Migrant Workers and Minimum Wages

Regulating the Exploitation of Agricultural Labor in the United States

Marc Linder
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Published in 1992 in the United States of America by Westview Press, Inc., 5500 Central Avenue, Boulder, Colorado 80301-2877, and in the United Kingdom by Westview Press, 36 Lonsdale Road, Summertown, Oxford OX2 7EW

Library of Congress Cataloging-in-Publication Data
Linder, Marc.
Migrant workers and minimum wages: regulating the exploitation of agricultural labor in the United States / by Marc Linder.
p. cm.
Includes bibliographical references and index.
ISBN 0-8133-8616-0
3. Migrant agricultural laborers—Legal status, laws, etc.—United States. I. Title.
KF3505.A4L56 1992
344.7 3'01544—dc20
92-19439 CIP

Printed and bound in the United States of America


10 9 8 7 6 5 4 3 2 1
The Limits of Welfare-State Paternalism

Where labour is weak—and its strength or weakness depends largely on factors outside the control of law—Acts of Parliament, however well intentioned and well designed...cannot do much to modify the power relation between labour and management. The law has important functions in labour relations, but they are secondary if compared with the impact of the labour market (supply and demand) and...with the spontaneous creation of a social power on the workers' side to balance that of management.1

I. Weak Workers and State Intervention

Can legislatures and courts enable workers with little or no economic power to bypass disadvantageous labor-market forces long enough to create a breathing space in which to forge such power? Or are "[t]he laws of trade...stronger than the laws of men"?2 Despite the fact that The Road to Serfdom3 has been definitively

3 Friedrich Hayek, The Road to Serfdom (1944 [1976]). Even—or precisely—Hayek has acknowledged that: "We must face the fact that the preservation of individual freedom is incompatible with a full satisfaction of our views of distributive justice." Friedrich Hayek, Individualism and Economic Order 22 (1980 [1948]). Although Hayek has in mind an aspect of collective rationality, one way of dealing with it would be centralized decision-making based on the collectivity's superior overview of the current economic framework and of the long-run effects of current decisions on
paved in the advanced capitalist societies, debate still surrounds the issues of the extent to which individuals need to be protected against disruptive-anarchic market forces and of the superior competence of the state to make decisions on behalf of individuals. More poignant still is the perennially unresolved dilemma of how to empower marginalized groups without frustrating the emergence of their autonomy by that very act of state benevolence.

In his internationally oriented discussion of the late-nineteenth-century working class, Eric Hobsbawm argues that

the state unified the class, since increasingly any social group had to pursue its political aims by exerting pressure on the national government, in favour of or against the legislation and administration of national laws. No class had a more consistent and continuous need for positive state action on economic and social matters, to compensate for the inadequacies of their unaided collective action....

In this context it is crucial to distinguish between two different modes of interaction between the working class and the state. On

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the one hand, that class may use the state apparatus as a convenient mechanism for imposing uniform working conditions or social benefits that it has been able to extract from the employing class through concerted effort on a local or industrial basis. Here it has etatized collective self-help. On the other hand, the working class (or various of its fractions) may be compelled to resort to influencing the state politically in order to bring about economic conditions that it is not strong enough to win on its own for the bulk of workers. In some instances, it may engage in a "civil war" against the whole class of employers in order to enforce shorter working hours, while at the same time coercing individual workers to submit to class-wide standards. In other historical situations, the working class may be so weak that "middle class reformers" constitute the driving force behind state imposition of such conditions on the employing and employed classes. In other words, "voluntarism," that is, trade-union self-sufficiency and abstentionism vis-à-vis state

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9In an interesting variant, in the late 1940s and early 1950s, the United Auto Workers, having been out-lobbied by the large automobile companies in its effort to secure increased old-age social security pensions from Congress, succeeded in securing improved private pensions from those companies through industrial action and collective bargaining. Once the companies had the inducement of reducing their private pension costs and increasing those of other employers, the UAW succeeded in persuading them to join in renewed congressional lobbying. JILL QUADASO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE 159-68 (1988).

10On the complicated character of such struggles, see 1 MARX, DAS KAPITAL ch. 10 §§ 6-7; CHRIS NYLAND, REDUCED WORKTIME AND THE MANAGEMENT OF PRODUCTION 11-16 and passim (1989). At the extreme, it has been argued that the claim that

| Law is bound to serve...the class responsible for social production...holds true even if, within the ruling class, there are no groups which are both willing and able to enforce the general interests of a capitalist society against individual capitalists, so that the pressure necessary to have the law enacted must be exercised by the [workers] themselves.

RUDOLF SCHLESINGER, SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND DEVELOPMENT 19-20 (2d ed. 1951 [1945]). A major gap in this approach is its failure to provide an account of the political filtration and decision-making processes that would inexorably generate the result most functional to capital.

11If those who wish to use state regulation as a means of raising the plane of competition are primarily middle class reformers, then this method is likely to be restricted to the most sweated industries or classes." PAUL DOUGLAS, THE ECONOMIC THEORY OF WAGE REGULATION, 5 U. CHI. L. REV. 184, 194 (1938). For a nineteenth-century example, see J. HAMMOND & BARBARA HAMMOND, LORD SHAFTESBURY 83-146, 162-74 (1939 [1923]).
intervention,12 is as weak or as strong as the social, not the legal, conditions allow; for it rests to a significant extent upon autonomous union bargaining strength.13

Distinguishing between these two fundamentally different types of working-class recourse to the state helps make prominent the fact that a significant component of state intervention as embodied in labor law is continuous with an older, pre-industrial, and in part pre-capitalist tradition of poor-law relief.14 Yet a policy bordering on the philanthropic-humanitarian, solidaristic, or even coercive—such as outlawing wages below a certain level where neither the forces of the labor market nor the bargaining strength of the workers involved can sustain such a level—should not be analyzed as if it were the result of programmatically confrontational class conflict even where the ruling classes are largely motivated by the fear of the disorder that might follow widespread material privation.15 Instead it is crucial to differentiate between two related but nevertheless distinct constellations of labor market forces. One refers to the general relationship between supply and demand while the other involves the opportunity afforded employers to take advantage of individual workers' extraordinary need in order to press the wage below its customary minimum level. Unions in effect


Supplementing a minimum wage with an earned income tax credit differentiated according to family size is the functional equivalent of the principle of less-eligibility, which guided able-bodied relief under the New Poor Law and still underlies welfare policy in the United States. See infra ch. 3.
operate as "insurance societies" to prevent the latter possibility.\textsuperscript{16}

The aforementioned two modes of interaction between the working class and the state correspond to these two labor market situations.\textsuperscript{17} Where that class merely seeks state ratification of an existing de facto minimum wage secured through market forces and negotiation, legislation appears more as an extension of the private collective ordering of the labor market than as state intervention. In contrast, the second scenario, in which the state imposes a minimum on the parties, invites analysis as paternalism.

\section*{II. The Structure of Paternalism}

Caution is called for in structuring historical understanding through the use of a category such as paternalism because it

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is a loose descriptive term. It has considerably less historical specificity than such terms as feudalism or capitalism. It has as
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\item \textsuperscript{16}Karl Marx, \textit{Das Kapital (Ökonomisches Manuskript 1863-1865)}, in II:4 \textsc{Marx \& Engels, Gesamtausgabe (MEGA)} at 11-12 (1988).
\item \textsuperscript{17}Paul Rubin, \textsc{Business Firms and the Common Law: The Evolution of Efficient Rules} 31 (1983), envisions a third situation:
\end{itemize}

If class actions were generally allowed, then we would expect the same types of agents to litigate as now lobby for statutes. That is, to the extent that the legal system allows class interests to litigate, then the common law system approaches the statutory system and the sort of inefficient legislation that has been statutorily established in recent years would occur instead through common law means. For example, if unions filed \textit{amicus} briefs for some low-paid workers, the issue of wages could have been litigated by arguing that wages below some minimum were "unconscionable" and hence, a minimum wage law would have passed by litigation rather than by statute.

One reason why unions may not have pursued such a strategy overlaps with the reason why they have not lobbied more vigorously for higher minimum wages benefitting more workers—namely, that such an approach would reduce the incentive low-paid workers would have to join unions in industries in which unions believe that organization would not be "cost-effective." Moreover, perhaps because of the unpredictable ramifications of the application of the doctrine of unconscionability to labor contracts, courts have never ruled on the issue. See \textsc{Restatement (Second) of Contracts § 208} (1981 & App. 1986, & Supp. 1988); C. Macpherson, \textsc{The Rise and Fall of Economic Justice} 18-19 (1987 [1985]). Kahn-Freund, \textsc{Labour and the Law} at 23, found no British labor "case in which a court invalidated a contract by reason of gross exploitation...." A Westlaw/Lexis search also revealed no case involving an unconscionably low wage. See \textsc{infra} ch. 7.
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much and as little value as other generalized descriptive terms—authoritarian, democratic, egalitarian—which cannot in themselves, and without substantial additions, be brought to characterize a system of social relations. No thoughtful historian should characterize a whole society as paternalist or patriarchal. But paternalism can, as in Tsarist Russia, in Meiji Japan, or in certain slave-holding societies, be a profoundly important component not only of ideology but of the actual institutional mediation of social relations. These snares of ahistoricity do not imperil its use here, which invokes no such totalizing macrosocial analysis. Instead, paternalism will be confined to a heuristic examination of the consequences for workers without labor-market power of the protection that the state will be confined to. The following methodological admonition is valid in this setting as well as in studying earlier paternalist agents such as pre-liberal authoritarian states, eighteenth-century Tory-patricians, slaveowners, or capitalist employers:

Comparisons...have some validity, so long as they are restricted to the psychological model of the family as the universal prototype for the exercise of authority. ... Paternalism does not exist indiscriminately across time and place. Specific paternalisms

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Limits of Welfare-State Paternalism

represent specific social and cultural bridges across the gap of ultimately irreconcilable interests. They afford a measure of maximizing the decency and self-respect with which the powerful and the unarmed can share the same territory.20

The socioeconomic paternalism that constitutes a key aspect of the modern labor-protective welfare state appears in a form qualitatively different from that of any of these historical predecessors.21 For unlike other paternalisms, this (quasi-authorized) agent neither expects nor demands reciprocity or willing obedience from the beneficiaries. As the first formal-democratic paternalist, it purports to have no ulterior motive in implementing the will not only of the majority but of the majority of the paternalized.22

Insofar as the welfare state serves to reproduce the working population in a form specifically functional to capital by modifying the reproduction of labor power, that function and the basic social-welfare needs of the working class become so fused in reality and consciousness that in the amalgam of elements constituting income security programs it is difficult to disengage capitalist social control

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21Indeed, Genovese takes the position that "[t]he subordination...of the people of any country to a welfare state does not constitute a paternalistic order in any historically meaningful sense." GENOVESE, ROLL, JORDAN, ROLL at 611. But see L. MOREAU DE BELLAING, L'ÉTAT ET SON AUTORITÉ: IDEOLOGIE PATERNALISTE (1976).

from the working-class agenda. Unlike other paternalisms, labor-protective regimes are in conflict with the self-regulating mechanisms of market-mediated capital accumulation while protecting capitalism from self-destruction. In this sense alone it may be said that "[m]orality arises from market failure." The underlying principle of such paternalism is that it is justified to restrict a person's liberty of choice, without his consent, even when the person's action would affect himself only, when the person is not considered to be in a position to know his best interests and the behavior imposed is believed to be in those best interests.

Although John Stuart Mill is the modern philosophical fountainhead of deontological prohibitions on community interference with the self-regarding decisions of competent adults, he also furnished
powerful act-utilitarian underpinning for the view that state prescription, for example, of (premium pay for) maximum hours may not be paternalistic. For such "interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."\textsuperscript{27}

Here Mill was alluding to a variation of the free rider problem. In the canonical case, some members of the class have an incentive to desert their fellow workers because they can secure the benefits of class action without bearing any of the associated costs.\textsuperscript{28}

For however beneficial the observance of the regulation might be to the class collectively, the immediate interest of every individual would lie in violating it.... If nearly all restricted themselves to nine hours, those who chose to work for ten would gain all the advantages of the restriction, together with the profit of infringing it; they would get ten hours' wages for nine hours' work, and an hour's wages besides. ... Probably...so many would prefer the ten hours' work on the improved terms, that the limitation could not be maintained as a general practice: what some did from choice, others would soon be obliged to do so from necessity, and those who had chosen long hours for the sake of increased wages, would be forced in the end to work long hours for no greater wages than before. ... [S]uch an enactment...serves to exemplify the manner in which classes of persons may need the assistance of law to give effect to their deliberate collective opinion of their own interest, by affording to every individual a guarantee that his competitors will pursue the same course, without which he cannot safely adopt it himself.\textsuperscript{29}

\textsuperscript{27}John Stuart Mill, \textit{Principles of Political Economy} 963 (7th ed. W. Ashley ed. 1936 [1848]).


\textsuperscript{29}Mill, \textit{Principles of Political Economy} at 964-65.
In the case posited by Mill, the problem is not that some workers will reap the benefits that others have sown, but rather that, unless all workers agree to resist working longer hours, the force of competition will deprive all workers of the shorter workday. Where, as here, state intervention serves to solve the free rider problem, Gerald Dworkin has argued that it is no longer paternalistic because "compulsion is not used to achieve some benefit which is not recognized to be a benefit by those concerned, but rather because it is the only feasible means of achieving some benefit which is recognized as such by all concerned."\(^{30}\) This view rests on the definitional proposition that where it is necessary to substitute state action for class action not because of cognitive failings but because the class is not strong, organized, or cohesive enough to achieve its ends, "one should not talk about paternalism."\(^{31}\) Paternalism on this view would be implicated only where the state confers 'benefits' on individuals irrespective of their preferences.

No cognitive obstacle prevents low-paid workers from forming a preference for a statutory minimum wage of $4.25 per hour over a contractual wage of $3.00. In practice, however, some workers may acquiesce in the lower wage because they believe that, with job seekers far outnumbering jobs, a willingness to accept such wages will increase their chances of securing employment. Consequently, confining paternalism to the imposition of values to the exclusion of the enforcement of preferences that a class or person holds but is on its or his own unable to implement, appears


\(^{31}\)Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 84 (rev. ed. 1986 [1979]). Arneson takes a similar position in characterizing certain kinds of intervention—such as usury laws—as nonpaternalistic if enacted not because legislators suppose that someone might "make a foolish bargain if left to his own devices," but because "the eventual bargain struck is likely to be highly unfavorable" as a result of the person's "weak bargaining position." Richard Arneson, *Mill versus Paternalism*, 90 *Ethics* 470, 472 (1980). Russell Hardin, *Morality within the Limits of Reason* 143, 147 (1980), in contrast, sees such state intervention as not paternalistic "in any but perhaps the very strongest sense." Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563, 572-73 (1982), adopting an individualistic perspective, arrives at the same conclusion; he thereby fails to see the paternalistic implications of what he refers to as "distributive motives."
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A more fruitful approach would distinguish between **strong paternalism**—the state's acting in a person's best interest in spite of or without regard to his stated preferences—and **weak paternalism**—the state's furnishing its will and/or power where a person or class lacks either or both to achieve his or its goals. Such a position also appears to accord more closely with the original familial context of paternalism.

Thus a parent may substitute her judgment for her child's by interfering with the child's preference for candy over spinach. Here substituted judgment and (attempted) coercion go hand-in-hand. But what of the scenario in which the parent substitutes his abilities for the child's in order to promote attainment of a good formulated by the child? The child may, for example, like to eat apples and the parent may agree that apples are good for the child to eat. Unfortunately, the child is neither tall nor agile enough to reach the apples growing on a nearby tree. Is it paternalistic for the parent to use his adult height to secure them? Since lack of apples is not life-threatening, a parent might take the position that substituting her abilities for the child's discourages the child's development—depriving her, for example, of the incentive she needs to learn how to climb.

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33John Rawls, *A Theory of Justice* 249 (1971), recognizes paternalism as encompassing protection of persons "against the weaknesses and infirmities of their reason and will in society." In a different pairing, Kleing, *Paternalism* at 14, distinguishes between strong paternalism, which does not consider the person's capacity to choose the imposed good for himself, and weak paternalism, which is based on the person's incapacity to make that decision.

34Genetic paternalism is by far the most important form of *sincerely cooperative*
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Analogously, if the state intervenes to secure the minimum wage for workers, they may begin to regard themselves as wards instead of developing the social-psychological wherewithal needed to organize and to sustain successful collective action.\(^{35}\) "In other words, we may think there is an important difference between Smith's goals being achieved and Smith's achieving them."\(^{36}\) Indeed, paradoxically, unless paternalists succeed in realizing their hidden agenda or meta-goal of educating their beneficiaries to become autonomous masters of generalized problem-solving, the latter's first-order goals may never be enduringly secured.\(^{37}\)

Here a distinction must also be drawn between state interference such as mandatory minimum wages and mandatory contributory old-age pensions. The latter can be interpreted as an instance of precommitment in which dependent workers, knowing that they do not have the willpower to abstain from current consumption in order to postpone some consumption for their post-working years, bind themselves to an involuntary savings plan, by which they irrevocably authorize the state to prevent them from opting out.\(^{38}\) To the extent that the deferred gratification is imposed

\[\text{paternalism...in which those acting paternally are sincerely acting to help the other person become more independently competent over the long run....} \]\n

\(^{35}\)As the Supreme Court summarized the argument of an opponent of social security: "Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings." Helvering v. Davis, 301 U.S. 619, 644-45 (1937).


\(^{37}\)"Unfortunately, a paternalistic intervention that will maximize opportunities for choice in the long run may also interfere with the development of the ability to choose." Donald Regan, \textit{Paternalism, Freedom, Identity, and Commitment} at 121. For a clear statement of the potentially "progressively self-liquidating...character" of a certain kind of entrepreneurial paternalism, see \textit{Herbert Lahne, The Cotton Mill Worker} 66 (1944).

\(^{38}\)Such systems satisfy all five criteria of self-binding adduced by \textit{Elster, Ulysses and the Sirens} at 39-46.
rather than self-imposed, this interpretation becomes less and paternalism more plausible.39 Introduction of a minimum wage, in contrast, does not hinge on temporal self-denial: the root problem is not a lack of individual rationality or will, but of individual and collective power.40 Or as one of the supporters of the original FLSA phrased it: "Social justice means that we as legislators should extend to the unfortunate human beings those social rights which they could demand if they had the power of unity of action."41 The final operative distinction pertains to the spectrum of individual and collective involvement in contractual relationships.42 It arises between state intervention that directly restricts the freedom of the beneficiary and that which also impinges on third parties. In the case of direct or "pure paternalism," "the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions." Indirect or "impure paternalism," in contrast, "will involve restricting the freedom of other persons besides those who are benefitted."43

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39 This interpretation makes sense only if workers empirically have a margin of current savings on which they can draw. If old-age pensions are based on redistributive subsidies or other collective mechanisms, then the Ulysses-Sirens analogy would not apply. In fact, most workers in the U.S. in the 1930s had no savings. See Helvering v. Davis, 301 U.S. at 642-43. Hardin, Morality within the Limits of Reason at 199, fails to distinguish between these two possibilities in his characterization of social security legislation as a mode of dealing with *akrasia*.

40 If workers had the will to strike, that is, to accept a reduction of current consumption, they could force their employers to pay higher wages (i.e., a collectively bargained minimum wage). If such workers are unable to subsist without income, then, again, it is not a question of weakness of will, and paternalism reasserts itself as the solution. Even if the workers could survive a strike and it were a matter of *akrasia*, the relevant act of self-binding would not be a mandatory minimum wage but an implausible state-enforced lockout to prevent the workers from working for less than the minimum wage. To the extent that established unions of the skilled and better-paid workers exclude the unskilled and the latter's employers gain access to even cheaper sources of labor (immigrants), a de facto lockout occurs without any of the positive educative effects. For a broad historical interpretation consistent with this scenario, see Gwendolyn Mink, Old Labor and New Immigrants in American Political Development: Union, Party, and State, 1875-1920 (1986). For empirical analysis, see Stanley Lieberson, A Piece of the Pie: Blacks and White Immigrants since 1980 (1980); Peter Shergold, Working-Class Life: The "American Standard" in Comparative Perspective, 1899-1913, at 53-55 (1982).


43 Dworkin, Paternalism at 111.
latter intervention may require stronger justification insofar as those whose liberty is infringed are not being interfered with in their own interest. Whereas pure paternalism appears generally implausible in bilateral, voluntary contractual relations, even impure paternalism does not describe intervention such as a minimum wage in a uniformly accurate way; for it may or may not benefit the employers whose economic freedom to exploit it restricts while benefitting other employers whose substantive freedom to contract is not affected.\footnote{Although it may be possible, by construing external effects everywhere, ultimately to dissolve all pure paternalism into the impure variety, rhetoric rather than logic undergirds the denial, for example, that forcing people against their will and judgment to save for their old age is paternalistic. Kelman, \textit{Regulation and Paternalism} at 244. Abstracting from the aspect of redistribution, even such a staunch libertarian as Hayek does not object to such programs despite the element of paternalistic coercion. \textit{See} FRIEDRICH HAYEK, \textit{THE CONSTITUTION OF LIBERTY} 286 (1960); HAYEK, \textit{THE ROAD TO SERFDOM} at 120-21.}

\section*{III. A Statutory Minimum Wage}

State intervention into the wage relationship is more complicated than that adumbrated by the Mill-Dworkin approach to the regulation of hours.\footnote{In one sense this is obvious inasmuch as workers cannot bargain individually about hours in large industrial establishments, which require the coordinated presence of hundreds or thousands of employees. \textit{See} ROBERT MACDONALD, \textit{COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY: A STUDY OF WAGE STRUCTURE AND COMPETITIVE RELATIONS} 62 (1963).} On the one hand a statutory minimum wage is enforced for the good of the individual employee and the class of employees\footnote{Insofar as earning sub-minimum wages makes it impossible to sustain a family and thus results in external effects in the form of state-mediated redistributive subsidies, the decision whether to acquiesce in such wages is not purely self-regarding. State intervention would, to that extent, be subject to a lower degree of justificatory scrutiny.} as well as for that of the sub-class of employers who wish to be protected against what President Roosevelt and the New Deal Congress called wage-"chiseling" competitors, who engaged in unscrupulous corner-cutting designed to lengthen hours and lower wages.\footnote{"The great mass of our population has little patience with that small minority which has been termed ‘chislers.’ It is at this minority particularly that this bill...is aimed." H.R. REP. NO. 1452, 75th Cong., 1st Sess. 8 (1937). President Roosevelt also} On the other hand, the only deviant motivation that might
impel an individual employee to accept a sub-minimum wage is that
she prefers it to unemployment. Such a situation calls for more
extreme action than that envisioned by Mill insofar as both em­
ployers and employees seek protection against fellow class members
who need to be restrained from acting against the interest of their
class and their own long-term interests.\footnote{48}

Extensive testimony at the FLSA hearings in 1937 confirmed
the view that employers refuse to be disadvantaged by competitors
who engage in extraordinarily exploitative practices.\footnote{49} As formulated
by the U.S. Commissioner of Labor Statistics, FLSA was designed to
recreate "a competitive system which gives to every business
enterprise an equal opportunity in the struggle for existence;" by

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set[ting] the rules of the industrial game...it...determines the manner
in which competition will take place. ... It incorporates into law
standards which, even though acceptable to the majority, could not
be put into effect without governmental authority as long as a
handful of men in any given industry refused to conform to them.\footnote{50}
\end{quote}

When an organization purporting to represent over half of

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emphasized that "[a] self-supporting and self-respecting democracy can plead...no
economic reason for chiseling workers' wages...." S. REP. NO. 884, 75th Cong., 1st Sess.
2 (1937). The congressional debates on the Portal-to-Portal Act of 1947 were also
replete with references to employers as chislers, who euchred their employees. See
93 CONG. REC. 1494, 1497, 1500, 1503, 1507 (1947) (Rep. Celler, Walter, Robison,
Norton, and Kefauver).

\footnote{48}See Karl Marx, Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863), in
II: 3 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 162 (1976) ("the individual
capitalist constantly rebels against the aggregate interest of the capitalist class");
ELSTER, ULYSSES AND THE SIRENS at 96-97. On "capitalists against capitalism" during
the New Deal, see MICHAEL WEINSTEIN, THE GREAT DEPRESSION: DELAYED
RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-1939, at 204 (1988 [1987]).

\footnote{50}FLSA Hearings at 309, 310 (statement of Isador Lubin). Numerous witnesses
echoed this sentiment. "In this industry, as in many others, 'free competition' and 'fair
labor standards'...cannot coexist." \textit{Id.} at 464 (statement of Paul Brissenden, Vice­
Chairman, N.Y.C. Millinery Stabilization Comm.). "As an employer, as long as you
make my competitors do the same thing, I don't care what wages you force me to pay." 
\textit{Id.} at 475 (statement of E. Lane, The Lane Co. [largest furniture producer in U.S.]).
"[S]weatshop practices'... [are] not a matter which industry itself can correct." \textit{Id.} at
710 (statement of G. Harrington, Nat'l Publishers Ass'n). "It is difficult to induce
employers to enter into collective bargaining agreements when the unions are not in
position [sic] to protect the employers from the undercutting of labor costs in other
areas." \textit{Id.} at 946 (statement of Sidney Hillman, Pres., Amalg. Clothing Workers of
Am.).
\end{quote}
all industrial employment in the United States stated "that it is an unfair competitive advantage for one manufacturing establishment to gain a commercial advantage over another through the exploitation of its labor," it neglected to explain that it had only one subset of exploitation in mind. For once larger employers were in a position to maintain profitability by relying predominantly on the increased productivity associated with labor-saving capital investment and the machine-forced intensification of labor, they could afford to dispense with lengthening the working day and wage-chiseling. Only in this sense, therefore, was the bill "a step away from what we have been doing in the past, where we had absolute liberty of action to exploit labor to our hearts’ content." Consequently, the formal equalization of conditions of exploitation by means of a national statutory floor under wages and a ceiling on (non-overtime) hours in fact created unequal conditions inasmuch as it deprived smaller firms of their basic methods of exploitation: "The little fellow is the fellow who is going to catch the devil, who is not mechanized, who has got probably inefficient labor...." Precisely because "[e]very great industrial corporation in America" was paying in excess of the proposed minimum none opposed FLSA, while numerous industry associations and companies urged Congress not to exempt small employers.

In its approach to workers who were earning below the

51Id. at 134 (statement of John Paine, Chairman of Management Group of Nat’l Council for Indus. Progress).

52See 1 MARX, DAS KAPITAL ch. 16-17; DOREEN MASSEY & RICHARD MEEGAN, THE ANATOMY OF JOB LOSS (1982); 83 CONG. REC. 7411 (1938) (Rep. Kitchen). The president of Johnson & Johnson Co. testified that he had introduced the six-hour day in his plants because that "is the longest operating period that a man or woman can work without interruption." FLSA HEARINGS at 99 (statement of Robert Johnson).

53Id. at 138 (statement of John Paine).

54The owner of numerous cotton spinning mills in Alabama and a former president of the Am. Cotton Mfrs. Ass’n urged a ban on overtime altogether: "Get another man." Id. at 451 (statement of Donald Comer).

55Id. at 487 (statement of E. Lane).

5683 CONG. REC. 6256 (1938) (Rep. Fish); FLSA HEARINGS at 149 (statement of Paul Hanway, Exec. Sec’y-Treasurer, Nat’l Can & Tube Ass’n). Several witnesses, including the National Association of Manufacturers (NAM), noted that exempting small employers would undermine the goal of eliminating sweatshops. See id. at 645-46, 654 (statement of N. Sargent, Sec’y, NAM); id. at 752 (statement of H. Gutterson, Pres., Inst. Carpet Mfrs. Am.).
minimum wage, FLSA was clearly paternalistic. As numerous witnesses testified, its purpose was to "protect[] only poorly paid workers who are not in a position to protect themselves." As to those—largely adult white male—workers whose wages already exceeded the level for which any plausible consensus could be marshalled, their agent, the American Federation of Labor, forcefully put Congress on notice that it would "strenuously oppose[]" "[a]ny proposal to deal with the fixing of general minimum wage standards by a government fiat for men in private industry...." In this view the AFL was joined by the CIO and numerous large employers, who emphasized the need to preserve voluntary collective bargaining.

57KLEINIG, PATERNALISM at 11, misunderstands this connection. In defending itself against a lawsuit charging it with having entered into subminimum-wage agreements with its employees, according to Kleinig, a company argues that the workers entered into the agreements freely. In arguing that workers need to be protected against unwise agreements, "the judge has acted paternalistically toward the workers...though the law is not paternalistic in its intent. Though the workers have been treated paternalistically, they would not be justified in claiming that the law forbidding them from entering the particular wage contract was itself paternalistic." Precisely the opposite is the case: the entire motivation of a minimum wage law is to prevent them from acquiescing in offers that the state deems not to be in their interest. This type of legislation paternalistically constricts the permissible scope of consensual agreements by declaring that only economic coercion could induce a worker to accept such an exploitative offer. The judge is merely ministerially executing the letter, spirit, and purpose of the law.

58FLSA Hearings at 10 n.1 (statement of Robert Jackson, Asst. Att'y Gen.). Sen. Pepper referred to the bill as an effort "to build up the last group that is down at the bottom that have not been able to build themselves up by their own bootstraps." Id. at 234. John L. Lewis characterized this group as the "submerged element in our working people who incapable of helping themselves and whom the organized labor movement has not been permitted to serve...." Id. at 286.

59Id. at 1195 (statement of Donald Richberg); id. at 219 (statement of William Green, Pres., AFL); id. at 281 (statement of John L. Lewis); id. at 848-49 (statement of J. Battle, Exec. Sec'y, Nat'l Coal Ass'n). The opposition took the form of objecting to the proposed Labor Standards Board, which would have had the power to establish a "fair wage" up to a maximum of eighty cents per hour where it had reason to believe that, owing to the inadequacy or ineffectiveness of collective bargaining, employees were receiving less than such a wage. S. 2475, 75th Cong., 1st Sess. § 5(a) (1937). As an example of such opposition, see FLSA Hearings at 564 (statement of A. Besse, Pres., Nat'l Ass'n Wool Mfrs.). FLSA retained a very attenuated version of this provision in the form of industry committees that recommended minimum wage rates to the Wage and Hour Administrator with a view to raising the minimum wage from thirty to forty cents between the second and seventh year the Act was in effect. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 5, 6, 8, 52 Stat. 1060, 1062-1065 (1938). When Congress raised the minimum wage from forty to seventy-five cents in 1949, it
State intervention vis-à-vis employers, however, assumed a different quality. The relatively few low-paying firms that were either forced out of business or shocked into reorganizing production and increasing productivity were subjected at best to an attenuated version of impure paternalism.60 Those whose good the state was seeking to achieve were such firms’ low-paid employees or more productive and higher-paying competitors to which production and employment would be shifted.61 FLSA sought “to protect the man who is engaged in interstate commerce on a fair and lawful basis from the competition of those who would go into it on an unfair basis.”62

Such employers benefited from the enhanced viability and legitimation of the economic system as well as from the elimination of competitors who destabilized aggregate conditions of profitability.63 To the extent that FLSA was designed “to permit and protect the functioning of the competitive system,” it served to save capitalism for the next generation of employers from the macro-economically dysfunctional rapacity of the current generation of sweatshop employers.64 If these benefits were clearly not contrary to large employers’ intentions,65 did such firms have the power to


60When FLSA went into effect in 1938 the percentage of covered employees earning less than the initial minimum wage of twenty-five cents was minuscule. Carroll Daugherty, The Economic Coverage of the Fair Labor Standards Act: A Statistical Study, 6 Law & Contemp. Probs. 406, 407 (1939).


62FLSA Hearings at 18 (statement of Robert Jackson, Asst. Atty. Gen.).

63A poll conducted soon after FLSA went into effect revealed that small manufacturers and retailers supported it more than their larger counterparts. What Business Thinks, FORTUNE, Oct. 1939, at 52, 90. This surprising result may derive from the fact that the smaller firms may have been exempt by virtue of not having been engaged in interstate commerce. FLSA, §§ 13(a)(1) & (2), 52 Stat. at 1067.

64FLSA Hearings at 309 (statement of Isador Lubin, Comm’r of Lab. Statistics). Manufacturers of some consumer goods also stood to benefit from the purchasing power redistributed to low-paid workers through a minimum wage.

65NAM, while instinctively opposing any expansion of federal power or state economic regulation (but not state subsidies to capital), did not deny the need for local minimum wage laws. FLSA Hearings at 623-25 (statement of James Emery, Gen. Counsel, NAM). But see Albion Taylor, Labor Policies of the National Association of Manufacturers 166 (1928) (NAM’s opposition to “class legislation” was inconsistent). On the eve of the Roosevelt administration’s presentation of FLSA,
attain them without state intervention? If not, can employers’ lack of autarchy be analogized to farm workers’ inability to secure a minimum wage from employers through collective action?

Whereas the workers’ weakness manifested itself vis-à-vis an antagonistic class, the impediment to large employers’ profitability lay not so much in their own employees as in their relationship to competing producers (and the latter’s exploitation of their workers). Here it is necessary to distinguish between industries in which large employers and "wage-chiseling" employers competed directly and industries dominated by the latter. The former conflict played itself out at the time of the FLSA debates largely as a regional antagonism between northern industrial employers on the one hand and southern mills on the other, with the latter urging and the former (successfully) resisting regional differentials.66

Direct action by large employers to contain the disruptive effects of unbridled "wage-chiseling" by smaller employers would presumably have entailed competing them out of business. In industries in which the two competed, the wage differential may have been too great—given the stage of development of capital-intensive, labor-saving mechanization—to be offset. Industries dominated by sweatshop methods may have been little amenable to mechanization at that time. Finally, the largest employers in the most capital-intensive industries, which precluded entry by small firms, may have

NAM opposed such legislation on the grounds that it would impede economic recovery by increasing uncertainty, costs, and prices. Peril to Recovery Seen in Wage Bill, N.Y. Times, May 24, 1937, at 7 col. 2. By the end of World War II, NAM was willing to concede that a wealthy society could afford to aliment those it excluded from employment through the impact of a mandatory minimum wage. 1 NAM, THE AMERICAN INDIVIDUAL ENTERPRISE SYSTEM: ITS NATURE, EVOLUTION, AND FUTURE 167-68 (1946). Yet at the same time, a minority faction within NAM, led by steel and automobile manufacturing corporations concerned with overtime and portal-to-portal pay issues, advocated repeal of FLSA. Russell Porter, NAM Group Seeks Labor Acts’ Repeal, N.Y. Times, Dec. 23, 1946, at 1, col. 2. The initial indifference of large northern industrial employers to FLSA had been rooted in the understanding that the statute would not affect them because they was already paying their employees at rates in excess of the statutory minima. When, in connection with the portal-pay dispute during the 1940s, the risk of a potentially much more expansive-intrusive interpretation became evident, these firms attacked the law. See Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 BUFF. L. REV. 57, 61-63, 67-68 (1991).

66See, e.g., FLSA Hearings at 813-14 (statement of C. Murchison, Pres., Cotton-Textile Institute). For a graphic account of the significant differences in wage rates between the North and the South, see How a Minimum Wage of 40 Cents an Hour Would Hit the Hiring Rates of Unskilled Labor, BUS. WK., Dec. 18, 1937, at 26.
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been unable to exert any direct market-mediated impact on unscrupulously exploitative employers in other industries.

In the absence of competition and given their confrontational anti-unionism in the 1930s, such large employers, as organizationally represented by the National Association of Manufacturers, lacked the long view of the plausibly realizable needs of employers as a class.\(^67\) It is precisely at such critical political-economic junctures that that class in general benefits from the fact that strong yet short-sighted groups of employers do not directly control the state.\(^68\)

IV. Prohibition of Child Labor

Child labor legislation\(^69\) creates a double layer of paternalism with the state paternalistically overriding or sanctioning the literal paternalism of parents who compel their children to work.\(^70\) Until

\(^67\) In the 1930s the leadership of NAM was captured by representatives of the largest manufacturing firms that were also closely associated with extreme right-wing political organizations. See Russell Burch, Jr., *The NAM as an Interest Group*, 4 Pol. & Soc'y 97, 102-103, 110-14 (1973). For a sample of contemporary progressive opinion of NAM, see *Messiahs of Feudalism*, 52 Christian Century 1615 (1935); *The NAM through the Ages*, 93 New Republic 184 (1937); Alfred Hirsh, *What is Big Business Up to?* Forum, July 1938, at 3.


\(^70\) On the contemporary extent of child labor throughout the world, see Elias Mendelievich, *Child Labour*, 118 Int'l. Lab. Rev. 557 (1979). Arguably the most famous example of successful literal-paternal resistance to state paternalism is *Hammer v. Dagenhart*, 247 U.S. 251 (1918), in which a father, on behalf of his two sons
the 1966 amendments, FLSA exempted from the child labor provisions "any employee employed in agriculture while not required to attend school." In amending FLSA to phase in coverage of agricultural workers and to prohibit some child labor, arguably the most liberal Congress of the postwar period rejected an amendment that would have outlawed the employment of thirteen- and fourteen-year-olds as migrant farm workers. Consequently, migrant and seasonal farm worker-parents, for example, continue to enjoy considerable latitude with regard to their children’s labor.

Children of any age may, with parental permission, be employed outside of school hours on farms not employing enough labor to be subject to the minimum-wage provision of FLSA. Employed in a cotton mill, successfully challenged the constitutionality of the Owen-Keating Act, which prohibited the shipment in interstate commerce of products of factories, etc., produced by children under fourteen. For a grotesque example of inverted Benthamite paternalism, in which a privately owned but state-subsidized joint-stock company as "appointed Father whose attribute was 'perfectibility,' rather than the 'arbitrary' and 'variable' government of...natural fathers," would have employed in manufacturing four- to fourteen-year-old children, "who could not be properly cared for by their own parents and...were... 'property of the public,'" see Gertrude Himmelfarb, The Idea of Poverty: England in the Early Industrial Age 79-82 (1985 [1983]).

§ 13(c), 52 Stat. at 1068. Although FLSA exempted—that is, excused or released—employers of children from the obligations imposed by the Act, § 13 is worded as if the children (and excluded employees) were being freed from obligations rather than deprived of rights. On the child labor provisions of the Sugar Act of 1937, see supra ch. 1 § IV. On child agricultural labor, see Lumpkin & Douglas, Child Workers in America at 59-81; Taylor, Sweatshops in the Sun. For an overview of current state child labor laws and their applicability to agriculture, see 3 Neil Harl, Agricultural Law § 23.06 (1987); Federal and State Employment Standards and U.S. Farm Labor; Thomas Coens, Child Labor Laws: A Viable Legacy for the 1980s, 33 Lab. L.J. 668 (1982). Extensive use of child labor in agriculture was historically, of course, not confined to the United States. As late as 1904, almost one-fifth of all German pupils under the age of fourteen were agricultural wage workers outside of their families. See Tennstedt, Sozialgeschichte der Sozialpolitik in Deutschland at 162.

112 Cong. Rec. 11,605-607, 20,639, 20,776-90 (1966). Although all parents possess this discretion, the very high accident and mortality rates among the under-sixteen-year-old children of family farmers exempt from the Occupational Safety and Health Act raise significant issues of state acquiescence in biological paternalism. A farmer whose eleven-year-old son had suffocated in a grain wagon revealed the commercial orientation of such paternalism by referring to him as "a good little worker." Isabel Wilkerson, Farms, Deadliest Workplace, Taking the Lives of Children, N.Y. Times, Sept. 26, 1988, at 1, col. 5, at 17, col. 3 (nat. ed.).

Twelve- and thirteen-year-old children may be employed in agriculture with parental permission or on the same farm as their parents. Children fourteen and older may be employed on farms without any restrictions provided that the work is not found by the Secretary of Labor to be hazardous to children under sixteen. The Secretary may grant farmers a waiver to employ even ten- and eleven-year-old children to hand-harvest crops as non-migrant commuters on a piece-rate basis for as long as eight weeks. In addition, agricultural employers need not pay the minimum wage to children sixteen or under who hand-harvest for a piece rate on the same farm as their parents provided they are paid the same piece rate as adults.\(^7^4\)

The fact that these statutory prohibitions apply only to children who are employees furnishes employers with an incentive to treat their child laborers as non-employees.\(^7^5\) Since parents are permitted to employ their own children under the age of sixteen, farmers may evade the ban on employing "oppressive child labor" if they succeed in classifying parents as self-employeds employing their own children as laborers.\(^7^6\)
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By granting parents and farm employers waivers from the otherwise applicable bans on child labor and sub-minimum wages, the state defers not only to biological paternalism, but also to pre-capitalist master-paternalism: within the statutory limits, fathers and farmers are deemed to know the children's best interests to the point of being entitled to deprive them of the freedom not to perform hard labor.\(^7^7\) This deference is particularly ironic in the light of three consequences. First, the state apparently regards the parents' and employers' judgment as unclouded and unbiased despite the fact that it is exercised solely to the end of maximizing profit or family income and has little or no rational relation to the children's welfare.\(^7^8\)

Second, by acquiescing in such private commercial judgments and hence in the flooding of the farm labor market with a large number of low-paid workers, the state reinforces the vicious circle that induces migrant-parents to cause their children to work in the first place. "Even more ironic is the fact that child labor does not solve the family low-income problem. The employment of children sharecropper contracts and thus become in law independent 'producers' themselves—with their children free to continue working...." LUMPKIN & DOUGLAS, CHILD WORKERS IN AMERICA at 73.


\(^7^8\)Marx spoke of working fathers as slave merchants vis-à-vis their wives and children insofar as the latter did not have unfettered disposition of their own labor power. This revolutionizing of the "legal relation between the buyer and seller of labor power, so that the transaction loses even the semblance of a contract between free persons," provided Parliament with the juridical excuse for intervention in the form of second-order paternalism. 1 MARX, DAS KAPITAL, republished in II:6 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 385-86 (1987 [2d ed. 1872]). Whereas Marx viewed early capitalism's voracious appetite for child labor as a product of the most advanced mechanization and the highest capital-labor ratios, contemporary child labor is confined to atavistic, labor-intensive niches in the division of labor that use little capital. The industrial distribution of older employed teenagers has undergone a radical change. See ELLEN GREENBERGER & LAURENCE STEINBERG, WHEN TEENAGERS WORK: THE PSYCHOLOGICAL AND SOCIAL COSTS OF ADOLESCENT EMPLOYMENT (1986); GAO, CHILD LABOR: CHARACTERISTICS OF WORKING CHILDREN (HRD-91-83BR, June 1991).
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in agriculture—a source of cheap labor—in the long run depresses the general wage level. Consequently, the use of child labor creates "a self-fulfilling prophecy that an adequate [adult] labor supply will not be available." Thus whereas the state, treating parents and employers as lacking the will to refrain from exploiting children, could intervene to prohibit such employment—regardless of the adults' short-term preferences—it in fact works at cross-purposes with the otherwise paternalistic minimum-wage legislation by exacerbating the very conditions that make such laws necessary. The problem, in other words, is not Odyssean self-binding, but Sisyphean labor.

Finally, state deference to commercial or familial paternalism perversely transforms parents into the labor-market appendages of their working children: "Many Mexican fathers and mothers are being hired today because they have a large family of young children who will work next to them on their knees...picking crops."

V. Protecting Farm Workers from Procedurally Unconscionable Contracts

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) is a virtually unique regime of paternalism designed to protect its wards from specific types of overreaching by employers. In this regard it is redolent of premodern (but still extant) legislation prescribing the form of agreements between masters and seamen as well as substantive provisions such as furnishing of meals, time of

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wage payments, and wage advances. Even in the nineteenth century, the United States Supreme Court upheld a paternalistic seamen's payment law as in the best interest of a peculiarly powerless class.

In this act very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.

That the state views migrants as requiring the same kinds of intervention as seamen, who, having entered into a quasi-voluntary servitude, "surrender(ed)" their "personal liberty" and were subject to "criminal punishment for desertion," is powerful recognition of the antiquated forms of domination still prevalent in agriculture.

Insofar as a presumption of market rationality implies that all workers prefer $4.25 to $2.00 per hour, the state cannot be deemed to be acting without regard to workers' preferences by imposing a minimum wage. But is the state substituting its judgment for migrants' or merely supplementing their will and power when it prescribes requirements regarding written disclosures, labor contractor registration, recruitment, recordkeeping, payment of wages, transportation, and housing--matters that the federal government does not regulate on behalf of other privately employed workers? If, that is, workers preferred to trade off some of these protections for higher wages, would the state be acting paternalistically in proscribing the exercise of that judgment?

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84 Robertson, 165 U.S. at 280-81, 283. For the historical background, see MARCUS REDIKER, BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750 (1989 [1987]).
86 Recent legislative initiatives to limit the waiving of rights by employees under the Age Discrimination in Employment Act in connection with mass terminations reveal that even avowed opponents of paternalism bow to it. In opposing such a bill, they
Rather than giving rise to a trade-off, migrants' substandard non-wage terms of employment typically go hand in hand with substandard wages. It is nevertheless worth pursuing the question for its theoretical implications for paternalistic interference with "choices" made in ignorance or under economic coercion. This particular paternalism is, moreover, compensatory insofar as the state bears responsibility for migrants' historical self-defenselessness by virtue of having excluded them from such statutory rights as collective bargaining, premium overtime rates, social security, unemployment insurance, and workers compensation.

AWPA may be analyzed into substantive and procedural protections. The former, largely restricted to the safety and health aspects of transportation and housing, do not differ qualitatively from consumer safety or health requirements. What, after all, is the difference between mandating a bolted-down seat for every migrant transported by an agricultural employer and mandating safety belts on common-carrier airplanes? Just as an air passenger might protest that he would prefer that the government not burden the airline with additional costs so that it could reduce the price of a ticket by a few dollars, a migrant might say that he would prefer taking his chances sitting on the floor of a flatbed truck for a thousand miles if in exchange his hourly wage were raised by ten

characterized it as saying "that Congress is in a better position than the employee to decide whether he or she should voluntarily sign a release because we can't trust employees to make such a decision for themselves." S.REP. No. 79: THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989, 101st Cong., 1st Sess. 30 (1989). Yet in offering their own alternative approach, these senators proposed mandatory disclosure of sufficient information "to make knowing and voluntary decisions." Id. at 35. In other words, they, too, did not trust employees to know when they do not know enough to make such decisions or to know how to secure such information on their own.


88See supra ch. 1 & infra ch. 4.


9029 C.F.R. § 500.104(l); 14 C.F.R. § 121.311 (1989).

91The importance of the transportation conditions for migrants is enhanced by the fact that "[i]n the ordinary sense of the word, they do not travel; most of them are hauled." PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN
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cents. Given the penury of most migrants, the costs associated with injuries that could have been avoided by compliance with such safety regulations would have to be socialized. These external effects and public charges thus reduce the justificatory weight that must be borne by this particular "impure" paternalistic argument.

In contrast, state imposition on the contracting parties of a requirement that migrants be given a written disclosure of the terms of employment at the time of recruitment and a detailed written statement of their wages and all deductions can plausibly be interpreted as non-paternalistic in the sense that without such information no worker can make rational decisions concerning the range of relevant offers in the labor market. Such blind contracting lacks the consensual element inherent in the putative autonomy of the individual in his commercial relationships. In other words, those without an alternative may be exposed to such economic coercion that their autonomy becomes so attenuated that the state, rather than violating it, creates its prerequisites:

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American Agriculture 94 (1951). AWPA itself grotesquely enshrines this cattle-like designation: "day-haul operation" means the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day." 29 U.S.C. § 1802(4).

92 Mill, On Liberty ch. 4; Kleinig, Paternalism at 92-96.

29 U.S.C. § 1821. Congress conferred a lower level of protection on local workers whom crew leaders or employers do not transport to work; they are not entitled to a written disclosure of the terms and conditions of their employment unless they request it. 29 U.S.C. §§ 1831(a), 1802(4); 29 C.F.R. § 500.20(g). Presumably Congress believed that, because such workers were not a captive labor force and could leave the worksite and return home immediately upon discovering that the work did not meet their expectations, any damages they might suffer would be minimal and could therefore safely be chalked up to experience. But massively fungible local workers without nonfungible alternative employment face the same predicament as long-distance migrants. As a vestige of Texas farmers' traditional proprietary attitudes toward their workers and attempts by northern employers to recruit them, the employers of seasonal farm workers in Texas who lobbied for this type of lesser protection were eager to testify that "when you have been transported to a housing facility thousands of miles away, you really do not have the freedom to negotiate, to work or not to work, that you would have living at your own home." Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 78 (1976) (statement of S. Toothaker). In the mid-nineteenth century, New England cotton manufacturers paid labor recruiters additional amounts for recruiting workers at such long distances that it was no longer easy for them to return home. Ware, The Early New England Cotton Manufacture at 215.
As a social fact that which the law calls "freedom of contract" may...be no more than the freedom to restrict or to give up one's freedom. Conversely, to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will.94

This type of state intervention, which serves to prevent the creation of a temporarily captive labor force, can be analogized to Mill's exemption of agreements to enter into slavery from the general presumption in favor of liberty of contract on the ground that they defeat the very purpose of the justification for permitting people to dispose of themselves.95

FLSA and AWPA constitute a paternalistic regime designed to restrain atomized workers from acquiescing in their own exploitation. Incompatible with the moral groundwork of liberal capitalist society, such paternalism can be justified only insofar as it ultimately prepares these wards of the state for the collective autonomy that the non-paternalized working class has presumptively already achieved.96 Like the infantry-industry exception to free trade, labor protection is supposed to act as a temporary shield behind which ward-like workers can develop to the point of being able to dispense with such supports: "In one sense, the first objective of any [Minimum] Wages Council should be to commit suicide."97


95Mill, On Liberty ch. 5.

96It is ironic that farmers (including employers) are beneficiaries to a much greater extent than migrants of the perpetual largesse of a panoply of state paternalistic programs in the form of price supports, production controls, marketing orders, payment-in-kind programs, commodity loans, export credits, applied research, and extension service consulting. See 11 Harl, Agricultural Law ch. 90-92 (1987); 9 Harl, Agricultural Law ch. 70 (1982). In addition, the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. §§ 499a-499t (1980 & Supp. 1991), protects farmers from unfair, deceptive, and fraudulent practices by the commission merchants, dealers, and brokers who buy their perishable commodities in ways analogous to the protections that AWPA affords migrants against overreaching employers. See also Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-2306 (1988). P. Atiyah, The Rise and Fall of Freedom of Contract (1979), argues that Anglo-American legislatures and courts have paternalized contractual relations generally.

97Wedderburn, The Worker and the Law at 352.
But unlike some beneficiaries of affirmative action programs—as well as their employers, co-workers, and unsuccessful co-candidates—who perversely may doubt whether they are meritocratically deserving of their positions, migrant farm workers’ problem is not that their employers may believe that they could not have achieved the minimum wage or better housing without state intervention: since the latter’s purpose is to suppress the spontaneous workings of a defective labor market, that belief can scarcely be refuted. Instead, their problem is the inability to vindicate—let alone to build on—these rights even with state intervention. To extend the comparison with affirmative action: where affirmative action candidates obtain positions for which they are currently less ‘qualified’ than other candidates, a positive self-fulfilling prophecy may be acted out in which the mere fact of occupying the positions invests them with the self-confidence to perform (and to be perceived as performing) as well as the preempted competitors. It is the analogous collective self-transformative process that migrants have yet to complete: circumventing market forces in the short run in order to forge conditions and consciousness under which they can ultimately confront their employers in a normally operating labor market.

The next chapter will examine the extent to which a minimum wage statute can shape those market forces.

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98 Preferential treatment may...stigmatize its recipient groups, for...such a policy may imply to some the recipients’ inferiority and especial need for protection.” United Jewish Orgs. v. Carey, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring).

99 In explaining the Roosevelt administration's FLSA bill to Congress, Ass't Att'y Gen'l Jackson indicated that he anticipated that enforcement would be fueled largely by complaints from labor unions and business competitors (rather than from the affected unorganized workers). FLSA Hearings at 71 (1937).