them unfit”<sup>74</sup> – have a positive duty to do so.<sup>75</sup>

## Section VII. Conclusion

Again, we might share Mill’s approval of the traits of being active and intelligent, but we need not approve so heartily that we refuse to recognize the contributions of those who either are not “*as active and as intelligent as other people*” or who do not choose to focus all their powers of

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73 JOHN STUART MILL, XII THE COLLECTED WORKS OF JOHN STUART MILL 207-08 (Francis E. Mineka ed., Routledge and Kegan Paul 1963) (1834).

74 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 763-64 (W.J. Ashley ed., Longmans, Green & Co. 9th ed. new ed. rpt. 1915) (1848).

75 Mill’s views on the value of competition are also telling in this regard: “To be protected against competition is to be protected in idleness, in mental dulness; to be saved the necessity of being as active and as intelligent as other people; and if it is also to be protected against being underbid for employment by a less highly paid class of labourers, this is only where old custom, or local and partial monopoly, has placed some particular class of artizans in a privileged position as compared with the rest; and the time has come when the interest of universal improvement is no longer promoted by prolonging the privileges of a few.” *Id.* at 793-94.

activity and intelligence on their “day jobs.” Many workers who are not particularly motivated or intelligent – or who don’t have the opportunity and/or inclination to apply these traits at work – can nonetheless perform valuable roles within productive endeavors that are conceived, initiated, and managed by others. We might not find these “role players” as impressive as the entrepreneurs who define their roles, but justice undeniably requires us to recognize and reward these workers’ contributions.

This points to what may be the most important lesson we can draw from Mill’s flawed prescription for workers’ “futuraity.” Because of his near-exclusive focus on the traits that he particularly admires, Mill seems significantly to overvalue the contributions of entrepreneurs as compared to those of non-managerial workers. As I argued above, Mill’s proposal would be unappealing to many workers because it would require them to become co-managers of firms. Not everyone wants to perform managerial tasks and have managerial responsibility, and we would need a very compelling reason to impose such work on the unwilling. According to Mill, the reason that everyone should be an entrepreneurial co-manager is that this would make society more productive, keep workers from “stagnating,” and force them to “exert themselves to improve” and develop what is best in themselves. But it is especially challenging to be a co-manager of a cooperative firm, since it is so difficult to reach consensus when every member of the firm has an equal vote. Simply put, the problem with Mill’s proposal is that it requires “too many chiefs; not enough braves.” Accordingly, one reason to be wary of placing disproportionate value on managers and entrepreneurs is that we don’t need very many of them. Indeed, if everyone were involved in management, firms might well be hopelessly difficult to run.

Another reason to question the extent to which Mill values entrepreneurs – and he’s not alone in overvaluing them, as the increasingly bloated salaries of CEOs and upper management demonstrate – draws on Thomas Paine’s complaint about what we lost when we left “the state of



nature” and ceased to enjoy common ownership of the earth. On the one hand, we can acknowledge that entrepreneurs are impressively “active” and “intelligent.” After all, their predecessors were able to entice us out of the state of nature with their ambitious plans to enclose and improve land, thereby expanding its productive capacities tenfold. But on the other hand, we should be just as aware that entrepreneurs were *also* the insufferable busybodies who have thrust us into the modern world of 90-hour work weeks, the perceived obligation to be “productive” at all times, ludicrously wealthy privileged classes, and crushingly impoverished “underclasses.”

Accordingly, in response to Mill and others who profess unmitigated admiration of ambitious entrepreneurs, we should insist on greater restraint. We should value and reward entrepreneurs to the extent that their ambitious schemes benefit society as a whole – including those members of society who clean the entrepreneurs’ executive bathrooms and keep their production lines running – but we should just as surely resent and refuse to reward entrepreneurs to the extent that they have only enriched themselves, and – in the apt words of Thomas Paine – “thereby created a species of poverty and wretchedness that did not exist before.”<sup>76</sup>

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76 PAINE, *supra* note 57, at 331.

**CHAPTER THREE**  
**REVISING THE ROLES OF MASTER AND SERVANT:**  
**A THEORY OF WORK LAW**

**Section I: Work Law As I See It**

*A. Brief Introduction*

In this paper, I will explore and analyze the philosophical foundations of laws regulating labor and employment (hereafter, “work law”). I will say more below about what I intend to include within the body of “work law” that is my subject, but as an initial description, I will say simply that I will focus my analysis on laws that govern the relations between employers and employees in the United States and other common-law jurisdictions. More importantly, I will argue for the adoption of a particular way of viewing and understanding work law and an associated normative framework through which to assess its legitimacy.

I argue herein for the view, which I will call the “relationship view,” that work law defines and regulates the authority relations involved in work relationships, particularly those within firms. This would constitute a departure from the more prevalent alternative view of work law, which I will call the “freedom-of-contract view.” This view holds that work law is best understood as a set of constraints on freedom of contract in labor markets which primarily affect decisions whether to enter a given employment relationship and bargaining over compensation and benefits.

In contrast, the relationship view suggests that we analyze work law as constituting and regulating the nature of work relationships, which are essentially status-based governance

relationships. Furthermore, a critical evaluation of a given jurisdiction's body of work law should focus on whether and to what extent these governance relationships might be justified. Accordingly, my positive project in this dissertation is to argue that the primary purposes of work law are and should be to define and regulate the nature of the work relationship, to provide effective checks against abuses of authority, and to recognize and permit only legitimate exercises of authority in the workplace.

In addition, I will pursue the negative project of arguing that the aforementioned freedom-of-contract view of the nature and purpose of work law is flawed and incomplete. The view mistakenly holds that work law is best understood as a part of contract law which largely consists of restraints on freedom of contract in labor markets. Moreover, the view errs in placing undue emphasis on the negotiations and transactions through which parties enter or modify the terms of work relationships, to the exclusion of the "internal" aspects of employment relationships with which work law is primarily concerned.

### B. *What I Mean By "Work Law"*

I follow what I take to be a current trend in legal academia by referring to the area of law governing the terms and conditions of work and working relationships as "work law." I will now expand on my earlier remarks in order to provide a necessarily rough but fuller picture of what I mean to discuss under the term "work law."

I will first explain why I choose not to refer to the body of law in question as the law of "labor," "employment," or both. Although the term "labor law" is often used in a broader sense in other common law legal systems, such as those of England and Canada, Americans tend to use "labor law" to refer more specifically to laws regulating unions. This is understood as largely distinct from "employment law," which is understood to refer to laws regulating non-union hired workers.

Perhaps because of these terms' ambiguity, some U.S. scholars use the term "work law" to refer to the body of law comprising both labor law and employment law, along with other laws regulating the world of work.

For example, Orly Lobel argues, in an article titled "The Four Pillars of Work Law," that U.S. work law comprises labor law, employment law, employment discrimination law, and the laws regulating employee benefits:

Work law developed in the American legal system as a patchwork of common law doctrine, federal and state statutes, and evolving social norms. Typical law school curricula often include courses related to the four pillars of work law: "employment law," "labor law," "employment discrimination," and some variation of a tax-oriented "employee benefits law."<sup>77</sup>

I do not dispute Lobel's claim that these topics constitute the "four pillars," but I will occasionally use the term "work law" even more broadly. For example, although law schools typically do not offer entire courses devoted to the study of the federal and state Occupational Safety and Health Acts, these statutes' principle purpose is to promote and ensure health and safety in the workplace by regulating relevant minimum standards, so I consider them part of work law. Similarly, I will also use "work law" to refer to federal, state, and local regulations mandating the provision of various facilities in workplaces, such as bathrooms, break rooms, and first aid equipment.<sup>78</sup> In short, I understand "work law" as the body of laws in a given jurisdiction which directly define and regulate the employer-employee relationship, and I will therefore use the term in this expansive sense and use

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77 Lobel 2010, p. 1539.

78 See generally 29 CFR 1910. These laws are often contained *within* the jurisdiction's OSHA statute, but for purposes of discussion, they seem to have a different emphasis from those laws limiting exposures to dangerous conditions, etc.

the specialized terms “labor law,” “employment law,” “employment discrimination,” “employee benefits,” and “workplace safety regulations” in their usual, narrower senses.<sup>79</sup>

I should also say something about the areas of law that I want to set aside in my discussion of “work law.” For example, state Temporary Assistance for Needy Families (TANF)<sup>80</sup> laws bear on the lives of workers in several ways, most obviously by setting forth the terms under which and the extent to which their communities are willing to support them when they are in need of public assistance. Less obviously, these laws also make up part of the large and varied body of jurisprudence that contributes to the definitions of terms such as “work,” “employment,” and “job” within a given legal system. Despite these connections with the law’s regulation of workers’ lives, I exclude TANF laws from the “work law” I want to discuss because I understand it to comprise all and only those laws that directly regulate the work relationship. In addition, I will exclude most “higher-level” policy that is arguably intended to influence employers, employees, or workplaces via indirect incentives or penalties rather than direct regulation of what the parties in work relationships may, must, or must not do.

For example, I exclude the core provisions of job-creation and -training programs such as the Workforce Investment Act of 1998<sup>81</sup>; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>82</sup> which implemented the aforementioned TANF and “workfare” programs in the United States; and in general, any federal, state, or local taxation, environmental, consumer protection, food and drug safety, or other laws or regulations that offer incentives or

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79 Please note, however, that this usage is not universal, and many of the authors I cite herein use the terms differently. For example, it is especially common to see “labor law” used in the same broad “catch-all” sense in which I use “work law.”

80 This is the current statutory name for the form of social insurance often known as “welfare.”

81 29 U.S.C. §§ 2801-2945 (2000).

82 42 U.S.C. §§ 601-619 (2000).

impose costs on either employers or employees in ways that arguably aim to influence their conduct in or with respect to work relationships.

## **Section II: Initial Skirmish with the Freedom-of-Contract View**

Despite the centrality of work in most people's lives, theoretical discussion of work law has been scant in contemporary legal and political scholarship. This scarcity may be largely explained by the freedom-of-contract view's assumption that work relationships can be adequately analyzed under the existing and relatively well developed philosophy of contract law. For example, Horacio Spector notes that the "paucity of contemporary philosophical works on labor law is surprising," but he simultaneously asserts that labor law is no more than "a complex bundle of restraints on freedom of contract in the labor markets."<sup>83</sup> Moreover, Spector proposes, in an article titled "Philosophical Foundations of Labor Law," merely to "focus on philosophical arguments relevant to the *justification* of labor law institutions."<sup>84</sup> Spector's remarks suggest that we can understand work relationships entirely through the lens of contract law and define the "philosophical foundations of labor law" as the project of attempting to justify such laws' intrusions into "freedom of contract in the labor markets."<sup>85</sup>

This approach is bizarre in light of work law's emergence from the laws of master and servant. This is a distinctive form of status-based law. Work law is no more an *intrusion* upon the employment contract than marriage law "intrudes" upon the marriage contract. To the contrary, marriage law *constitutes* the marital relationship, which can then only be modified by contracts such as

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83 Spector 2006, pp. 1120-21.

84 Id. (emphasis added).

85 Id.

prenuptial agreements. Similarly, work law *constitutes* the work relationship, which can then only be modified in limited ways by particular employment contracts.

Nonetheless, the view that work law might best be understood as a species of contract law has some *prima facie* plausibility. For example, what we refer to as “labor law” constitutes a major component of work law, and it governs the formation and activities of unions, which exist in large part to negotiate *contracts* between unionized workers and management. Similarly, “employment law” is another significant component of work law, and it governs relationships between employers and employees which are typically entered via *contractual* or quasi-contractual agreements. In short, when people work for a salary or wages, they typically agree to a bargain specifying that they will provide labor in exchange for money and other valuable consideration – the quintessential elements of a contract at common law. So it is understandable that some might believe the most important aspect of work law concerns the contracts through which employers and employees enter work relationships and specify some of their terms.

However, viewing work law as merely ancillary to an overarching body of contract law – which it “restrains” – is deeply mistaken. At best, this is a stiflingly narrow view which ignores the many ways in which work law supersedes or functions alongside the law of contracts. At worst, it is a category mistake. As I will discuss further in the next section, the roles of employer and employee are primarily defined by “status” rather than by “contract.” We have long understood *status* and *contract* as distinct from and even opposed to each other, but the work relationship formed when parties voluntarily agree to a contract of employment clearly involves accepting and assuming distinct statuses within a state-defined and -regulated institution.

Consider again the comparison with marriage laws, which allow some modifications of the marriage relationship through prenuptial agreements and only recognize as valid those marriages that are entered voluntarily through signed agreements by both parties. The foregoing are important

elements of marriage law. But they do nothing to change the fact that once one has agreed to enter a marriage, one thereby takes on the status of spouse in a legally defined relationship, most of the features of which cannot be altered by contract. For example, spouses typically cannot sue each other during marriage for anything other than divorce, spouses cannot be forced to testify against each other in court, and spouses have mutual obligations to support each other during marriage that cannot be contractually waived or altered.

Accordingly, courts have long recognized that marriage is primarily a relationship of status, despite its gradual incorporation of contractual elements. For example, in 1888, the U.S. Supreme Court explained:

[A]t common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.<sup>86</sup>

Since 1888, of course, we have abolished the laws of coverture and enacted civil rights legislation protecting the rights of women, and the law no longer sees the parties to a marriage relationship as “merged into one.” However, despite the greatly increased “independence” of the parties to modern-day marriage contracts, 21<sup>st</sup>-Century courts continue to reaffirm the essentially status-based nature of the marriage relationship. For example, in its landmark 2003 decision holding that same-sex couples have the right to marry under the Massachusetts Constitution, the Massachusetts Supreme Court’s majority opinion explains that “marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise.”<sup>87</sup> Yet more recently, the

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86 *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888) (holding that “marriage is not a contract within the meaning of ... [the Commerce Clause]”).

87 *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003).



federal District Court for the Northern District of California held, in *Perry v. Schwarzenegger*,<sup>88</sup> that the U.S. Constitution guarantees a right to same-sex marriage. In its majority opinion, the *Perry* Court describes marriage as follows:

[M]arriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. The spouses must consent to support each other and any dependents. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. . . . [T]he evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage.<sup>89</sup>

As the foregoing legal opinions attest, although the state-sanctioned marriage relationship can only be entered by two parties' consenting to sign a marriage contract, courts and judges have long seen this contractual element of the relationship as a mere formality in comparison with its core nature and function as a state-defined institution conferring a "marital status" on those parties who choose to participate in it.

Similarly, when two parties consent to enter a work relationship via an employment contract, they thereby agree to do so and set some of the terms of the relationship, but work law defines and regulates the relationship so that many of its essential features cannot be altered by contract. For example, if two parties purport to enter an employment contract, but the putative "employee" meets, instead, the legal definition of an "independent contractor," the putative "employer" cannot be held vicariously liable for a variety of torts committed by the "employee" in the course of her work for the "employer," even if the "employer" implicitly or explicitly agrees to assume such liability in the contract. More frequently, a hiring party will purport to agree to a contract for services with an "independent contractor" while nonetheless retaining the sort of control over the worker that is definitive of an employment relationship. In such cases, courts have held that even

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88 704 F. Supp. 2d 921 (N.D. Cal. 2010).

89 *Perry*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010).

though the hiring party did not explicitly *agree* to enter an employment relationship and assume the rights and obligations associated therewith, the nature of its relationship with the purported “independent contractor” – no matter how it is described in the contract – unavoidably constitutes an employer-employee relationship in the eyes of the law. Thus, even though contractual attempts to execute an “end run” around the provisions of work law are common – and all too often successful despite their illegality – they are prohibited by law and will be declared void if discovered.

Moreover, most of the laws governing the day-to-day interactions between workers and employers have little to do with contracts. In practice, most employment litigation is prosecuted on behalf of aggrieved employees – interestingly, very few employers sue their employees to enforce their rights *qua* employer, preferring simply to fire any employees who displease them – and employee plaintiffs typically do not sue their employers to enforce their *contractual* rights. Instead, they much more commonly seek to enforce rights guaranteed to them by local, state, and federal statutes. For example, common employee-initiated lawsuits based on work law statutes include causes of action for discrimination based on race, sex, disability, age, or religion; sexual harassment; wage and hour claims, including those based on allegations that workers have been misclassified as “independent contractors” rather than “employees”; and employer retaliation against whistleblowers or employees who have attempted to enforce their statutorily guaranteed rights.

Accordingly, we could plausibly suggest that it is principally through such statutes and other elements of work law – rather than the law of contracts – that the U.S. and other common law jurisdictions regulate work relationships. In response, Horacio Spector and others sympathetic to the freedom-of-contract view might argue that these statutes should nonetheless be viewed as *part of* contract law since they principally function as restraints on freedom of contract. However, in addition to its straightforward inaccuracy, this line of reasoning is problematic in that it implies that we should conceive of a great many distinct bodies of law as somehow ancillary to – or mere

“branches” of – contract law. For example, it is a matter of blackletter law that any contractual provision involving illegal subject matter is unenforceable, so all statutes that make any sort of conduct illegal thereby function as restraints on contract by making putative contracts involving the illegal conduct unenforceable. Thus, statutes prohibiting murder indisputably constrain freedom of contract by rendering unenforceable any contractual agreement to commit murder. But to view criminal laws principally as means to limit the enforceable subject matter of contracts is obviously misguided. By analogy, it seems similarly misguided to view work law as no more than a specialized branch of contract law.

The freedom-of-contract view’s focus on external aspects of work relationships distorts the primary purpose of work law by neglecting its function of regulating the ongoing nature of the relationship between employer and employee in the workplace, over the course of performing the contract. This is a mistake because the core of work law concerns this ongoing relationship. The view I will defend in this dissertation more accurately conceives of work law as specifying and regulating the content of the relationship. This relationship is one of governance, in which the employer is understood and permitted to exercise authority over the employee. Indeed, we might plausibly see work law as providing a constitution for a sort of private government that persists within the workplace, much as it has since work law was more commonly called the law of “master and servant.” I will discuss and defend this view of the workplace as a zone of private governance below. In the next section, however, I will explore and critically evaluate the ideology that arguably motivates the freedom-of-contract view.

### Section III: What Motivates the Freedom-of-Contract View?

#### A. Maine's "From Status to Contract"

It is widely accepted among social scientists and legal theorists that Sir Henry Maine was largely correct when he wrote in 1861 that "the movement of progressive societies has hitherto been a movement from status to contract."<sup>90</sup> This pronouncement may have contributed to the enthusiasm of the late 19th-century "freedom of contract" movement, and it is not surprising that many people took it as an optimistic projection of the future, associating "status" with serfdom or slavery and "contract" with liberty and individual choice. Most importantly for my purposes, the freedom-of-contract view is arguably rooted in an ideology inspired, at least in part, by Maine's status-to-contract hypothesis, so I will examine it closely, beginning with an excerpt from *Ancient Law*, the work in which Maine first advanced the hypothesis:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But, whatever its pace, the change has not been subject to reaction or recoil, and apparent retardations will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared – it has been superseded by the contractual relation of the servant to his master. The status of the female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. .... The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best

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90 Maine 1917, p. 100.

writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.<sup>91</sup>

As this passage illustrates, Maine clearly endorses the “movement *from Status to Contract*” as an “advance [that] has been accomplished” rather than merely describing it in the form of an observation about social and legal change. That is, Maine means both to describe a trend he observes in modern legal systems and to endorse the trend as “progress.” It’s not clear whether he thinks this positive change is in some sense *inevitable*, but he does claim to have identified “a formula expressing the *law* of progress” underlying the movement from status to contract.<sup>92</sup> Perhaps we should understand this invocation of “law” as the claim that his “formula” expresses the best or only way to achieve progress, or alternatively, that some law of human nature will always push human societies to progress in the way he describes. Note also that Maine defines the dichotomy he suggests in the excerpt’s closing paragraph by asserting that if we can call all “personal conditions” arising from the family “Status,” we can then refer to all those connections that arise by agreement as “Contract.” This division allows for the possibility that connections will be “coloured by” the previous rights and obligations provided by Status, but he suggests that the more we can abandon such “archaic ideas and customs” and move toward purely contractual relations, the better.

There are various problems with Maine’s suggestion, including the difficulty of separating the deeply intertwined influences of Status and Contract. Indeed, it is ironic that Maine insists on explicitly including both the master-servant and marriage relations in the broad move toward contract, since his discussion of these relations simultaneously demonstrates that these are among the most problematic cases for his “formula” to explain. In his description of work relations, he argues that the “status of the Slave ... has been superseded by the contractual relation of the servant

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91 Maine 1917, pp. 99-100.

92 Id. [emphasis added]

to his master.”<sup>93</sup> Why “to *his* master” instead of “with *a* master”? If Maine hoped to portray this supersession as a laudable move toward a relation between free and equal contractors, he shouldn’t have described it in terms that make clear the hierarchical and status-based nature of the master-servant relation. To illustrate, it is evident that we could easily describe the “buyer-seller” relation in neutral terms that imply nothing about hierarchy or status, e.g., a buyer contracts *with a* seller to pay money for goods. In contrast, it would sound neither neutral nor intuitively correct to say that she enters a “contractual relation of the buyer *to her* seller.”

Similarly, when Maine discusses marriage, he explains that the “status of the female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract.” As Nora Flum notes, Maine simply *can’t* pretend that married women of his era could be viewed as entities who were separable from their status:

Women were only free from status when they existed outside of a marriage relationship. Despite Maine’s desire to show that Western society had ascended to a purely contractual level, he was forced to concede that married women were prohibited from contract and thus existed in a status relationship within the family.<sup>94</sup>

Furthermore, as Maine was surely aware, life as an *unmarried* woman – in his time and long thereafter – typically did not offer significant freedom, contractual or otherwise. Phyllis Atwell, a former sociology professor of mine, once asserted that the reason the father of the bride traditionally “gives her away” during the wedding ceremony is “so that the woman is always under male supervision.” I’m not sure to what extent her assertion is historically or culturally accurate, but it sounds roughly right to me as a plausible explanation of the tradition as it persists today, and I suspect it would have seemed *obviously* right to Maine and his contemporaries.

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93     Id.

94     Flum 2011, p. 61.

### B. *Where Maine Went Wrong*

Notwithstanding its substantial influence, Maine's hypothesis has also been the subject of sustained criticism. For example, legal academic Nathan Isaacs writes as follows in a 1917 article in the *Yale Law Journal*:

The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. ... Now and then the formula has been modified or limited, or exceptions to it have been noted; then the universality of the doctrines began to be questioned; and finally its applicability to Anglo-American law has been categorically denied.<sup>95</sup>

Isaacs attributes the above-referenced "categorical denial" to Roscoe Pound, then-dean of Harvard Law School, who was a prominent representative of the emerging school of thought known as "legal realism" or "sociological jurisprudence."<sup>96</sup>

Pound did, indeed, deny that Maine's formula had "any basis in Anglo-American legal history," and argued that Maine's purported historical insight constituted little more than his endorsement of a short-lived and anachronistic phase of 19th-Century jurisprudence:

Puritanism, the attitude of protecting the individual against government and society which the common-law courts had taken in the contests with the crown, the eighteenth-century theory of the natural rights of the abstract individual man, the insistence of the pioneer upon a minimum of interference with his freedom of action, and the nineteenth-century deduction of law from a metaphysical principle of individual liberty – all these combined to make jurists and lawyers think of individuals rather than of groups or relations and to make jurists think ill of anything that had the look of the archaic institution of *status*. The Romanist idea of contract became the popular juristic idea and, as Maitland puts it, contract became "the greediest of legal categories." ... This was furthered by the general acceptance ... of [a] political interpretation of jurisprudence ... which found the key to social and hence to legal progress in a gradual unfolding of the idea of individual liberty .... It was furthered also by the famous generalization of Sir Henry Maine that the evolution of law is a progress from *status* to contract. ... But in truth the dogma of Sir Henry Maine is a generalization from Roman legal history only. It shows the course of evolution of Roman law. On the other

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95 Isaacs 1917, p. 34.

96 I won't attempt a full definition or discussion of these terms here. In essence, these theorists were opposed to what they took to be the dominant view that the law provided determinate answers to some or all legal questions. Pound and other legal realists denied this, holding that what judges did was more a function of their role as political actors rather than objective interpreters of the law.

hand it has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it, unless indeed, we are progressing backward.<sup>97</sup>

In response, Isaacs objects to Pound's dismissal of Maine by pointing to what he takes to be factual evidence supporting Maine's formula:

Is there indeed "no basis in Anglo-American legal history" for the status-to-contract theory as generally understood? Its original application was to personal relations derived from or colored by the powers and privileges anciently residing in the family. Is it not true that the relation of master and servant was originally – and still is nominally – a domestic relation? And whether the nineteenth century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? "Employer" and "employee" (words having reference to the contract) now seem more appropriate terms than the older "master" and "servant" (words having reference to status).<sup>98</sup>

But Isaacs' half-hearted rhetorical gestures at terminological changes are not at all persuasive, especially since Isaacs refers to – and is therefore aware of – Pound's much deeper analysis of early 20th-Century developments in the laws regulating the work relationship.

Essentially, Pound argues that rather than moving from status to contract, the legal system of his day was progressing in the opposite direction:

[M]ore significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. Such is the settled tendency of the present. To me it seems a return to the common-law conception of the relation of master and servant, with reciprocal rights and duties and with liabilities imposed in view of the exigencies of the relation. ... For it is not out of line with the common law to deal with causes where the relation of master and servant exists differently from causes where there is no such relation. It is not out of line to deal with such causes by determining the duties and the liabilities which shall flow from the relation. On the contrary, the nineteenth century was out of line with the common law when it sought to treat the relation of master and servant in any other way.<sup>99</sup>

Pound explains this change largely on the basis of what he takes to be a widespread rejection of the "liberty of contract" view of social legislation that had briefly taken hold of U.S. courts from the late

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97 Pound 1921, pp. 27-28.

98 Isaacs 1917, p. 35.

99 Pound 1921, pp. 29-31.



19<sup>th</sup> century to the early 20<sup>th</sup>. In reaction to the Supreme Court’s repeatedly striking down laws aimed at regulating the work relationship, during what is now called the *Lochner* era,<sup>100</sup> many subsequent jurists and legislators focused their regulatory efforts on attaching more and more significance to the *status* of the parties to such relationships rather than the contracts by which they entered them. Pound argues in the above-quoted passage that this more recent movement of the law not only demonstrated that the early 20th-Century legal “progress” was from *contract* to *status*, but also that this was a return to the “spirit” of the traditional common law rather than a departure from it.

I am persuaded by Pound’s explanation and reasoning in the above-quoted passages that Maine’s status-to-contract formula has not merited the undue influence it has had on subsequent legal and social theory, in large part because it has not proved accurate in the intervening decades. Moreover, I believe that Pound’s argument against the applicability of Maine’s view also suggests an indictment of the freedom-of-contract view of work law. I will expand on this contention in the next section.

#### **Section IV: Why the Freedom-of-Contract View Is Mistaken**

##### *A. Master and Servant*

West Publishing’s legal research Web site Westlaw.com provides access to myriad legal materials, including state and federal cases, law review articles, statutes, regulations, and transcripts of legislative debates. Westlaw also features West’s distinctive and proprietary “West American Digest System,” which organizes legal issues discussed in reported cases into major topics and constitutes what West claims is the only existing “taxonomy” of American law. These topics

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100 *Lochner v. New York*, 198 US 45 (1905) (holding that law limiting bakers’ hours of labor was unconstitutional because it interfered with “liberty of contract”), was decided in 1905, but I follow convention in using “*Lochner*-era” to refer more generally to late 19th and early 20th-Century Supreme Court ideology and decisions.

provide titles for the “headnotes” which appear in many Westlaw cases and provide brief summaries of the issues discussed therein. The Digest System’s topics are organized by numbers as well as titles. Topic number 29, “Labor and Employment,” is especially interesting. Whenever the Westlaw editors judge that an issue discussed in a case is pertinent to topic 29, they indicate this with a headnote, such as the following sample from the Westlaw version of a 2002 case decided by the Supreme Court of Texas:

Labor and Employment  29

231Hk29 Most Cited Cases

(Formerly 255k5, 255k1 Master and Servant)

The test to determine whether a worker is an “employee” rather than an “independent contractor” is whether the employer has the right to control the progress, details, and methods of operations of the work, because an employer controls not merely the end sought to be accomplished, but also the means and details of its accomplishment, with respect to the work of an employee.<sup>101</sup>

This example provides a concise statement of the current and longstanding common law standard for determining whether a worker is an “employee” rather than an “independent contractor.” As the headnote makes clear, the key element in the test for employee status is presence or absence of the employer’s “right to control ... the work of an employee.”<sup>102</sup> This may sound familiar to the attentive reader, as I briefly mentioned the “right to control” test in my discussion in Section II of lawsuits based on the claim that employees have been misclassified by their employers as “independent contractors.” As I explained in that discussion, when the plaintiffs prevail in such lawsuits, the law requires courts to hold that it is the nature of the relationship – *not* the terms set forth in the contract – that determine whether a given worker is an “employee” or an “independent

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101 *Limestone Products Distribution, Inc., v. McNamara*, 71 S.W.3d 308 (Tex. 2002).

102 *Id.*

contractor” in the eyes of the law. This alone seems to give us a reason to reject the freedom-of-contract view.

Moreover, the headnote implies that the relationship in question has been defined by the same “right to control” test for quite some time, as it notes parenthetically that the content of the current section 231Hk29 of topic 29, which sets forth the test, was previously listed as sections 255k5 and 255k1 of a subject area titled “Master and Servant.” From its inception in 1910 until the late 20<sup>th</sup> Century, West’s Digest System referred to the body of law governing work relationships as the law of “Master and Servant.” I have referred to the “master-servant” relation several times in previous sections, especially in my discussions of Maine’s formula and Pound’s criticism thereof, and I suspect that this term for the work relationship strikes most of us as outdated and unappealing – nobody wants to think of herself as a “servant” toiling for a “master.” Fortunately for our modern sensibilities – but unfortunately perhaps for sociological clarity and historical understanding – West and other legal commentators largely abandoned the old terminology in the latter half of the 20<sup>th</sup> century. As the above headnote indicates, West’s Digest topic “Master and Servant” became “Labor and Employment,” and – as Isaacs was quick to point out in his defense of Maine’s formula – the roles of “master” and “servant” became “employer” and “employee.” However euphonious these changes in terminology might be, it seems clear that according to the understanding of work law advanced by the editors of West’s Digest System, the new names were appended to *existing* roles rather than creating new ones.

These roles – whether “master” and “servant” or “employer” and “employee” – are clearly better conceived as designations of status rather than creations of the agreements between free and independent contractors. I hold that the main aim of work law has long been and continues to be the legal recognition and regulation of hierarchical relationships in which the “master” is understood and permitted to exercise a significant right of control over the “servant.” This uncomfortable

reality is obviously in tension with Maine’s view of progressive modernity as moving “from status to contract.”<sup>103</sup> While there is undoubtedly some truth to Maine’s generalization, the work relationship is one of several important exceptions to its applicability. This is because work law provides work relationships with much of their default – and in many cases, mandatory – content, such that many or even most aspects of the work relationship are governed by non-contracted terms of work law rather than bargained-for results of negotiation between two independent parties. For example, many substantive rights and obligations attach to the employer-employee relation – such as those requiring minimum wages, maximum hours, and the employer’s provision of worker’s compensation and unemployment insurance – and employers often seek to avoid these obligations by inducing workers to agree to work as purported “independent contractors.” But work law prohibits this practice by defining and identifying work relationships in its own mandatory terms, which cannot lawfully be waived by contract. Thus, one’s rights and obligations as a party to a work relationship are mostly determined by one’s status – i.e., whether one meets the legal definition of a “master” or a “servant” – rather than by contract. And therefore, the freedom-of-contract view is as deeply mistaken, and for many of the same reasons, as Maine’s status-to-contract formula. At the risk of appearing glib, I’ll venture that the body of law in question just doesn’t work that way.

### *B. Blackstone*

As I argue above, the roots of modern work law in the master-servant relation provide compelling reasons to reject the freedom-of-contract view. This is because the master-servant relation is clearly one of status rather than contract, and it requires that the parties to it accept status-based roles within a hierarchical governance relationship. To illustrate this point in more detail, I

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103 Maine 1917, p. 100.

will now turn to a discussion of the 18th-Century master-servant relation as described in Sir William Blackstone's 1759 treatise *Commentaries on the Laws of England*.

It is difficult to overstate the influence of Blackstone's *Commentaries*, especially in the United States. As Amy Dru Stanley explains – after referring to the *Commentaries* as “the most influential legal treatise in the Anglo-American world of the late eighteenth century” – the pioneering lawyers who brought the common law to the New World in the 18<sup>th</sup> century didn't have the luxury of acquiring or transporting extensive libraries of legal tomes, but they could easily carry the two-volume *Commentaries* on a mule or wagon and count on it to offer an answer to nearly any question about the common law they might encounter.<sup>104</sup> Accordingly, Blackstone became, perhaps as much as a matter of convenience as of respect for his work, even more influential in America than in his native country. Note, however, that I do not emphasize the influence of his treatise in order to bolster its credibility as an *accurate* description of the “laws of England” in Blackstone's day. Instead, I mean to suggest that Blackstone's *Commentaries* had a perhaps inordinately powerful effect on what most jurists and lawyers *believed* about the common law – especially in America – whether or not all, most or few of his pronouncements were accurate. Accordingly, it is worthwhile to look at what Blackstone said about the law of master and servant in order to trace its influences on modern work law.

The England of Blackstone's time was marked by a meticulously ordered hierarchy of social statuses and titles, and Blackstone explains at length how the various sorts of nobility and “commonalty” – i.e., all those persons who lacked clerical or noble rank – were ranked and esteemed:

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming, together with the bishops, one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them

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104 Stanley *From Bondage to Contract*, p. 7.

according to their several degrees, or titles of honour. All degrees of nobility and honour are derived from the king as their fountain: and he may institute what new titles he pleases.

Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons.<sup>105</sup>

After extensive discussion of the above-listed ranks of the nobility, Blackstone moves on to discuss the commonalty:

The commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.<sup>106</sup>

Blackstone then describes in great detail the various sorts of knights, including knights of the garter, knights banneret, knights of the bath, and knights bachelors. These are the highest-ranking members of the commonalty, according to Blackstone and his contemporaries, and their titles are “names of dignity.” He then offers a summary of the remaining ranks of the commonalty:

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, serjeants at law, and doctors in the three learned professions. ... As for *gentlemen*, says Sir Thomas Smith, they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. ... The rest of the commonalty are *tradesmen, artificers, and labourers* ....<sup>107</sup>

Note first that “gentleman” was a title of respect and status among the commonalty, and that this status could be attained by anyone with a university education and enough income or wealth to “live idly, and without manual labour.” Anyone who fulfilled these requirements and could carry himself with the bearing of a gentleman “shall be called master.” This makes plain what we might have assumed, namely, that “master” has never been a mere designation of the party who *happens* to be issuing the orders in a given master-servant pairing. Instead, “master” is a “name of worship” that is

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105 Blackstone, \*397.

106 Blackstone, \*403.

107 Blackstone, \*404-07.

reserved for those members of the commonalty who have enough education and noble bearing to function in polite society, and enough money to “live idly, and without manual labour.” The second noteworthy detail is that the last sentence of the preceding quoted passage is all Blackstone has to say about those members of the commonalty who fell below the rank of knights, esquires, or gentlemen: “The rest of the commonalty are tradesmen, artificers, and labourers.”<sup>108</sup>

Thus, in a chapter titled “Of the Civil State,” Blackstone describes the “master” as an educated gentleman who is wealthy enough to dress properly and live idly. Although he has little to say about the socially undistinguished “rest of the commonalty” in that chapter, he has much more to say about these industrious, non-idle persons in the context in which Blackstone and his fellow gentlemen presumably valued them most, namely, in his chapter titled “Of Master and Servant”:

The three great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated.<sup>109</sup>

Blackstone’s description of the master-servant relation as one of three great relations in *private* life is not at all consistent with the standard freedom-of-contract view of employment as an arms-length arrangement that is separate from home and family. In Blackstone’s time, servants were considered members of their masters’ households, and many interesting consequences followed from the domestic nature of the relation.

First, Blackstone explains that the master of a household was not only in charge of his wife, children, servants, and other inferiors, but also responsible for most torts committed by them. This

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108 Blackstone, \*407. I omitted the latter part of that sentence in the longer quoted passage, but it says nothing further about the undifferentiated “rest of the commonalty,” other than to note that all such persons are required by statute to be referred to by what they do and “the place to which they belong.”

109 Blackstone, \*422.

is because they were viewed by the law as extensions of his person, under his care, and among his many responsibilities:

A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household.<sup>110</sup>

The master's responsibility for the actions of his servants or other members of his household also extended to any business they might transact in accordance with his orders *or* in cases in which the master did not explicitly order or authorize the transaction, but third parties might reasonably believe that the servants were acting at the master's behest:

[W]hatever a servant is permitted to do in the usual course of [the master's] business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience.<sup>111</sup>

The master, accordingly, was quite generally held responsible for the acts of all those who were part of his household and therefore "under his charge." It is noteworthy that the master's wife, friend, or other relations could sometimes be viewed as "servants" in this context. It seems that all members of the master's household were seen to be at his service and working for his purposes, so if they caused damage or transacted business, the master could be held responsible. This general doctrine survives in the modern common law rule of *respondeat superior* or "vicarious liability," according to which the principal of an agent – often, though not always, the employer of an employee – may be held liable for torts of the agent committed while acting for the principal or for business transacted by the agent on the principal's behalf.

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110 Blackstone, \*431.

111 Blackstone, \*430.



Blackstone discusses various classes of servants, including menial servants, apprentices, labourers, and “superior” servants, “such as stewards, factors, and bailiffs.”<sup>112</sup> But the first sort of servant he discusses is the slave:

I have formerly observed that pure and proper slavery does not, nay, cannot, subsist in England: such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. . . . But, secondly, it is said that slavery may begin ‘*jure civili;*’ when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible.

Thus, it seems that in Blackstone’s time, one could agree to “sell oneself” to another as a servant, so long as the agreement did not purport to give the master power over the servant’s life and liberty.

The agreement could and did, however, give the master a *property interest* in the servant – or at least, in certain of his services – as Blackstone states explicitly in the following passage:

A master likewise may justify an assault in defence of his servant, and a servant in defence of his master: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them . . . . The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.<sup>113</sup>

This, to me, is the most striking passage in the chapter. Blackstone makes clear that the master has an interest – a *property interest*, no less – in the “service of his domestics,” such that he would be justified in assaulting a third party in order to defend his servant, thereby protecting the property interest in that servant which he acquired upon hiring and purchased with wages. The servant, on the other hand, takes on a duty to “stand by and defend his master” whenever he is in danger – presumably the master’s right to expect this duty is purchased along with his property

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112 Blackstone, \*425-27.

113 Blackstone \*429.

interest in the servant, though *not* as a result of arms-length contracting. Instead, Blackstone's explanation shows that English law in his day assumed that *every* master acquired a property interest in *every* servant by paying wages, and *every* servant took on the duty to protect his master in the event of danger by accepting wages.

This passage leaves little doubt that Blackstone and his contemporaries did not use "master" and "servant" as mere descriptions of particular roles in a workplace, but rather as designators of *status*. The servant, needless to say, had lower status than the master in all contexts: in the hierarchy of the master's household, field, or factory; in English society; and in the eyes of the law. This last inferiority of status is starkly illustrated by the law's provision that a servant who struck a master would receive harsh punishment, while a master who struck a servant would only be "punished," if at all, by the servant's gaining the right to depart from the master's service:

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: though, if the master or master's wife beats any other servant of full age, it is good cause of departure. But if any servant, workman, or labourer, assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.<sup>114</sup>

Luckily, *this* rule has not been preserved in modern work law, but many other influences of the master-servant relation have remained with us. As I discussed above, the modern rule of *respondet superior* or vicarious liability is based on similar doctrines in the law of master and servant. The modern "master" no longer has a cause of action against another master who hires away his servant, but modern work law does provide for a very general duty on the part of the employee to obey the employer's orders, within certain limits, and not to act against the employer's interests while in his employ. Most importantly, however, the modern master/employer retains, by definition, a broad right of *control* over the servant/employee. I will discuss this right of control in depth in the next subsection.

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114 Blackstone \*428.

### C. *Modern Law*

Against the status-laden backdrop provided by Blackstone’s picture of the master-servant relationship, we can consider the ideal contract-based model toward which modernization – according to Maine, Isaacs, and many other scholars – promises to lead us. Recall Maine’s approbation of this welcome trend when he observes, “Starting from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.”<sup>115</sup> As Amy Dru Stanley explains, this sentiment was much in line with the thinking of other 19<sup>th</sup> century American thinkers:

In revolutionary America the dominant conception of covenant no longer was a relation of submission and dominion premised on protection and obedience. Rather, it suggested a voluntary association created by citizens equal under the law, a compact guaranteeing inalienable individual rights as well as the private contract relations arising from those rights.<sup>116</sup>

This is undoubtedly appealing, especially when one contrasts this picture of freedom with the evils of serfdom or slavery. But how accurate is this picture? Are “employees,” as they are defined in modern work law, considered or treated as free and independent contractors?

The answer is a resounding and unequivocal “no.” In fact, the definition of “employee” under both the common law and statutory law of work is now and has long been, essentially, “one who works under the control and authority of another and is *not* an independent contractor.” Noah Zatz explains the rule defining “employee” as follows:

Most federal employment statutes contain brief, vague, and often circular definitions of the related concepts of employee, employer, and employment. *See, e.g.*, 42 U.S.C. §§ 2000e(b), (f), 2000e-2(a) (2000) (... defining an “employee” as “an individual employed by an

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115 Maine p. 99.

116 Stanley *From Bondage to Contract*, p. 7.

employer” and an employer as “a person . . . who has . . . employees”). The Supreme Court has held that, absent specific provisions to the contrary, such definitions incorporate the common-law test for employment developed in agency law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). This test emphasizes “the hiring party’s right to control the manner and means by which the product is accomplished.” *Id.* at 323 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)); accord *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445-46 (2003).<sup>117</sup>

As Justice Souter observes in the *Darden* opinion Zatz references, the standard statutory “definition of ‘employee’ as ‘any individual employed by an employer’ . . . is completely circular and explains nothing.”<sup>118</sup> The Court’s solution to these circular definitions has consistently been to hold that whenever courts are called upon to construe the meaning of such definitions, they must apply the common law definition derived from the law of master and servant. The preceding sentence may look suspiciously like the sort of “ambitious” interpretation one might be tempted to advance in order to suit one’s pet thesis, but there is no ambiguity in this *unanimous* holding – i.e., all nine Justices voted for it – which follows a long line of cases affirming the same rule:

In the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).<sup>119</sup>

There are two especially noteworthy aspects of this quote I’d like to point out. First, notice that the common-law definition of the term “employee” endorsed by U.S. courts is derived from the law of *agency*, not contract. Second, the preceding quote is from *Darden* (1992), which quotes *Reid* (1989), which in turn cites *Kelley* (1974), *Baker* (1959), and *Robinson* (1915). These Supreme Court cases – which constitute binding authority over *every* court in the United States – spanning nearly a century are all cited as precedent for the same holding: When Congress does not define “employee” in a

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117 Zatz “Working at the Boundaries of Markets,” p. 871, n. 50.

118 *Darden*, 503 US 318, 323 (1992).

119 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989)).

statute, courts construing the statute should apply the test for “the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>120</sup>

Moreover, Congress has consistently endorsed the Supreme Court’s interpretation of its legislative intent. First, Congress continues to use circular and uninformative definitions of “employee” – e.g., “any individual employed by an employer”<sup>121</sup> – in most work law statutes despite being fully aware of the Supreme Court’s unwavering interpretation of such definitions as signaling Congress’s intent that the statute should be construed with reference to the common-law test for “the conventional master-servant relationship.”<sup>122</sup> Second, as the *Darden* Court notes in support of its continuing endorsement of this test, in two previous cases in which the Court presumed to interpret a statutory definition that understood Congress as intending to go *beyond* the traditional common-law test, Congress “overruled” the Court’s interpretation by amending the statute to make it clear that they *did*, despite the Court’s contrary interpretation, intend the statute’s definition to be construed in the traditional – i.e., master and servant – manner:

But *Hearst* and *Silk*, which interpreted “employee” for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read “employee,” which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.<sup>123</sup>

And the Supreme Court has not changed its view since issuing its opinion in *Darden*. In 2003, when the Court next had occasion to construe a statutory definition of “employee,” in the

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120 Id.

121 Id., at 323 (*quoting* 29 U.S.C. § 1002(6)).

122 Id.

123 Id., at 324-25 (*citing* *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); and *United States v. Silk*, 331 U.S. 704 (1947)).

case of *Clackamas Gastroenterology Assocs., P.C. v. Wells*,<sup>124</sup> the Court did what anyone familiar with its past decisions on the matter would expect it to do: It affirmed *Darden* by quoting *Darden*'s quotation of *Reid*:

Quoting *Reid*, 490 U.S. at 739-740, we explained that “when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>125</sup>

Incidentally, the Court does not perpetually quote itself in these cases out of laziness – the Justices do not seem to begrudge the work involved in writing extremely long opinions – but rather to signal that it is affirming its prior holdings without modification. In other words, the cases indicate that the rule has been exactly the same for a long time – at least since 1915 – and the Court is showing no inclination to change it in the foreseeable future.

The *Clackamas* case is also interesting because it presented a novel question, namely, how to distinguish an “employee” from a “partner.” Recall for a moment the misclassification lawsuits I briefly mentioned – and will return to in a moment – earlier in this chapter. Such cases usually involve workers’ claims that they have been misclassified as “independent contractors” rather than “employees” or a third party’s claim that a purported “independent contractor” was actually an “employee,” so that the third party can sue the hiring party under the doctrine of *respondeat superior* (or, conversely, the hiring party might offer, as a defense to such a lawsuit, the argument that a purported “employee” was actually an “independent contractor”).

In *Clackamas*, the defendant medical clinic sought to avoid liability under the Americans With Disabilities Act (ADA),<sup>126</sup> which only applies to employers with 15 or more employees.<sup>127</sup> If the medical clinic could prevail in its argument that several of its doctors were not “employees” but

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124 538 U.S. 440 (2003).

125 *Clackamas*, 538 U.S. at 444-445 (quoting *Darden* (quoting *Reid*)).

126 The Americans with Disabilities Act of 1990, 104 Stat. 327, as amended, 42 U. S. C. §12101 *et seq.*

127 *Id.*, at §12111(5).

“partners,” since they owned shares in the clinic and were professionals with a great deal of responsibility, then the clinic’s former employee would not be permitted to pursue an ADA claim against the clinic. But the Court held that just as employers cannot evade liability by labeling workers who meet the common-law definition of “employee” as “independent contractors,” it didn’t matter whether the clinic called the personnel in question “partners,” “shareholder-directors,” or any other title. If the doctors met the common-law definition of “employee,” then they were employees for the purposes of any statute incorporating the common-law definition:

Rather than looking to the common law, petitioner argues that courts should determine whether a shareholder-director of a professional corporation is an employee by asking whether the shareholder-director is, in reality, a partner. ... The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as employees, because *control* is concentrated in a small number of managing partners. ... Thus, asking whether shareholder-directors are partners, rather than asking whether they are employees, simply begs the question.<sup>128</sup>

Accordingly, modern work law simply does not permit hiring parties and workers to craft their own distinctive working relationships with exactly the features they select. Instead, work law insists that it doesn’t matter what you say in the contract – i.e., the parties can agree to describe the worker as a “partner,” “independent contractor,” “franchisee,” or “comrade” – if the relationship as it is conducted in reality, after the contract is signed, fits the common law definition of the master-servant relationship.

What, one might ask, is this common-law definition? So far, the only element of the test for employee status I have mentioned is “control,” which is the central focus of the definition:

At common law the relevant factors defining the master-servant relationship focus on the master’s control over the servant. The general definition of the term “servant” in the Restatement (Second) of Agency §2(2) (1958), for example, refers to a person whose work is “controlled or is subject to the right to control by the master.” See also *id.*, §220(1) (“A servant is a person employed to perform services in the affairs of another and who with

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128 *Clackamas*, 538 U.S. at 444-446 (internal citations omitted; emphasis added).

respect to the physical conduct in the performance of the services is subject to the other's control or right to control"). In addition, the Restatement's more specific definition of the term "servant" lists factors to be considered when distinguishing between servants and independent contractors, the first of which is "the extent of control" that one may exercise over the details of the work of the other. *Id.*, §220(2)(a). We think that the common-law element of control is the principal guidepost that should be followed in this case.<sup>129</sup>

However, the *Darden* Court notes that control is not the only factor relevant to determinations of employee status and explains that "[s]ince the common law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"<sup>130</sup> Accordingly, the *Darden* Court quotes *Reid* for its previous summary of the several factors involved in the test:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>131</sup>

As the above-cited cases make clear, no matter how anachronistic the "master-servant relation" might seem to our modern sensibilities, it is still the foundation of the employment relation as it is defined and discussed in 21st-century work litigation in the U.S. For example, the shipping company FedEx classifies many of its delivery drivers as "independent contractors" rather than "employees," and many of the drivers have brought a class action against the company to sue for damages and a declaration that they have the status and rights of employees. Investigative journalist Steven Greenhouse describes the litigation against FedEx as follows:

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129 *Id.*, at 448.

130 *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

131 503 U.S., at 323-324 (quoting *Community Center for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989), and citing Restatement (Second) of Agency §220(2) (1958)).



In more than thirty lawsuits, FedEx Ground drivers have argued that they are employees, not independent contractors, and that the company should, as a result, pay for their trucks, insurance, repairs, gas, and tires. Many drivers mock FedEx Ground's claim that they are independent entrepreneurs who can "grow" their business, considering that their business is delivering packages that FedEx assigns them. Similarly, many drivers ridicule the company's assertions that they can show their business acumen and increase their profits through such supposedly enterprising steps as finding cheaper ways to repair their trucks. In a lawsuit that FedEx Ground drivers filed in California, a state judge ruled that the company was essentially engaged in a ruse in maintaining that its drivers were independent contractors. The judge wrote that FedEx Ground "has close to absolute control" over the drivers, adding that the operating agreement that the drivers sign "is a brilliantly drafted contract creating the constraints of an employment relationship ... in the guise of an independent contractor model." An appeals court upheld that decision in August 2007, writing that FedEx has "control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair."<sup>132</sup>

The plaintiffs in misclassification lawsuits of this sort assert that it is unlawful for businesses to label workers as "independent contractors," thereby shifting many costs – such as those associated with providing unemployment insurance, workers' compensation insurance, the employer's share of federal taxes, health care coverage, vacation and sick time, and vehicles and other equipment and maintenance thereof – to their workforce, while nonetheless retaining and/or exercising the right of control traditionally enjoyed by employers.

These lawsuits bring into sharp relief the main point I want to establish through discussing the work law of past and present, which I hope has already become clear throughout this section: modern work law defines an "employee" as someone who is hired to work but is *not* an "independent contractor." This is much the same as it was in Blackstone's day, and while other aspects of the master-servant relation have changed, the test for servant/employee status persists largely undisturbed. The freedom-of-contract view distorts the nature of work law because it suggests that we focus on the contracts by which an employer and employee may choose to enter a work relationship, despite the fact that a survey of modern work law demonstrates that there is

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132 Greenhouse 2008, p. 123. I quote Greenhouse's description both because it is accurate and well-written and because I previously represented some of the plaintiffs involved in this class action, and I therefore have a continuing professional responsibility that precludes my speaking freely about the drivers' claims and opinions.

precious little about how the relationship itself is defined, constituted, regulated, or conducted that the parties can lawfully establish or modify by contract.

## **Section V: Conclusion**

I hope I could be forgiven for harboring the conceit that I might have the freedom-of-contract view “on the ropes” at this point. After all, that view, which is arguably motivated by Maine’s enthusiastic endorsement of the relations created by free and independent contractors, holds that we should consider work law to be a mere branch of contract law, a branch that guides contract law by specifying what sorts of work relationships free contractors may choose to create. But as I have shown herein, modern work law simply doesn’t *allow* anyone to be both an “employee” and an “independent contractor,” and in the context of work, contractors are not at liberty to *create* any sort of relationship. To the contrary, although contracting parties are certainly free to describe the relationship they purport to “create” via contract in any way they like, if a court is ever called upon to apply the substantive provisions and requirements of work law to the relationship in question, the court and the law – *not* the contract – will determine the nature of the relationship in question and the rights and obligations that attach to the parties to the relationship. So why not simply call it a “win” for the relationship view and end this paper here? Well, it can’t be quite *that* easy to dispense with such a doughty dialectical opponent as the freedom-of-contract view.

Even if my arguments in this paper convinced – or should convince – any erstwhile supporter of the freedom-of-contract view that it does not offer an accurate picture of work law as it has been in the past or as it is now, I wouldn’t be satisfied with that limited success, nor should a freedom-of-contract proponent feel especially deterred by it. For I have made clear from the outset that although I am interested in describing the way work law *is*, I am even more intent on arguing for a particular conception of how it *should be*. I assume that proponents of the freedom-of-contract

view would share my interest in offering a normative account of how work law should be, and I further assume that they would therefore argue that even if work law *is* just as I say it is, we should respond to this by *cleansing* modern work law of its 18th-Century trappings of “masters” and “servants” in favor of a work law that fulfills Maine’s bold prediction. *Shouldn’t* we freedom-loving folk strive to discard all connections with “property interests” in persons, entrenched hierarchy, and servitude, and strive to remake work law to allow everyone to bargain for no more and no less than he or she wills? In other words, the freedom-of-contract view might well offer the undeniably compelling argument that perpetuating the master-servant relation is a *problem*, and that we should solve this problem by moving – as Maine suggests – toward ever-greater independence and freedom to contract as we please.

In response to this argument, I offer a sketch of a normative argument I will expand upon in future work, which is that work law not only *is* a status-based relationship, but also that it *should* remain so, albeit with further modifications. In short, no matter how unsavory we might find its lingering associations with the law of master and servant, work law’s function of offering a hierarchical relationship of private governance within the workplace is not some quaint remnant of the past that we could easily slough off. As R. H. Coase argues in his seminal article “The Nature of the Firm,” modern systems of production seem to *require* governance and control of employees within firms rather than a series of one-off contracts between free and independent contractors. Coase entertains and attempts to answer several questions economists had previously taken for granted, such as why capital hires labor, rather than the other way around, and why firms exist at all, instead of leaving production entirely up to the market and the price mechanism. Since the price mechanism could theoretically lead independent capitalists, laborers, and entrepreneurs to collaborate on discrete projects in accordance with their respective needs and preferences, Coase investigates why individuals might have reason to create firms at all.

Coase argues that relying entirely on the market and price mechanism in this way would significantly increase costs, as it would be prohibitively expensive to negotiate and agree to a protracted series of contracts with various workers. Therefore, our current system of production seems heavily to rely on firms, and firms, in turn, seem heavily to rely on the internal systems of governance made possible by our current, status-based work law. If Coase is correct, the goal of maintaining efficient production would give us strong reason to continue to allow employers<sup>133</sup> to retain and exercise a broad “right of control” over their employees within firms. On the other hand, if Maine and like-minded thinkers are right to value freedom of contract and the relationships we would form thereby above all else, then we would have reason to eliminate any status-based influence that colors the employment relation, thereby converting all work relationships to purely contractual arrangements. But this would be impracticable if not impossible.

For example, assume that it would be relatively simple and efficient for an individual to contract with another to perform a discrete task, such as moving a refrigerator, in exchange for payment, such as \$20, on a one-time basis, so long as both parties shared a sufficient understanding of what the task involved, the nature of the payment, etc. However, it would be nigh-impossible for two parties to draw up and fully specify a contractual agreement to the effect that one party would perform *all* the tasks that would or could be involved in occupying the role of servant or employee in exchange for wages and/or other compensation. It would not be sufficient – even if it were practicable in any realistic scenario – to provide an exhaustive list of tasks that the servant would be obliged to perform and when, where, and how they would all be performed. This is because such a list would not only be prohibitively difficult to generate, but also fail to provide the hiring party anywhere near the value he or she would receive by entering a standard, status-based work relationship as it is constituted by current work law.

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133 Or worker-managers, in the case of worker-managed firms, which do exist and are consistent with Coase’s view of the nature and value of firm-based production.

Under current work law, when two parties agree to enter a work relationship, they understand that they will occupy roles within a hierarchical relationship, such that the employee is agreeing to be subject to the employer's authority and to do what the employer orders him or her to do – within limits defined and regulated by work law – at whatever times and places and in whatever manner the employer wants or requires. On the other hand, a purely contractual list of when, where, and how the employee agrees to perform various tasks would not provide the employer with any of the flexibility, the ability to respond to unforeseen (or unforeseeable) circumstances, or the simplicity of the traditional status-based work relationship. Moreover, such a list would offer no significant advantage over the similarly labor- and time-intensive process of executing a series of one-off agreements – apart from avoiding the transaction costs associated with negotiating a long series of contracts on an individual basis – to perform each task on the list as each became necessary, perhaps along with the worker's agreement to be available in the places and times he or she is likely to be needed for these one-off tasks. So “purely contractual” work relationships sound not only outrageously difficult, but downright unappealing, especially for the hiring party. The average hiring party wants to be the *boss*, and he or she wants someone to join his or her firm and be an *employee*. Contracts alone don't offer these options.

In response, advocates of the freedom-of-contract view might protest that so long as both parties understand the nature of the traditional work relationship, they could use “employ” and other work-related terms in their contractual agreements and count on their shared understanding of such terms' meaning in much the same way other contracting parties count on their shared understanding of terms like “purchase,” “insure,” or “widget.” But this would be wholly parasitic on the prior legal constitution of the employment relationship created by work law, rather than some widely shared and socially constructed linguistic or conceptual understanding of the terms.

Moreover, even if the parties were somehow able to *insist* in their contract that they were adamantly *not* adopting various pre-existing legal terms of art, such as “employ,” “employee,” “right of control,” etc., the newly created relationship they could thereby enter would almost certainly be far too unstable and uncertain for any savvy free contractor to accept. Without a substantive, independent (from contract law), and fully specified body of work law to define what these terms mean and entail as a matter of law, neither party could assume that the right of the “boss” to issue reasonable orders to the “worker” did or did not include a right to, e.g., indulge in sexual harassment or racially discriminatory put-downs, require engineers or other professional employees to clean toilets or paint fences – which our current work law, incidentally, probably would allow but arguably should not – and/or permit employees to take bathroom breaks at will. That is, even if we could somehow discard work law’s constitutive understanding of work relationships in order to make way for the unfettered creation of *sui generis* work relationships, it seems far from clear that anyone would have reason to seek that outcome.

In summary, since work law is neither consistent with the freedom-of-contract view’s portrayal of it nor likely to be improved by the view’s normative prescription for it, I conclude that we should abandon it and adopt the more descriptively and normatively accurate relationship view which I have described herein.

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<sup>134</sup> Note that citations to legal cases are provided within the footnotes in their entirety rather than in an abbreviated form referencing the bibliography.

## CHAPTER FOUR

### COMPETING IDEOLOGIES AND THE END OF THE *LOCHNER* ERA

#### Section I. Introduction

In this chapter, I will explore further the motivation and ideology underlying the “freedom-of-contract” view which I criticize in the first two chapters. I do so via a critical analysis of political scientist Howard Gillman’s critique of the received view that Supreme Court Justices in the early 20<sup>th</sup> Century (aka the “*Lochner* era” after *Lochner v. New York*, a 1905 case striking down a maximum hours for bakers on the grounds that it violated “liberty of contract”) decided cases based largely or entirely on policy preferences rather than principled legal interpretation. Gillman challenges this “attitudinal” account of the *Lochner* era by reconstructing a principled legal ideology to which the Justices could have been committed. Gillman thus undermines the argument that *Lochner*-era Justices had no principled legal basis for their decisions and therefore *must* have been deciding cases according to their *laissez faire* policy preferences.

Thus far, I agree with much of Gillman’s argument, but I take issue with his further claim that the Justices who dissented in *Lochner* and eventually overruled the “liberty of contract” regime in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), had no principled basis for *their* decisions and therefore *must* have decided cases according to their policy preferences. In response, I reconstruct the ideology underlying *West Coast Hotel* and argue that (at least) two plausible and defensible strands of legal ideology were competing for dominance during the *Lochner* era and that each Justice could have taken himself to be committed to one or the other based on principled legal interpretation



rather than policy preferences. In sum, I show that *West Coast Hotel* is no more amenable to an attitudinal explanation than *Lochner* by reconstructing the principled legal ideology to which the Justices who struggled against and ultimately defeated the *Lochner* era’s “liberty of contract” regime were committed.

Following this critique of Gillman’s characterization of *West Coast Hotel*, I will also sketch a normative argument to the effect that the majority decision was not only based on a plausible interpretation of early-20<sup>th</sup> Century constitutional law, but also constituted the best possible move – with respect to justice, at least, and perhaps also, derivatively, with respect to the law – for the Court to make at that point in its history.

## Section II. Legal Premises, Attitudinal Conclusions

### A. Gillman’s Attitudinal Explanation of *West Coast Hotel*

In his seminal work *The Constitution Besieged*, Howard Gillman argues that “attitudinal”<sup>135</sup> explanations of Supreme Court decisions in the *Lochner* era<sup>136</sup> fail to capture the influence of shared legal ideology on Justices’ behavior.<sup>137</sup> Gillman challenges the attitudinal account, in part, by arguing against the widespread belief that most late 19<sup>th</sup>- and early 20<sup>th</sup>-Century Supreme Court Justices had

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135 See, e.g., Frank B. Cross, *Political Science and the New Legal Realism*, 92 NW. U. L. REV. 252 (1997-1998) at 252-53 (“Political scientists, such as Jeffrey Segal and Harold Spaeth, employ an ‘attitudinal model’ to predict decisions according to the political ideology of judges. The attitudinal model ascribes judicial decisions almost entirely to politics, not precedents.”) (citing JEFFERY A SEGAL AND HAROLD J SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Lee Epstein and Jack Knight, *Documenting Strategic Interaction on the US Supreme Court*, 4 ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, CHICAGO (1995) at 2 (reporting that the “attitudinal model’ . . . remains dominant in the discipline”); RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993* (1994) at 3 (reporting that “[p]olitical models of Supreme Court decisionmaking, which emphasize that Justices act like policymakers and are influenced by changes in the wider political system have dominated the intellectual landscape, especially among political scientists”); Lee Epstein, *The U.S. Supreme Court*, in LEE EPSTEIN ED., *CONTEMPLATING COURTS* (1995) at 250 (noting that “scholarly work on the role of the Court in American society has adopted Spaeth’s attitudinal model”).

136 *Lochner v. New York*, 198 U.S. 45 (1905).

137 See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993).

largely disregarded the Constitution in favor of advancing their own *laissez faire* policy preferences.<sup>138</sup> This belief rests largely on a characterization of *Lochner*-era jurisprudence as lacking foundation in any plausible or consistent interpretation of existing legal materials. Instead, according to the conventional narrative – especially as adopted and developed in “attitudinal” accounts of the Court – *Lochner*-era Justices simply decided cases in accordance with their individual policy preferences and then referred to whatever legal materials seemed to offer some justification, however thin.

Based on this narrative, proponents of the attitudinal model claim that the Justices’ appeals to legal materials must have been mere “window dressing” for their *laissez faire* policy preferences.<sup>139</sup> In response to this central attitudinal claim, Gillman provides an extensive reconstruction of *Lochner*-era Justices’ legal ideology using contemporary legal materials and other historical evidence. Based thereon, Gillman argues “that the Justices were by and large motivated by a principled commitment to the application of a constitutional ideology of state neutrality, as manifested in the requirement that legislation advance a discernible public purpose.”<sup>140</sup> During the *Lochner* era, the dominant view among Supreme Court Justices held that the due process clauses set forth in the Fifth and Fourteenth Amendments to the U.S. Constitution guaranteed citizens an expansive right to

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138 Many commentators trace this characterization to Justice Holmes’ blistering dissent in this case. *See* *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”)

139 *See, e.g.*, Kyle Scott, *The Impact of Common Law on Judicial Decision Making*, 3 INTERNATIONAL JOURNAL OF POLITICAL SCIENCE 184 (2007) at 184 (“Studies of the judiciary seem to be most concerned with how justices make decisions .... The research has focused on explaining judicial decisions as a function of fact patterns, the political values of the presiding judges, or institutional design.”) (*citing* LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY (2002); JEFFERY A SEGAL AND HAROLD J SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); and Jack Knight and Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOCIETY REVIEW 1 (1996)).

140 HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993) at 199. It may strike modern readers as bizarre for *Lochner*-era Justices to claim that protecting the health of bakers did not “advance a discernible public purpose,” but as I will discuss later in the paper, they made this claim against the backdrop assumption that freely contracting adult men were somehow independent from the “public,” such that designing legislation to assist or protect any of these free-agent parties would constitute offering them an unfair advantage rather than contributing to the common weal.

“liberty,” especially with respect to their rights to conduct business and/or pursue a chosen trade or occupation. Accordingly, *Lochner*-era Justices were notorious for striking down duly enacted legislation – much of which was intended to effect popular interventions to improve the conditions of labor, commerce, and other important aspects of the lives of ordinary citizens – on the grounds that it unconstitutionally invaded citizens’ “liberty of contract.” The opposing, minority view held that “liberty of contract” could legitimately be limited by a state’s “police powers,” such that the “liberty” protected was broadly subject to regulation in order to protect, *inter alia*, the “health, safety, morals *and welfare* of the people.”<sup>141</sup> This view eventually became the majority position on the Court in the 1930s, and it remains so to this day.

Looking back on the *Lochner* era, many commentators have characterized the majority view as both reactionary and without basis in law. For example, Ronald Dworkin refers to *Lochner* as an “infamous ... example of bad constitutional adjudication,”<sup>142</sup> and Justice Rehnquist claims that *Lochner* and *Adkins* – another decision protecting “liberty of contract” at the expense of popular “New Deal” legislation – were “erroneous decisions” and that the Court “correct[ed] its errors” by

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141 *Id.* (emphasis added). I emphasize the inclusion of “welfare” because Gillman consistently omits it from his description of legitimate police powers regulation, which he defines as state regulation which aims to protect “health, safety and morals,” even though contemporary sources of law at least as frequently included the more expansive term “welfare” along with “health, safety and morals” as one of the legitimate aims of police powers regulation. *See, e.g.*, *West Coast Hotel*, 300 U.S. at 391-92; *Nebbia v. New York*, 291 U.S. 502, 524 (1934) (“Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government.”); *O’Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931); *Nectow v. Cambridge*, 277 U.S. 183, 187-88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (“The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”); *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (*citing* *Holden v. Hardy*, 169 U.S. 366, 395 (1898)); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917); *Chicago, B & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911); *McLean v. Arkansas*, 211 U.S. 539, 547 (1909); *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900); *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895); *Crowley v. Christensen*, 137 U.S. 86, 90 (1890).

142 RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) at 208.

overruling *Adkins* in *West Coast Hotel*.<sup>143</sup> In response, Gillman essentially adopts and endorses the reasoning set forth in *Adkins*:

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question.<sup>144</sup>

However, Gillman also provides extensive historical background to show that the legal argument recited in *Lochner*, *Adkins*, and many other late-19<sup>th</sup> and early-20<sup>th</sup> Century cases was deeply rooted in American cultural, political, and social traditions. Accordingly, Gillman demonstrates that the dominant view during the *Lochner* era was no mere creature of a group of reactionary Justices – as many commentators both at the time and in subsequent generations have held – but had a substantial claim to legitimacy based on a plausible reading of contemporary sources of law, as viewed through the lens of a historically influential ideology that valued “liberty,” broadly construed, above all else.

For what it's worth, I think that Gillman succeeds in showing that it is more plausible to conclude that a consistent legal ideology significantly influenced contemporary Justices' decisions

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143 *Planned Parenthood v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist (dissenting), arguing that “the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that 'liberty' under the Due Process Clause protected the 'right to make a contract'”) (*citing* *Lochner*, 198 U.S. at 53).

144 *Adkins v. Children's Hospital*, 261 U.S. 525, 545 (1923) (*citing* *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897); *New York Life Insurance Co. v. Dodge*, 246 U.S. 357, 373-374 (1918); *Coppage v. Kansas*, 236 U.S. 1, 10, 14 (1915) (holding that “[i]ncluded in the right of personal liberty and the right of private property – partaking of the nature of each – is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money”); *Adair v. United States*, 208 U.S. 161, 174-75 (1908) (holding that “[t]he right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employe [*sic*] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land”); *Lochner v. New York*, 198 U.S. 45 (1905); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884); *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

than to contend, as many do, that commitment to a legal ideology had little to no influence. However, I think Gillman goes too far in his further claim that the competing ideology – which became dominant with the passage of *West Coast Hotel* – was, instead, properly characterized as having no basis in law.

When Gillman discusses the Court’s majority opinion in *West Coast Hotel*, which he claims “ushered in a revolution in constitutional law,” he is uncharacteristically brief.<sup>145</sup> As Gillman states, the majority opinion in *West Coast Hotel v. Parrish*<sup>146</sup> overrules *Adkins v. Children’s Hospital*,<sup>147</sup> holding that “the decision in the *Adkins* case was a departure from true application of the principles governing the regulation by the State of the relation of employer and employed.”<sup>148</sup> The majority opinion in *West Coast Hotel* includes extensive legal argument in support of this conclusion and the resulting decision, but Gillman is unimpressed:

This [i.e., the claim that *Adkins* was a “departure”], of course, was not so – anyone interested in knowing the principles relating to the government’s authority to regulate employer-employee relations need only look at the opinions and decisions of [late 19<sup>th</sup> century] state and federal judges. . . . But you can’t blame the Chief Justice for claiming that he was merely correcting a mistake rather than jettisoning a constitutional tradition that was a century and a half old. He was less interested in clarifying the past than in forging a new conception of the role of the state in an industrial economy.<sup>149</sup>

This characterization of the majority opinion in *West Coast Hotel* seems somewhat ironic in a work primarily devoted to *challenging* the attitudinal model.

On what grounds does Gillman venture the opinion that Chief Justice Hughes was merely “claiming” – rather than earnestly endeavoring – to correct a mistake? And what evidence supports

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145 *Id.* at 190.

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

147 *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

148 *West Coast Hotel*, 300 U.S. at 397.

149 HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993) at 191.

Gillman’s claims about what Hughes was more and less interested in “forging” with his opinion? The implied argument is a familiar one: Since, according to Gillman, there was no principled basis to be found in existing legal materials for the decision set forth in the *West Coast Hotel* majority opinion, Hughes’ extensive appeals to the Constitution and prior precedents must have been mere window dressing for Hughes’ *real* interest in “forging a new conception of the role of the state in an industrial economy.”<sup>150</sup> In other words, Gillman appears to be offering an attitudinal explanation of Hughes’ opinion in *West Coast Hotel*.

After going to such pains to reconstruct the relevant discourse, legal materials, and ideology in order to characterize *Lochner*-era Supreme Court Justices as “motivated by a principled commitment to the application of a constitutional ideology of state neutrality,”<sup>151</sup> why does Gillman so readily abandon this explanation in his discussion of *West Coast Hotel*? Were only some of the Justices – such as the steadfast *West Coast Hotel* dissenters Butler, McReynolds, Sutherland, and Van Devanter, aka the “Four Horsemen” – truly “principled,” or were all or most of the Justices motivated by “a constitutional ideology of state neutrality” *until* the decision in *West Coast Hotel*, at which point they abruptly abandoned their erstwhile “principled commitment”? Gillman’s discussion of *West Coast Hotel* implies the latter, as he endorses the dissenting Justices’ castigation of the majority opinion as motivated by recent economic changes rather than good-faith interpretation of authoritative sources of law.

In order to motivate this attitudinal argument, Gillman needs either to show that the *West Coast Hotel* majority’s opinion lacked a plausible legal rationale, i.e., was groundless or nearly so, or that the *West Coast Hotel* majority opinion was based on a barely plausible rationale but was in some sense an *obviously* incorrect interpretation of existing legal materials. In this Section, I will attempt to

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150 *Id.* at 191.

151 *Id.* at 199.

show that the *West Coast Hotel* majority opinion was not entirely *ad hoc* but was, instead, based on a plausible interpretation of contemporary constitutional law. In Section III, I will that Gillman does not – indeed, could not – show that this interpretation was obviously incorrect, and finally, in Section IV, I will sketch a normative argument in favor of the *West Coast Hotel* majority’s decision to overrule the liberty-of-contract legal regime.

### B. *A Legal-Ideological Account of West Coast Hotel*

How might we challenge Gillman’s attitudinal explanation of the majority opinion in *West Coast Hotel*? Following Gillman’s example, we could begin with a close reading of the relevant legal materials, starting with *West Coast Hotel* itself. The *West Coast Hotel* majority opinion upholds the Supreme Court of Washington’s decision “that the [Washington minimum wage] statute is a reasonable exercise of the police power of the State” and asserts that “[i]n reaching that conclusion, the state court ... invoked principles long established by this Court in the application of the Fourteenth Amendment.”<sup>152</sup> In reviewing these principles, the majority opinion notes that “[t]he Constitution does not speak of freedom of contract,” but instead, “it speaks of liberty and prohibits the deprivation of liberty without due process of law.” The “liberty” at issue is “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. ... [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”<sup>153</sup>

I propose to interpret these passages as offering the following rationale for *West Coast Hotel*: (1) The Constitution does not require legislatures to extend special protection to “freedom of contract,” as opposed to any other manifestation of “liberty”; (2) the “liberty” protected is broadly

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152     *West Coast Hotel*, 300 U.S. at 389.

153     *Id.*, 300 U.S. at 391-92.

subject to regulation in order to protect, *inter alia*, the “health, safety, morals *and welfare* of the people”<sup>154</sup>; and (3) “due process” requires only that police powers regulation must be reasonable – i.e., not arbitrary – and “adopted in the interests of the community.” In addition, the *West Coast Hotel* majority makes clear (4) that it relies on different factual assumptions than those assumed by the *Lochner* and *Adkins* majorities, and more importantly, *West Coast Hotel* endorses the principle that the Court must defer to legislatures’ determinations with respect to debatable questions of fact. I will not argue, in this Section, that this rationale was the “correct” or “best” interpretation of *Lochner*-era constitutional law. Instead, I hold that the rationale rested on a sufficiently “reasonable” interpretation of contemporary legal materials for it to be plausible to suggest that the *West Coast Hotel* majority Justices were, by and large, motivated by a principled commitment to an existing and well-supported legal ideology.<sup>155</sup>

In support of the rationale outlined in the preceding paragraph, the *West Coast Hotel* majority quotes the 1911 case *Chicago, B & Q.R. Co. v. McGuire* as follows:

[F]reedom of contract is a qualified, and not an absolute, right [and t]he guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.<sup>156</sup>

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154 *Id.* (emphasis added). I emphasize the inclusion of “welfare” because Gillman consistently omits it from his description of legitimate police powers regulation, which he defines as state regulation which aims to protect “health, safety and morals,” even though contemporary sources of law at least as frequently included the more expansive term “welfare” along with “health, safety and morals” as one of the legitimate aims of police powers regulation. *See, e.g.*, *West Coast Hotel*, 300 U.S. at 391-92; *Nebbia v. New York*, 291 U.S. 502, 524 (1934) (“Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government.”); *O’Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931); *Nectow v. Cambridge*, 277 U.S. 183, 187-88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (“The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”); *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (*citing* *Holden v. Hardy*, 169 U.S. 366, 395 (1898)); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917); *Chicago, B & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911); *McLean v. Arkansas*, 211 U.S. 539, 547 (1909); *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900); *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895); *Crowley v. Christensen*, 137 U.S. 86, 90 (1890).

155 For an excellent contemporary summary of the broad legal support for this ideology that already existed at or around the turn of the 20th Century, *see* Roscoe Pound, *Liberty of Contract*, 18 *YALE L. J.* 454 (1909).

156 *West Coast Hotel*, 300 U.S. at 392 (*quoting* *Chicago, B & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911)).



Interestingly, the unanimous *McGuire* opinion was written by Justice Hughes, who also wrote the *West Coast Hotel* majority opinion. If, as Hughes claims, the reasoning in *McGuire* supports that in *West Coast Hotel*, this would show not only that there *was* such support in existing legal materials, but also that Hughes, at least, had held similar interpretations of “liberty” and “due process” since 1911, at latest, as those he expresses in *West Coast Hotel* in 1937. And indeed, *McGuire* does seem to provide significant support for the *West Coast Hotel* majority’s reading of the Fourteenth Amendment – e.g., by permitting “restrictive safeguards” on the making of contracts and defining “liberty” as “the absence of arbitrary restraint” – but neither Gillman nor the dissenting Justices in *West Coast Hotel* choose to discuss *McGuire*, despite its prominence in the *West Coast Hotel* majority’s opinion.

Moreover, *McGuire* cannot be dismissed as an anomalous outlier, as it, in turn, cites further cases which contain similar language supporting the underlying rationale in both *McGuire* and *West Coast Hotel*:

[I]t is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But ... all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. ... What contracts respecting ... acquisition and disposition [of property] shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation.<sup>157</sup>

With respect to the rationale I outlined above, this passage from the 1890 *Crowley* opinion supports (1), that freedom of contract isn’t “special,” but instead is subject to “constant legislation,” and (2), that liberty rights are subject to all such reasonable regulation (4) “as may be deemed by the governing authority” to be in the interests of the community.<sup>158</sup> Similarly, in the 1895 case *Frisbie v. United States*, a unanimous Court reasoned as follows:

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157 *Crowley v. Christensen*, 137 U.S. 86, 90 (1890).

158 *Id.*

It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, *and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy.*<sup>159</sup>

Although Justice Brewer – who joined the *Lochner* majority 10 years later – wrote the opinion, the above-quoted language certainly seems to license a broad class of restraints on *any* employment contract “which is against public policy,” broadly construed.

*McGuire* extensively cites the 1905 case *Jacobson v. Massachusetts*, which endorses an even more permissive conception of legitimate “police powers” legislation:

Although this court has refrained from any attempt to define the limits of [the police] power, yet it has distinctly recognized the authority of a State to enact quarantine laws and “health laws of every description;” indeed, *all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States.* According to settled principles the police power of a State must be held to embrace, *at least*, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.<sup>160</sup>

This passage from Justice Harlan’s majority opinion in *Jacobson* – which was decided in February 1905, mere days before *Lochner* was argued – arguably provides strong support for the extremely broad conception of valid police powers endorsed in *West Coast Hotel* and *McGuire*.

This proximity in time is noteworthy because it demonstrates – in contrast to Gillman’s suggestion that the *Lochner* decision was based on a settled or uncontroversial interpretation of contemporary police powers jurisprudence – a tension between two uneasily coexisting strands of interpretation. In *Jacobson*, Harlan endorses a broad, permissive conception of police powers, and Justices Brewer and Peckham dissent. Two months later, in *Lochner*, Peckham attempts to rein in this permissive standard by insisting that a state’s promulgating “a purely labor law” is not within the

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159 Frisbie v. United States, 157 U.S. 160, 165-66 (1895) (emphasis added).

160 Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (emphasis added).

police power,<sup>161</sup> and Justices Harlan, White, Day, and Holmes dissent. Accordingly, just by counting votes, we can see that each of these conceptions – or indeed, *any* conception, if we take seriously Harlan’s claim that as of 1905, the Court had “refrained from any attempt to define the limits of [the police] power”<sup>162</sup> – was contentious, not settled.

Moreover, while Brewer and Peckham dissented without comment from Harlan’s opinion in *Jacobson*, Harlan’s *Lochner* dissent sets forth substantial arguments against Peckham’s majority opinion. Harlan, joined by White and Day, argues that although the state “may not unduly interfere with the right of the citizen to enter into contracts,” this right “may be ‘regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes.”<sup>163</sup> Of course, not just *any* state policy would pass constitutional muster:

[A]ssuming, as according to settled law we may assume, that ... liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In [*Jacobson*], we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* “when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law” [citations omitted]. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere.<sup>164</sup>

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161 *Lochner v. New York*, 198 U.S. 45, 57 (1905).

162 *Jacobson*, 197 U.S. at 25.

163 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting) (*quoting* *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897)).

164 *Id.* at 68.

In this passage, Harlan articulates the same broad, permissive conception of valid police powers legislation that he had previously endorsed in *Crowley* (1890), *Frisbie* (1895), and *Jacobson* (1905), and he cites *Crowley* and relies heavily on his reasoning in *Jacobson* in his arguments supporting this conception.<sup>165</sup>

Harlan's dissent also articulates another principle suggested in many *Lochner*-era cases and firmly endorsed in *West Coast Hotel*: that of judicial deference to legislatures, both with regard to questions of validity – “doubt as to the validity of [a] statute ... must ... be resolved in favor of its validity” – and questions of fact. On the latter point, Harlan concedes that “[w]hat the precise facts [regarding long working hours’ effect on health] are it may be difficult to say,” but insists that “it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion.”<sup>166</sup> In opposition to the majority’s refusal to “shut [their] eyes” to their suspicion that many laws “passed under what is claimed to be the police power ... are, in reality, passed from other motives,”<sup>167</sup> Harlan insists that where there is room for such doubts, “the courts must keep their hands off.”<sup>168</sup>

Four years later, Harlan's fellow *Lochner* dissenter Justice Day endorsed a similar principle of judicial deference in his majority opinion in *McLean v. Arkansas*:

[T]he police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the

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165 See also *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (holding that “unless [police power] regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference”). Harlan's *Lochner* dissent quotes this passage from *Gundling* in its entirety, and both *McGuire* and *West Coast Hotel* also cite *Gundling* for this proposition.

166 *Lochner*, 198 U.S. at 72 (Harlan, J., dissenting).

167 *Lochner*, 198 U.S. at 64.

168 *Id.* at 68.

right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.<sup>169</sup>

In this passage, Day echoes Harlan's *Lochner* dissent in holding that only when a statute is "palpably in excess of legislative power" can it be subject to judicial interference. Moreover, Day advances a further argument for judicial deference, namely, that since the legislature is "familiar with local conditions," it should be the primary judge of the need for legislation.

Two years later, in *McGuire*, Hughes – who wrote for a unanimous Court, including *Lochner* dissenters Harlan, White, Day, and Holmes but only one Justice, McKenna, from the *Lochner* majority – quoted much of the above-cited language from *McLean* in support of his further articulation and endorsement of the principle of judicial deference:

In dealing with the relation of employer and employed, *the legislature has necessarily a wide field of discretion* in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work *and freedom from oppression*. What differences, as to the extent of this power, may exist with respect to particular employments, . . . must be determined as cases are presented for decision. But it is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent [its regulations] from being nullified by prohibiting contracts which by modification or waiver would alter or impair the obligation imposed.<sup>170</sup>

Hughes emphasizes the legislature's "wide discretion" and opines that one proper object of police powers regulation is to "insure . . . freedom from oppression," which arguably both presages and supports Hughes' later opinion in *West Coast Hotel*. Earlier in *McGuire*, Hughes summarizes the principle of judicial deference as follows:

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the

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169 *McLean v. Arkansas*, 211 U.S. 539, 547 (1909).

170 *McGuire*, 219 U.S. at 569-70 (emphasis added).

legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review.<sup>171</sup>

This principle was invoked again, albeit in dissent, in the 1923 case *Adkins v. Children's Hospital*.<sup>172</sup> As Barry Cushman notes, the *Adkins* opinion continues the struggle between rival conceptions of valid police power legislation that played out in *Lochner*:

If Justice Sutherland's [majority] opinion resuscitated Peckham's mode of analysis [i.e., in *Lochner*], Chief Justice Taft's dissent echoed Justice Harlan's. Noting that the majority opinion in *Bunting* had vindicated Harlan's *Lochner* dissent with respect to hours regulation, Taft opined that the issue was thus reduced to whether wage regulation was constitutionally distinct. This question turned on whether the relation of health and morals to wages was less direct than their relation to hours. *This was a matter on which reasonable people might disagree; and accordingly, the legislature was entitled to the final word.*<sup>173</sup>

Interestingly, Justice Sutherland – a prominent member of the *Lochner* majority – himself endorsed a similar principle the following year, in his majority opinion in *Radice v. New York*:

Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.<sup>174</sup>

Sutherland did not, of course, take himself to be “precluded,” in his *Adkins* opinion, from not only “reviewing” but flat-out *dismissing* the D.C. legislature’s conclusion that its minimum wage legislation was necessary “to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent

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171 *Id.* at 569.

172 *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

173 BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) at 68-69 (emphasis added).

174 *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (*citing* *Holden v. Hardy*, 169 U.S. 366, 395 (1898)).

standards of living.”<sup>175</sup> Indeed, despite these and other factual assertions issued by the D.C. legislature, Sutherland distinguishes *Adkins* from *Radice* – which upheld a statute prohibiting employment of women in restaurants at night – on the grounds that the statute before it had been a “wage-fixing law, pure and simple,” which “had nothing to do with the hours or conditions of labor.”<sup>176</sup> Perhaps we may infer from the two opinions that Sutherland held that his factual conclusions in *Adkins*, though they contradicted those of the D.C. legislature, were so clearly correct that “the question of what the facts establish[ed]” was *not* a fairly debatable one.”<sup>177</sup>

Turning, at last, to *West Coast Hotel* – the case that finally overruled *Lochner*, *Adkins*, and the liberty-of-contract legal regime – it is no surprise that Hughes’ majority opinion in *West Coast Hotel* strongly endorses the principle of judicial deference. *West Coast Hotel* cites *O’Gorman & Young v. Hartford Fire Insurance Co.*,<sup>178</sup> as supporting “the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power,” and quotes *Nebbia*<sup>179</sup> for the proposition “that ‘with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal’; that ‘times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless *palpably* in excess of legislative power.’”<sup>180</sup> This echo of Harlan’s principle of judicial deference follows Hughes’ earlier articulation of his interpretation of the Fourteenth Amendment, which he first stated in *McGuire*,

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175 *Adkins*, 261 U.S. at 541-42 (quoting D.C. Stat., 40 Stat. 960, c. 174 (1918)).

176 *Radice*, 264 U.S. at 295.

177 *Id.* at 294.

178 *See O’Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931).

179 *Nebbia v. New York*, 291 U.S. 502 (1934).

180 *West Coast Hotel*, 300 U.S. at 397-98.

which conceives of “liberty” as “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people,” and holds, with respect to “due process” in relation to legislative restraints on liberty, that “regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”<sup>181</sup> This *very* expansive conception of valid police powers legislation could not coexist with the rival conception articulated in the majority opinions in *Lochner* and *Adkins*. Hughes had the votes, and the rest, as they say, is history.

### **Section III. The Normative in the Descriptive**

#### *A. Assessing Past Decisions*

According to Gillman, when we look back on this history, we should see Hughes’ opinion as stating an obvious falsehood, namely, the claim that *Adkins* had been “a departure.” Gillman replies that “[t]his, of course, was not so.”<sup>182</sup> Moreover, Gillman contends that Hughes disingenuously “claim[ed] that he was merely correcting a mistake” but was, in fact, “jettisoning a constitutional tradition that was a century and a half old” (*Ibid.*). What are we to make of this? First, Gillman’s characterization of Hughes’ *West Coast Hotel* opinion seems unwarranted and unfair. The above discussion of cases that seem to support Hughes’ opinion is very brief, but it demonstrates that Hughes’ opinion was supported by a line of reasoning developed in a number of cases over decades. Moreover, brief though it is, my discussion of the legal reasoning advanced in *West Coast Hotel* is much more than we get from Gillman, who follows Justice Sutherland in wholly ignoring Hughes’ legal arguments and doesn’t even mention the *McGuire* holding. The latter omission is especially culpable in a discussion of the legitimacy – or purported lack thereof – of an important opinion that

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181 *Id.* at 391-92.

182 HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993) at 191.



centrally relies on *McGuire*. Indeed, based on *McGuire* alone, we can confidently assert, *contra* Gillman, that Hughes’ opinion in *West Coast Hotel* wasn’t *obviously* or *completely* without legal support because it largely reiterated the broad and permissive conception of valid police powers legislation set forth in Hughes’ unanimous opinion in *McGuire* more than 25 years before *West Coast Hotel*.

Furthermore, as I outlined above, we can trace the roots of this broad conception back to the Court’s opinions in *Crowley* (1890), *Frisbie* (1895), *Gundling* (1900), *Jacobson* (1905), *McLean* (1909), and of course, *McGuire* (1911); and onward through *Radice* (1924), *O’Gorman* (1931), and – perhaps most importantly<sup>183</sup> – *Nebbia* (1934), before Hughes established its dominance in *West Coast Hotel* (1937).<sup>184</sup> In addition, important arguments in support of this conception appear in Harlan’s *Lochner* dissent and Taft’s *Adkins* dissent. And the aforementioned are just the cases I could include in a brief discussion; a more complete exploration of the available support for *West Coast Hotel* would surely consider the many additional cases Hughes cites in *West Coast Hotel* and *McGuire*. But the brief discussion I’ve provided herein permits me to reject Gillman’s uncharitable suggestion that Hughes’

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183 See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998), chapters 4-5.

184 See, e.g., *West Coast Hotel*, 300 U.S. at 391-92; *Nebbia v. New York*, 291 U.S. 502, 524 (1934) (holding that the New York Milk Control Board did not violate the Fourteenth Amendment by fixing the selling price of milk and noting that “this court from the early days affirmed that the power to promote the general welfare is inherent in government”); *O’Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931) (upholding New Jersey statute requiring reasonable rates for the provision of fire insurance as Constitutional); *Nectow v. Cambridge*, 277 U.S. 183, 187-88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (“The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.”); *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (*citing* *Holden v. Hardy*, 169 U.S. 366, 395 (1898)) (holding that New York statute prohibiting women from working at night did not violate liberty of contract because the differences between the sexes “justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon [women]”); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917); *Chicago, B & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911) (upholding Constitutionality of Iowa statute making railroads liable for any damage caused by negligence and stipulating that an injured party’s having entered into a “relief contract” with the railroad would pose no bar to recovery under the statute); *McLean v. Arkansas*, 211 U.S. 539, 547 (1909) (holding that Arkansas statute requiring immediate weighing of coal and stipulating that parties could not contract out of this requirement did not violate the Fourteenth Amendment); *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905) (holding that Massachusetts statute requiring compulsory vaccination did not violate the Constitution); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (holding that Chicago ordinance forbidding the sale of cigarettes by persons without a license did not invade liberty of contract); *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895) (holding that U.S. statute prohibiting attorneys from charging more than \$10 for prosecuting pension claims was a valid exercise of the federal police power); *Crowley v. Christensen*, 137 U.S. 86, 90 (1890) (holding that regulating the sale of “intoxicating liquors” was well within the police power of the state).

claimed justification for his *West Coast Hotel* opinion was a mere rationalization fabricated out of whole cloth.

B. *A Harmless Digression Concerning Legal Realism*

The Supreme Court's majority<sup>185</sup> opinion in *Planned Parenthood v. Casey* offers the following assessment of the majority opinion in *West Coast Hotel*:

*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.<sup>186</sup>

I offer this passage not as an authoritative interpretation of *West Coast Hotel*, but as one that a majority of the sitting Supreme Court Justices in 1992 considered sufficiently sensible to endorse. In particular, notice the Court's claim that *West Coast Hotel* could be accepted "as a response to the Court's constitutional duty." Perhaps the Court means to imply that the *West Coast Hotel* opinion was *the* response, i.e., the correct one, but we can just as plausibly read the passage as suggesting that it was *a* reasonable response to the Court's perceived constitutional duty.

In any case, the *Casey* majority did not need to say that the Four Horsemen's dissenting interpretation of their constitutional duty was *unreasonable* in order to say that the *West Coast Hotel* majority's interpretation was *reasonable*. Instead, it is possible to state without contradiction that each

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185 The passage is quoted from section III of the Court's opinion, which was announced by Justices O'Connor, Kennedy, and Souter and joined by Justices Blackmun and Stevens. *Planned Parenthood v. Casey*, 505 U.S. 833, 841 (1992).

186 *Id.* 505 U.S. at 863-64.

of two (or more) sharply differing interpretations of “what the law requires” in a given case is sufficiently reasonable for one or more sensible Justices sincerely to endorse it. This sort of “pluralism” about plausible legal interpretations seems to be a standard move in response to the attitudinal model,<sup>187</sup> and as I tried to show in the preceding section, if all we aim to do is show that sensible Justices could have sincerely endorsed the interpretation of contemporary constitutional law expressed in the *West Coast Hotel* majority opinion, *Lochner*-era legal materials provide ample support. This, in turn, supports the *Casey* majority’s assessment of *West Coast Hotel* and casts doubt on Gillman’s attitudinal account.

Defenders of the standard Legal Realist model might respond that my defense of *West Coast Hotel* – since it relies on showing that the majority’s decision-making was both rule-governed and consistent with a plausible interpretation of existing legal materials – only rules out the possibility that the Justices in question were *blatant* policy-seekers who didn’t even *pretend* to engage in principled decision-making. Since *nobody* holds that judicial decision-making is *only* constrained by unadorned policy-seeking, why not conclude that the *West Coast Hotel* majority had merely tacitly agreed to conform to institutional or professional norms while simultaneously seeking to influence policy as much as possible? If all agree that the apparently rule-governed character of judicial decision-making is consistent with *either* the Legal Realist model or the legal model, simply pointing out this sort of mutual consistency doesn’t provide any obvious reason to accept one model over the other.

However, this reasoning cuts both ways, and I contend that advocates of the Legal Realist model must meet a higher burden of proof than those of the legal model. This is because Legal Realists seek to advance an alternative explanation for the causes of judicial decision-making in order to *supplant* the established and *prima facie* plausible explanation. To illustrate, suppose a layperson

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187 See, e.g., Susan Haack, *The Pluralistic Universe of Law*, 21 *RATIO JURIS* 453 (2008).

asked one how judges decide cases. One might include some caveats, but the straightforward response is that judges *apparently* examine questions of law and relevant legal materials and then seek to discover and articulate what the law requires. This explanation *may be false*, but we can say in its favor that it describes what judges are expected – perhaps required – to do, what they typically claim to be doing, and what citizens subject to the courts over which they preside presumably want them to do.

Where such “default” explanations exist, those who seek to supplant them arguably take on a heightened burden of proof. Accordingly, I assert that the straightforward “legal” explanation of judicial decision-making does *not* have the same epistemic status as other explanations consistent with the relevant data. Instead, proponents of competing explanations must bear the burden of proving that they are *more* plausible than the received explanation, which we consider plausible for several reasons, e.g., judges tell us they seek to interpret the law in good faith, we expect them to do so, and the “legal” model is arguably the appropriate basis for any straightforward explanation of what judges do.

Moreover, one of my chief objections to Gillman’s attitudinal account of *West Coast Hotel* concerns his implication that Justice Hughes and the other Justices who joined his majority opinion were *self-conscious* “policy-seekers.” My opposition to this unnecessarily ambitious claim does not preclude my endorsing the insight in J. L. Mackie’s observation that “what judges say they are doing, what they think they are doing, and the most accurate objective description of what they actually are doing”<sup>188</sup> may frequently diverge. For example, I do not wish to deny that some or all judicial decision-making might be *unconsciously* driven by policy-seeking. Indeed, I am sympathetic to several

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188 J. L. Mackie, *The Third Theory of Law*, 7 PHILOSOPHY AND PUBLIC AFFAIRS 3 (1977) at 7. Indeed, Mackie is one of the most prominent proponents of an “error theory” about moral language, i.e., the view that there are no moral facts or properties in the world, and therefore all moral claims are mistaken. See J. L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977). However, Mackie does not claim that ordinary language users are *self-consciously* speaking falsely about moral matters but nonetheless continuing to make moral statements in order, for example, to manipulate others.

aspects of the Legal Realist project, not least its emphasis on the importance of examining and increasing awareness of the influence of extralegal factors on legal outcomes. Nonetheless, I think we should resist the common Legal Realist stratagem of asserting that the undeniable existence of ambiguity in the law automatically pushes us toward a presumption that extra-legal factors are dominant in judicial decision-making, both because this presumption simply does not follow from legal ambiguity and because there are commonsense reasons, as I outline above, to think that many judges either do or take themselves to be doing what judges are supposed to do, i.e., interpret and articulate what the law requires.

#### **Section IV: Abandoning Neutrality**

Thus far, most of my discussion has been relatively neutral about which of the two competing strands of *Lochner*-era ideology I describe above had the greater claim to legitimacy, in part because I wished to parse out the thorny question of what existing constitutional law required in the early 20<sup>th</sup> Century. However, I will now turn to a largely normative – though partly legal – argument in favor of the *West Coast Hotel* Court’s rejection of the liberty-of-contract legal regime upheld in *Lochner* and *Adkins*.

I conceded at the outset of this Chapter that the ideology endorsed by the *Lochner* majority and like-minded Justices had a claim to plausibility as a principled interpretation of contemporary Constitutional law, but I have also argued at length for the conclusion that the competing strand of ideology endorsed by Justice Hughes and the other Justices who joined his majority opinion in *West Coast Hotel* is similarly plausible. Now, for the sake of argument, let us assume that at least with respect to the question of legal and Constitutional interpretation, these two competing ideologies had roughly *equal* claims to plausibility. Even granting this further concession, it is clear that the liberty-of-contract view was normatively inferior to the broad-police-powers view which supplanted

it because it was based on a popular but deleterious fantasy. This fantasy concerns men and their amazing powers of strength, rationality, will, and temperance. It is both sexist and psychologically unrealistic but has been remarkably prominent and influential throughout recorded history. The fantasy, in its simplest form, is roughly as follows: Men are independent and don't need or deserve anyone else's help.

How is this familiar but very general line of thought relevant to the present discussion of *Lochner*-era legal ideologies? If the fantasy in question were the closely-related but gender-neutral version, such that humans have these amazing powers and are therefore independent – and this version has undoubtedly become more oft-stated and -endorsed than the gender-specific one over the last several decades – its relevance would be less obvious but still worth considering. However, in the *Lochner*-era legal context, the gender-*specific* fantasy was far more influential, and it was important to the ideological struggle I have described because it allowed the liberty-of-contract regime to persist long after the facts on the ground showed that it richly deserved to be discarded.

By way of explanation, recall that Gillman defends the *Lochner* majority Justices on the grounds “that the Justices were by and large motivated by a principled commitment to the application of a constitutional ideology of state neutrality, as manifested in the requirement that legislation advance a discernible public purpose.”<sup>189</sup> This argument would strike many modern readers as bizarre because our current understanding of “public purpose” is so much different from that which was commonly held in the 19<sup>th</sup> Century. In short, we now accept and embrace that the “public” in whose interests the law may legitimately intervene *includes* adult males of sound mind and

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189 HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993) at 199. It may strike modern readers as bizarre for *Lochner*-era Justices to claim that protecting the health of bakers did not “advance a discernible public purpose,” but as I will discuss later in the paper, they made this claim against the backdrop assumption that freely contracting adult men were somehow independent from the “public,” such that designing legislation to assist or protect any of these free-agent parties would constitute offering them an unfair advantage rather than contributing to the common weal.

body. Obvious though this seems to us now, it was not so to many *Lochner*-era Justices, as contemporary jurist Roscoe Pound presciently explains:

Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles.<sup>190</sup>

Legal opinions of the time abound with the sentiment Pound summarizes in the foregoing passage, and they make plain that the statute in *Lochner* – which prohibited contracts requiring bakers to work more than 10 hours per day – was held to advance no discernible “public” purpose because *men* are not to be helped by the law in the same ways that it may legitimately help the *public*. To help men in their struggle for advancement on a theoretically level playing field would not only “be insulting to their manhood and degrading,” but would also offend the notion of “state neutrality” by extending an unfair advantage – a “hand-out” – to some players while withholding it from others. As this rough metaphor suggests, on this “level playing field,” the *men* are the players and the *public*, though important in many ways, is largely regarded as a passive backdrop to the game at hand.

To recapitulate, on this view, it would be insulting to bakers’ manhood and unfair to other active parties for the law to intervene in order to improve bakers’ bargaining positions in labor markets. Accordingly, from the *Lochner* Justices’ perspective, the law limiting bakers’ hours of work advanced no discernible public purpose because if the bakers didn’t like the terms of their employment, they should simply “man up”: quit, refuse the bargain in the first place, or quit whining and follow through on what they had agreed to do. According to the dominant view, men didn’t need to be – and ought not have been – helped or protected by the law in their competitive struggles with and against each other.

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190 Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (citing *Godcharles v. Wigeman*, 113 Pa. St. 431, 437 (1886); *State v. Goodwill*, 33 W. Va. 179, 186 (1889); *Braceville Coal Co. v. People*, 147 Ill. 66, 74 (1893); *State v. Haun*, 61 Kans. 146, 162 (1899); *People v. Beck*, 10 Misc. 77 (1894) (dissenting opinion of White, J.); *Frorer v. People*, 141 Ill. 171, 187 (1892)).

Women and children, on the other hand, were legitimate objects of help and protection, and therefore one of the main exceptions to the *Lochner*-era presumption against the constitutionality of work regulations concerned those which sought to improve the working conditions of persons who were not men:

[T]he overwhelming weight of authority is to the effect that the legislature may regulate the hours and conditions of labor of women and children. Here it is said there are “natural” incapacities.<sup>191</sup>

This trend, which Roscoe Pound observed in 1909, continued into the early 20<sup>th</sup> Century for several years. For example, in 1924, the Supreme Court upheld a statute prohibiting the employment of women to work at night in *Radice v. New York*, endorsing New York’s argument for an exception to the usual liberty-of-contract rule, as follows:

The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the State is that night work of the kind prohibited, so injuriously affects the physical condition of women, and so threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting such work falls within the police power of the State to preserve and promote the public health and welfare.<sup>192</sup>

Why is this exception neither insulting nor unfair to the women whom it purports to protect? The answer, of course, is that it cannot be insulting to their “manhood,” as they are mere women, and it is in no way unfair to provide this sort of help and protection to those who are burdened by “natural” incapacities.”

However, even by 1924, this line of reasoning was starting to unravel, as this quote from *Adkins*, which was decided in the same year as *Radice*, demonstrates:

In addition to the cases cited above, there are the decisions of this Court dealing with laws especially relating to hours of labor for women: *Muller v. Oregon*, 208 U.S. 412; *Riley v.*

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191 Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) (citing *Con. v. Hamilton Mfg. Co.* (1876), 120 Mass. 383; *Beyman v. Cleveland* (1884), 39 Ohio St. 651; *State v. Buchannan* (1902), 29 Wash. 602; *Wenham v. State* (1902), 65 Neb. 394; *State v. Muller* (1906), 48 Ore. 252; *State v. Shorey* (1906), 48 Ore. 396; *Muller v. Oregon*, 208 U. S. 412 (1908); *Starnes v. Allison Mfg. Co.* (N. C. 1908), 61 S. E. 525).

192 *Radice v. New York*, 264 U.S. 292, 294-95 (1924) (citing *Holden v. Hardy*, 169 U.S. 366, 395 (1898)).



*Massachusetts*, 232 U.S. 671; *Miller v. Wilson*, 236 U.S. 373; *Bosley v. McLaughlin*, 236 U.S. 385. In the *Muller* Case the validity of an Oregon statute, forbidding the employment of any female in certain industries more than ten hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. The cases of *Riley*, *Miller* and *Bosley* follow in this respect the *Muller* Case. But the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* Case (p. 421) has continued “with diminishing intensity.” In view of the great — not to say revolutionary — changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.<sup>193</sup>

And that, in a nutshell, is why the liberty-of-contract era had to be abandoned. Faced with the unavoidable truth that women were becoming “players” – who could at that time “theoretically” be viewed as “on equal footing” with men about as plausibly as poor men could be held to be the equals of rich men and corporations – the Court had only two choices: either extend protective legislation to working men or take it away from women. At least one state court took the latter route,<sup>194</sup> but with the advent of the Great Depression, it was increasingly difficult to sustain the fantasy about men’s powers and independence that made the liberty-of-contract appear tenable to 19<sup>th</sup>-Century sensibilities. After 1929, it became abundantly clear that men – despite their most

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193     *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

194     *Richie v. People*, 155 Ill. 98, 99 (1895).

cherished and perennial fantasies about themselves – needed help and protection of the sort that had hitherto been extended only to women, children, and others with “natural incapacities.”

The Great Depression exposed men for the “weaklings” they are: vulnerable to hunger, thirst, exhaustion, and sickness; often susceptible to poor judgment, weakness of will, and loss of nerve; and above all needy and dependent upon others. The old fantasy about men didn’t disappear, of course, and it can be readily revived and enjoyed with a viewing of just about any 21<sup>st</sup>-Century “blockbuster” movie, but at least for a time in the 1920s and 30s, the “arms-length,” “lone wolf,” “free to choose his own terms” nonsense that animated the liberty-of-contract legal regime stopped making sense. The *Lochner* majority and like-minded Justices doggedly held the line for as long as they could, but their inflated understandings of the capacities and powers of *men* – or *humans*, for that matter – were simply *wrong*. Justice Hughes and his compatriots overruled the *Lochner* ideology in *West Coast Hotel* in 1937, and quite rightly, the law has never looked back.

## **Section V: Concluding Remarks**

I opened this Chapter by suggesting that Gillman offers an “attitudinal” account of *West Coast Hotel*, and I think that I have provided some grounds for doing so, given his characterization of Justice Hughes’ opinion in that case. But whether or not his account is “attitudinal,” it is dismissively critical of the *West Coast Hotel* majority opinion, and in Section II, I explored what might be offered in the opinion’s defense. My discussion of the legal materials that arguably provide support for Justice Hughes’ reasoning is brief, but it is sufficient for my purposes in that Section, i.e., to show that the broad conception of valid police powers legislation and what I have called the

principle of “judicial deference” expressed in *West Coast Hotel* was firmly grounded in existing legal materials.

In Section III, I discussed the seeming tension between Gillman’s recognition that “neither doctrinal formulations nor legal texts possess a singular, objective, determinable meaning,”<sup>195</sup> and his confident assertion that what Hughes claimed about the law “of course, was not so.”<sup>196</sup> This seems to imply that the relevant legal texts did, in fact, possess an objective meaning but that Justice Hughes had somehow *gotten it wrong*. Perhaps Gillman didn’t mean to say anything so “ambitiously normative,” but in any case, I show that the substantial support in contemporary legal materials for the ideology expressed in the *West Coast Hotel* majority opinion makes clear that Gillman’s dismissive characterization of the opinion’s reasoning cannot be accurate.

Finally, in Section IV, I turned to a normative argument in favor of the *West Coast Hotel* decision and the new legal regime it ushered in to replace the *Lochner*-era liberty-of-contract regime. I argue, in essence, that the extreme liberty-of-contract view is based on a perennially appealing but deleterious fantasy to the effect that men are or ought to be so capable and independent that they should be seen as somehow separate from the “public.” According to this view, although the health, safety, morals, and welfare of the “public” could be legitimate objects of legislative protection, it would be both degrading to individual men and unfair to their competitors to extend similar protection – with its implications of weakness and dependence upon others – to men.

Of course, this fantasy and the view it nurtured during the *Lochner* era were simply mistaken, and this became incontrovertibly clear with the advent of the Great Depression. The extreme liberty-of-contract view was both objectionably sexist and based on a dangerously unrealistic conception of what men – or perhaps only the “real” ones – could and should be. Therefore, its

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195     HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993) at 16.

196     *Id.* at 191.

realization in constitutional law should never have been pursued so enthusiastically. Once it became possible to “jettison” that tradition – in Gillman’s phrase – doing so was not only a reasonable interpretation of existing legal materials but also the only defensible move for the Court to make in response to its earlier missteps.

## CHAPTER FIVE

### CONCLUSION

In closing, I will briefly describe some of the further research suggested by the investigations I pursued in this dissertation. Each chapter had a distinct subject, but they all shared an emphasis on exploring what is important – beyond contracts of employment, which I believe are overemphasized in most discourse on this topic – about work law and work relationships.

First, I believe that Chapter Two, in which I argue that a just society owes more to its workers than exit options, suggests an exploration of what work law could contribute to improve the lot of workers. One concrete intervention for which I will argue in future research is the elimination or substantial revision of the longstanding rule of “at-will” employment, which provides by default that absent explicit agreement to the contrary, any party to a work relationship may terminate it at any time, for any reason – except provable discrimination, illegal retaliation, or other specific prohibited grounds – and without notice. Criticizing the “at-will” rule is not novel, but my focus on status, governance, and authority in work relationships offers a new lens through which to view the issue. For example, if we compare work with other important personal relationships, we could ask why we tolerate “at-will” employment but would reject “at-will” marriage, parenthood, or guardianship relationships. More pointedly, I will argue that if, as I contend, work law should only allow *justifiable* exercises of authority in work relationships, we cannot realistically expect to achieve this goal while allowing the “at-will” rule to persist. Having the ability to fire employees at will

simply places too much power in the hands of employers, permitting them to become petty tyrants in the workplaces they govern. I will conclude that no just system of work law should permit this.

Second, I argue in Chapter Three that it would best serve our normative and descriptive purposes to view work law as creating and regulating role-based authority relationships, but I leave important questions concerning the nature and extent of justifiable authority unanswered. I will address these questions in a further paper by sketching an approach to identifying legitimate and illegitimate exercises of authority by “masters” over “servants” in work relationships. I will employ “role-based” views of authority relationships to argue that such relationships derive their legitimacy, if any, from their nature and from the benefits they confer and burdens they impose. Accordingly, I will argue that authority is only legitimately exercised in work relationships to the extent that it is at least implicitly consented to by – and serves at least some important needs of – all affected parties. Furthermore, I will argue that by permitting at-will firing of employees and in other ways, the law grants employers the power to demand broad, status-based deferential treatment rather than mere compliance with work-related orders. In contrast, state or legal authorities should properly expect no more than compliance. As Scott Hershovitz notes, citizens who sullenly or grudgingly conform to the law’s requirements are not subject to being “reprimanded for insolence” like children. Similarly, work law should deny employers the ability to demand the “bowing and scraping” to which Michael Walzer famously objects while permitting no more authority than is necessary to run an efficient and stable workplace.

Third, Chapter Four is devoted to critiquing Howard Gillman’s mischaracterization of the *West Coast Hotel* majority opinion and offering a defense of its legal and normative legitimacy. I believe this offers further support for the importance of using state regulation to protect workers and improve the nature of work relationships, but what form should such further regulation take? I will answer this question by articulating and expanding the rights and obligations that work law does

and/or should impose upon parties to work relationships as necessary incidents to occupying either of the roles – i.e., accepting the status of “master” or “servant” – that are constitutive of such relationships. Focusing primarily on the interests of workers, I advocate the explicit adoption of a workers’ “bill of rights” which responds to and seeks to eliminate many of the worst abuses to which employees are often subjected. For example, current U.S. work law permits employers to fire their employees for, e.g., bumper stickers the employer dislikes, drinking beer after work, or attending a rally for a political candidate. It should not be thus, and we cannot rely on the hope that employers will choose to be decent without legal intervention. On the other hand, I will also argue that employers should have some basis in work law for expecting and demanding minimum standards of loyalty and good-faith investment in the success of their enterprises from their employees.