THE PRIMACY OF LABOR IN AMERICAN CONSTITUTIONAL DEVELOPMENT

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As demonstrated in landmark decisions of the U.S. Supreme Court, American constitutional development has been fueled since the framing by disputes arising from changing labor relations in both private and public settings. This pattern is explained by the original provisions of the Constitution, the English background of its emergence, and the primacy of labor *as a theoretical concept for studying political change. The Court's decisions protecting property express the status quo, the establishment against which transformations proceed. However, the property cases may also be reinterpreted along the lines indicated.*

Professional study of the U.S. Constitution is occupied by an attention to the document's formal characteristics and their change over time: separation of powers, individual rights, judicial review and its theoretical justifications, the determinacy or indeterminacy of legal rules. To the extent that this study has a social theme, it is most often the relationship of the constitutional order to the institution of private property—how public law has promulgated, promoted, and protected, in the short and long run, the interests of various kinds of private property holders.[1] Whereas property is thought to be related organically to the Constitution through the motives and worldview of the framers, other social subjects are treated as constitutionally adventitious, historically particular, their position in the broader development of fundamental law left unspecified.

Consider, for example, *Dred Scott* v. *Sandford* (1857). *Dred Scott* is seen as an expansion of judicial review, declaring the Court's authority to contravene national legislation, for the first time not on an issue concerning the governance of courts but on the most pressing political question of the day. The decision also is understood to express the Jacksonian judiciary's policy of confining Congress' sway over the states. Finally, the case is taken to illustrate the Constitution's protection of vested rights, especially the rights of property. In all American history, *Dred Scott* has furnished perhaps the most egregious example of the political system's deference to property over competing values (Fehrenbacher 1981; Meister 1989).

Not so much unnoticed as unattended analytically is the fact that *Dred Scott* was about the survival of a labor system upon which at least half the states in the federal compact were economically dependent. That slavery was a species of labor is obvious in any historical consideration of the case; but the deeper implications of this commonplace for constitutional development remain obscure. Absent an analytic link between the formal, constitutional implications of the Court's decision and the question of forced labor that occasioned the lawsuit, the association of constitutional and social issues appears fortuitous, the results—supporting states rights against Congressional power—as likely to have been produced by some other question as by slavery. Similarly, a regard for slavery as an institution with important constitutional ramifications—but not as a species of labor—has led to the slave's being regarded as a historical anomaly, inadequately conceived as property, cut off from a comprehensive examination of changing state-societal relations.

I take a contrary approach, arguing that American constitutional development has been inextricably connected to questions of labor or work relations; that changes in labor relations, as distinguished from property relations, have, since the founding of the republic, driven major constitutional change; and that American constitutional development has required, above all, the inclusion of society's essential work tasks within core principles of liberalism.[2] This is not to deny that protection of property was a foremost objective of the framers, that property has been a continuous subject of constitutional adjudication, or that property is related, conceptually and historically, to questions of labor. However, property is a background, an establishment against which other changes proceed and, for that reason, a relatively poor guide to constitutional turning points.

As a strategy of presentation, in order to test the argument against prevailing ideas, I avoid introducing case materials not already well known on the constitutional record. The aim is not to unearth new decisions or to reinterpret the results of the decisions discussed except as they are proposed here as an alternative constitutional "canon," responsive to a different dynamic of political development. The essay would miss its mark, however, if it were mainly contrarian. I also advance, in a preliminary way, both historical and theoretical explanations for why labor questions should have had the transformative effects they did.

First I offer a brief chronology of landmark Supreme Court cases in which labor issues underlay the constitutional questions decided. I make no claims for why labor should have figured in these decisions or that labor issues were necessary to the results, my purpose being to establish a prima facie case for labor's constitutional salience. I then place this chro-

nology against the constitutional document as originally framed and within the longer sequence of Anglo-American constitutionalism. These steps are necessary to show the institutional arrangements that changing labor relations in the United States would unsettle. I also argue for the *primacy of labor* as a theoretical concept in studying political development. In this perspective, the constitutional pattern at hand illustrates government's fundamental dependence on work relations, as well as the role of state structures in their regulation.[3] Finally, I support the proposition of labor's primacy by assessing the more traveled interpretive route of property and indicating how it might be remapped along the lines suggested.

THE WORK OF THE CONSTITUTION

A review of landmark decisions by the Supreme Court over American constitutional history reveals an unexpectedly large number that have arisen in disputes concerning work or labor relations. By landmark decisions I have in mind those commonly acknowledged to have defined the framework of government or the connections of state to society, decisions that could be expected to appear on a standard boiler-plate syllabus in Con Law. Being constitutional, they not only pertain to the parties before the bar, or even to groups or interests the parties may represent, but announce parameters for future public and private action generally. By labor relations I refer to relations between employer and employee, master and servant (or slave), supervisor and subordinate, typically (though not always) involving compensation and the possibility of discharge, as these occur at all levels of work organization and in both public and private settings.

Moreover, if one gleans from the mere landmark decisions those that are constitutional turning points —that is, those that do not merely refine or extend already established principles but mark a shift in authority among government institutions and/or between state and society—Court decisions based on labor facts become even more prominent. It is possible briefly to identify several.[4]

1. *A labor issue provided the foundational case for the constitutional practice of judicial review.*

Chief Justice Marshall's decision in *Marbury* v. *Madison* (1803) marked a turning point in the theory and practice of the judiciary within the framework of the American constitutional system. In *Marbury*, the Supreme Court for the first time held an act of Congress—Section 13 of the Judiciary Act of 1789—invalid. In his opinion, Marshall asserted that it was the judges' duty to "say what the law is," and he initiated the method of interpreting the text of the Constitution in the manner of an ordinary statute. This was a departure from the previous understanding of judicial power as protecting the limits of government against plainly unconstitutional violations, like the denials of jury trial and uncompensated seizures of property that had occurred before the Constitution's adoption (Snowiss 1990).

The *Marbury* case concerned the new and vexing problem of staffing a democratic government, with William Marbury taking his place at the head of a long line of disappointed office seekers in American political history. The commission Marbury sought was as a justice of the peace for the District of Columbia, a position compensated by fees and valued as an entry point to higher office. Perhaps because he had no interest in fostering Federalist cadres, Jefferson reduced the number of Adams' appointees, eliminating Marbury. In the pattern of Anglo-American office seekers for centuries, Marbury argued his case according to the common law rights attached to his appointment, which was for a fixed tenure of five years; it was largely on that basis that Marshall endorsed Marbury's entitlement to relief (Orren 1994).

The *Marbury* case engaged two other work-relations issues. Marbury sued for the common law writ of *mandamus*, directing the secretary of state to deliver his commission. Although attention historically has focused on Marshall's assertion of the judiciary's power over the Congress, Republicans of the period and Jefferson himself considered the main provocation to be the Court's invasion of the president's authority over his subordinates in the executive branch. The Court's deliberations over Marbury took place in the shadow of Congress's removal of 16 circuit court judges through the repeal of the Judiciary Act of 1801 that had authorized their appointment (O'Fallon 1992). Congress had delayed the Court's session for an entire year, during which the impeachment of other Federalist judges, Marshall among them, was openly discussed.

The only other time before the Civil War that the Supreme Court invalidated an act of Congress was in *Dred Scott* v. *Sandford*, declaring the Missouri Compromise unconstitutional and former slaves ineligible to become citizens. The labor content of *Dred Scott* was not limited to the institution of Southern slavery. Antislavery men like those who financed and argued Scott's cause believed the stakes involved the dignity of all labor and the civil liberty that free labor epitomized (Foner 1970). By the Court's decision, however, labor as property was for the time being preserved, along with constitutional arrangements arrayed in its defense.

2. *Labor issues were at the heart of the judiciary's expansive assertion of authority under the Fourteenth Amendment, with a labor case lending its name to the so-called "Lochner Era" in American constitutional history.*

The half-century beginning in the 1880s has been called the era of "laissez-faire constitutionalism" because of the regular overturning by state and federal judges of legislation curbing diverse practices by business. Accomplished under the doctrine of substantive due process, this activity reversed a pattern of judicial deference to legislatures that had prevailed before then. The legislation did not only concern

relations with employees; indeed, it was the reversal of laws regulating commerce pure and simple that characterized the judicial about-face, since few significant labor laws had been passed prior to the late nineteenth century. On the other hand, evidence from the case materials of the period supports the conclusion that labor reform was more likely to draw the judges' fire than the reining in of business in other respects.[5]

Within the doctrine of substantive due process, "liberty of contract" came closest to denying the validity of legislation per se. The line of liberty-of-contract opinions leads from the initial reference in dicta to "undue interference with mens' rights of making contracts" in an Illinois opinion on a statute regulating the calculation of miners' wages;[6] to the first state court decision to invalidate a statute as an unconstitutional infringement on liberty of contract, a Pennsylvania statute requiring iron mills to pay wages in cash;[7] to the first U.S. Supreme Court decision to invalidate a state statute based on liberty of contract, *Lochner* v. *New York* (1905), overturning a limit on the working hours of bakery employees (Pound 1908).

During this era, disputes over the constitutionality of purely commercial regulations were often argued *as if* they concerned employees. For example, in the *Slaughter-House Cases* (1873), the first Supreme Court decision interpreting the Fourteenth Amendment, plaintiff's counsel and the four dissenting justices argued that Louisiana's grant of a monopoly for slaughtering beef to a corporation interfered with the pursuit of common trades; Justice Field's dissent verged on claiming that New Orleans butchers had been forced into involuntary servitude, forbidden by the Thirteenth Amendment (1873, 90–91).[8] Similarly, in *Munn* v. *Illinois*, dissenters likened plaintiff warehouse owners to shoemakers and tailors (1877, 138).

3. *An issue of work relations occasioned the determination of plenary authority in the president under the "executive power" provided in Article II.*

By its statutory interpretations, the Court nibbled around the edges of the "new administrative state" installed during the Progressive Era. Constitutional arrangements remained settled, as the majority of justices gave Congress a wide berth to regulate businesses ranging from railroads to meatpacking.[9] A departure from this pattern was *Myers* v. *United States*. *Myers* held for the first time that Article II, Section 1, "grants to the President the executive power of the Government," rather than merely designates his office (1926, 162). As a result, Congress could not encumber the president's authority to remove other officers in the executive branch. Before this, plenary executive power had been upheld outside of wartime only in circumstances when "the peace of the United States" was considered at risk.[10]

Myers, a postmaster dismissed by President Wilson and now deceased, sought (through his widow) to recover back-salary due for his full appointed term, based on the grounds that the president had violated a 1876 statute requiring that postmasters' removals be approved by the Senate. The Court, however, held that both that statute and the Tenure of Office Act of 1867, which imposed this requirement for all civil officers appointed with senatorial consent, were unconstitutional. Justice Taft's opinion said that the president, in order to fulfill his duty faithfully to execute the laws, must possess the "disciplinary influence" of independent removal power over his subordinates (p. 132).

Following a suggestion in *Myers* that the chief executive might independently remove officers with quasi-judicial powers, President Roosevelt fired a Republican-appointed federal trade commissioner, William E. Humphrey. When Humphrey contested the dismissal by suing for his salary, the Court, in *Humphrey's Executor* v. *United States* (1935), denied the president's removal power over agencies not wholly executive in their functions. This turn of events halted Roosevelt's attempt at comprehensive administrative reform. Both decisions remain good law today, allocating authority among the branches.

4. *A labor case signaled the Supreme Court's final abandonment of common law ordering of personal relations and its deference to the legislative branch on matters of social policy.*

National Labor Relations Board v. *Jones & Laughlin Steel* (1937), upholding the Wagner Act of 1935, is the cardinal decision of modern employment law. Exhibiting "the switch in time that saved nine," its impact went to the respective powers of the Court and Congress and to the legal rules governing civil society. The Court's holding—that Congress might enact national measures to regulate private industrial disputes in a constitutional exercise of its powers under the interstate commerce clause—has had repercussions on virtually every policy area, from agricultural production quotas to civil rights.[11] Chief Justice Hughes denied that the National Labor Relations Board proceeding in question had deprived the company of its rights at common law. The proceeding, Hughes said, was "unknown to the common law": it was a "legislative proceeding." Thus, he removed an obstacle that had thwarted the Congress's will in previous labor statutes, the requirement that legislation must conform to preexisting common law rights as interpreted by judges.[12]

Labor's position in this constitutional turning point was not a fluke: the decision that had blocked the New Deal's recovery program, *Schechter Poultry* v. *United States* (1935), was also a labor case. Although known as the "sick chicken" decision because selling unhealthy birds in violation of the National Recovery Administration's live poultry code was an offense alleged, it stated unequivocally that "the question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets" (p. 548). The actual "switch in time"—Justice Roberts' move to the pro–New Deal position on the Court—had taken place in *West Coast Hotels* v. *Parrish* (1937), upholding

Oregon's minimum wage law for women. Other labor cases tied up constitutional loose ends of the new legislative regime. *Opp Cotton Mills* v. *Administrator* (1941), arising under the Fair Labor Standards Act (FSLA), turned aside *Schechter Poultry*'s suggestion that Congress must provide detailed guidelines when it delegated authority. *United States* v. *Darby* (1941), also upholding the FSLA, found that the legislature might judge for itself the legitimacy of means it devised to regulate commerce. *United States* v. *Hutcheson* (1941), applying the Norris–LaGuardia Act, rejected the parsing of separate legislation in favor of statutory interpretation within broad bodies of law.

5. *A labor issue underlay the shift of power from the judicial to the legislative branch in the essential matter of amending the Constitution.*

Coleman v. *Miller* (1939) held that the validity of state ratifications of constitutional amendments was a "political question," properly determined by the Congress. In so far as amendments already had the sanction (or, for that matter, the opposition) of the Congress, Congress's new authority to decide which amending processes were acceptable further increased the power of the national legislature over the legislatures of the states.

The amendment at issue would have empowered the Congress "to limit, regulate, and prohibit the labor of persons under eighteen years of age." This was a proposal to invade a field of regulation that traditionally belonged to the states and one that the Court before 1937 had specifically designated as outside the ambit of the interstate commerce clause.[13]

6. *A labor case defined for the post–World War II period the limits of presidential authority under nonstatutory claims of national emergency.*

Circumstances after the 1945 armistice—the overseas stationing of troops, nuclear weapons, and other aspects of the Cold War—created a spillover from military to domestic affairs and a de facto expansion of executive power. In 1952, during the U.S. military engagement in Korea, President Truman authorized the secretary of commerce to seize and operate steel mills, on the reasoning that a threatened strike in that industry would impair the national defense. The steel companies obtained an injunction, sustained by the Supreme Court in *Youngstown Sheet & Tube* v. *Sawyer*. Justice Black, writing for the Court, held that only Congress, as the Constitution's designated lawmaker, could authorize the president to take such action, and Congress had not done so (1952, 587). All six members of the majority wrote opinions, but they clearly establish that presidential subordinates will be objects of injunctive relief upon pleas that their actions are illegal.

Precedent for nonstatutory exercise of presidential authority had been established in *In re Neagle* (1890), concerning the employment of a federal marshal, and *In re Debs*, arising from the use of federal troops to quell the Pullman strikers. Chief Justice Vinson cited both in his *Youngstown Sheet & Tube* dissent (1952, 687–88, 702). That in circumstances of emergency Congress might validly pass legislation that would otherwise be unconstitutional had been decided in the setting of a labor dispute, a threatened national railroad strike on the eve of World War I. President Wilson had successfully pressed for the Adamson Act, providing for an eight-hour-day for railroad employees and establishing a commission temporarily to fix wages. The Court, in *Wilson* v. *New* (1917), upheld the act as a provisional measure to avert national calamity.

7. *The hallmark decision of the Warren Court's "countermajoritarian" jurisprudence concerned the absorption into effective national citizenship of persons descended from the labor system of slavery.*

Various constitutional and statutory gestures to redress the aftermath of America's "peculiar institution" had gone unenforced since Reconstruction. With *Brown* v. *Board of Education* (1954), the Supreme Court embarked on a corrective course, for two decades outpacing the Congress with antidiscrimination remedies across a broad institutional front. To be sure, *Brown* concerned issues other than labor: the ideology of race subordination had always extended beyond the servitude it outlived. That occupational parity of black and white, however, was a chief aim of school integration is evident both in the history of the litigation and words of the Court's decision. The "intangible factors" at the cornerstone of *Brown*'s reasoning (p. 493) had been laid by the Court's previous agreement that black lawyers were hampered in their work by segregated professional education.[14]

In the mid-1980s, lingering constitutional tensions converged on unequal employment. The Rehnquist Court's reversal of direction, and the Congress's testing of the justices' deference to legislative majorities by a new civil rights statute in 1991, came to a head as a result of a series of adverse decisions concerning the alleged hiring and stratification of employees by race and the use of affirmative action to remedy past discrimination.[15]

8. *A labor statute was the occasion for the Court's first reversal since the New Deal of a social policy of the Congress, based on the commerce clause.*

After 1937, Congress seemed to exercise unbounded authority through its power over interstate commerce. In 1976, however, in *National League of Cities* v. *Usery*, the Burger Court revived the doctrine of dual federalism, finding a "state sovereignty limitation" in the Tenth Amendment, which provides that powers not delegated to the Congress are reserved to the states, to be applied "in areas of traditional governmental functions" (p. 852). Upon that basis, the Court held that amendments to the FLSA that extended wage-and-hours standards to state and local government employees were unconstitutional.

The uncertainty of this retrenchment was apparent in a second labor case, in 1985. In *Garcia* v. *San*

Antonio Metropolitan Transit Authority, the Court took the unusual step of expressly reversing its earlier decision. Following *National League of Cities*, the San Antonio Mass Transit District had announced it would no longer pay its employees overtime. The Court, in the meantime, had ruled that state-owned commuter railroads did not qualify for immunity against the FLSA because owning railroads was not a "traditional government function."[16] In *Garcia*, this test was rejected altogether, on grounds that it led "to inconsistent results at the same time that it disserves principles of democratic self-governance" (p. 546). Instead of the Tenth Amendment, the Court said, states must rely on the "built-in restraints" of the political process (p. 556).

9. *The Court's turn to "modern substantive due process" implements the decline of the family as a system of obligatory labor.*

The decisions on state regulation of reproductive rights, beginning with *Griswold* v. *Connecticut* (1965) and including *Roe* v. *Wade* (1973) registered the abandonment of the enforceable duty of labor, including childbearing and child rearing, traditionally imposed on women (and sometimes other family members) by ancient common law. The liberty interest protected in these cases, while initially described as "privacy," has more recently come to be expressed in terms of women's work. *Planned Parenthood* v. *Casey*, reviewing Pennsylvania's antiabortion statute, acknowledges the "special responsibilities" of home and family that precluded women's full and independent legal status under the Constitution (1992, 2831). Justice Blackmun, concurring, goes so far as to find a work relation between woman and state when he characterizes restrictions on abortion:

> "By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead it assumes that they owe this duty as a matter of course" (p. 2847).

In its rejection of common law ordering, the "activism" of the post-Warren Court in *Roe* is united with the "deference" of the New Deal Court in *Jones & Laughlin Steel*. As in *Brown*, the constitutional doctrine contemplates a change in the employment prospects of citizens most directly affected. In *Casey*, Justice O'Connor's majority opinion supports the adherence to *Roe* by the fact that the "ability to participate equally in the economic and social life of the Nation has been facilitated by [women's] ability to control their reproductive life" (p. 2809). It should be emphasized that "modern substantive due process" in this reading does not present an analogy *to* labor but *labor proper*, albeit performed in a family setting, without compensation in the usual sense, and for which nonfamily persons are often hired without affectionate ties attached.[17]

LABOR'S DEVELOPMENTAL PRIMACY

How might one account for this series, the repeated association of constitutional turning points with labor relations? There are three answers, each instructive on labor's developmental impact. The first is (mainly) *institutional*, focusing on the provisions built into the constitutional design: the decisions in question reconfigured some arrangement of the Constitution that either as originally written or subsequently interpreted presumed an arrangement of labor relations changed or brought under scrutiny by the facts before the Court.

Looking no further than the Philadelphia convention of 1787, it is clear that labor—free and unfree, public and private—was woven into the constitutional fabric in diverse ways. Most familiar here are the framers' accommodations of the two labor systems, South and North: the fugitive slave clause, the continuation of the foreign slave trade, the prohibition of export taxes, the federal number of three-fifths, equal representation in the Senate. Just as significant, however, were ostensibly nonlabor provisions that incorporated assumptions about the regulation of work the framers would have taken for granted. In the eighteenth century, for example, a division between national and state authority dictated state jurisdiction over those departments of law in which English suits were brought in local courts, including land law, criminal law, health and safety, and the law of domestic relations—the category that encompassed relations between master and servant (and slave), husband and wife and parent and child.

In addition, beneath the more exalted purposes of separating powers, the Constitution was an elaborate job description for government personnel. The new government required staffing, by higher as well as lower functionaries. The founding document engaged all of the regular incidents of employment—how positions would be filled, tenure, how salaries were fixed, the process and causes of discharge. A full century before civil service reform, it created offices that reflected the English experience of balancing subordination and autonomy, employment and property. Details deferred were quick to be disputed: the president's power to remove subordinate officers was the subject of the first major constitutional debate in the House of Representatives.

Finally, the Constitution assumed an ordering of labor relations in which male persons who depended on either public or private employment for their livelihoods represented only a small part of the nonslave population. Some framers imagined the dangers of the opposite circumstance. Gouverneur Morris, for example, sought to impose a property qualification for suffrage on the states; the country would soon "abound with mechanics and manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty?" (McDonald 1985, 229). Most, however, anticipated a nation of freeholders and their families, and the political role of laborers remained a nonissue,

the status of nonslave labor under the Constitution an invisible clause.

These arrangements and assumptions were the institutional ground upon which future labor conflicts would be staged. Within a half-century, the great compromise among the states would face its severest test in the prolonged conflict over slave labor. For several decades following that, the Constitution's original conception of public employment would contend with competing plans for a modern bureaucracy. During the New Deal, constitutional resistance to labor legislation by judges, based on common law rights and on the powers of states, would result in the constitutional diminishment of the powers of states, of common law rights, and of judges.

This said, it points to the insufficiency of the explanation proffered. The Constitution made arrangements and assumptions affecting social subjects besides labor—for instance, religion and commerce. Why did changes in labor relations in particular have the impact claimed? To answer this, a (mainly) *historical* explanation becomes necessary: the importance of labor in American constitutional development is explained by the point in English constitutional development at which the United States government came into being. American states and territories formally received into their own legal systems the common law and statutes of England as of some stated time (e.g., the immigration of a colony's first settlers, national independence, the adoption of the state constitution). English common law in place at the time of the U.S. Constitution's adoption was, by the early nineteenth century, an accepted component of federal jurisprudence as well.

Crucial for subsequent American constitutional development was the occurrence of prior English development in stages, corresponding to the major upheavals in English history. Beginning with Henry VIII's move against Rome, for which assent was obtained in the form of parliamentary statutes, and gathering steam during the late seventeenth century when the rising commercial classes consolidated their position with statutes on monopolies, banking, and land development, court-regulated hierarchies of personal relations that once ordered the whole of feudal society according to precepts of common law were successively dismantled, and final authority for their affairs relocated in Parliament (Orren 1991).

At the times set for designating which English law would be received into American law, however, this dismantling was far from complete. Religious and commercial affairs and the regulation of officeholders were by then the jurisdiction of Parliament; pari passu, these subjects were governed by statutes in the United States (in religion's case, in those states that did not constitutionally provide for strict separation). By the same token, personal relations still under the authority of the judiciary in England—Blackstone organizes them as master and servant, husband and wife, parent and child, guardian and ward—transferred into the United States as judicially enforceable rights and duties at common law. Although there were English statutes on those subjects at this time, they implemented or clarified provisions in common law, which law was incorporated into American jurisprudence largely intact.[18]

The inherited division of sovereignty—between legislatures and courts—was buttressed by English rules of statutory interpretation. Statutes in derogation of common law were to be construed narrowly; legislative remedies were to be judged valid or "absurd" according to the particular category of relations affected (Smith 1848, 676–77). Following Blackstone, American treatise writers designated the personal relations above as "natural," and judges treated statutes for their regulation as suspect; business corporations, on the other hand, were deemed "artificial," subject to democratic renovation (Kent 1832). Although in principle these divisions were independent of the division between national and state authority, all were tied, historically and structurally, to the same particularized ordering of society by common law.

Only a few American statutes governing relations between masters and (nonslave) servants were passed prior to the Civil War. Under common law rules, however, these (e.g., the 10-hour statutes) could not be enforced against evidence that the parties had come to some other agreement, which was always present. Common law rights of husbands over the work of their wives were afforded parallel protection against legislative interference (Zeigler n.d.). Slavery had been declared a creature of "positive" (statutory) law—indeed, "repugnant" to the common law—shortly before the American Revolution.[19] However, in both Northern and Southern courts, slavery statutes were enforced by common law actions (e.g., habeas corpus and recaption, an ancient writ to recover villeins) as a matter of right.

The reception of English law remained the touchstone: at the height of "liberty of contract" in the late nineteenth century, usury statutes were permissible because their existence in England antedated the Constitution. In the case of public employment, where legislatures possessed expansive authority to establish rules for government service, common law rights of officeholders that transferred into the new United States remained an important supplement to statutory provision. When officeholding statutes by one method or another were voided or where statutes were silent, their ancient vitality continued and could be asserted in court to block contrary directives and denial of privilege.

Against this background, it will be seen that changes in labor relations implicated broader constitutional matters than the regulation of the nation's work force. Rather, they raised questions of how far democratic decision making would extend across the terrain of American society. The replacement of particularized governance by the universal political institutions anticipated in liberal ideology is a fair summary of American constitutional history. The process tracks the dislodgement of work relations shored up by the Court in *Marbury*, in *Dred Scott*, in *Lochner*. The

removal of aristocratic styles of public employment was the premise of the mass-based political party; the removal of slavery entailed the "national majority" and the Fourteenth Amendment; the removal of the hierarchy of master and servant removed common law barriers to legislation. The breakdown of divisions was evident in the mid–twentieth century: when the Civil Rights movement addressed lingering vestiges of slavery, it propelled a generalized "rights revolution."

The two answers provided thus far explain why labor relations was a subject of constitutional dimensions and why changes in labor relations reached beyond the affairs of the workplace. There is, however, a third answer, one able to encompass both of these, and also to account for why labor issues may prove constitutionally salient into the future. This answer is (mainly) *theoretical*: it proposes an abstract starting point for a general analysis of state-society relations in terms of the *primacy of labor* (Orren 1991, 19).

The primacy of labor builds on the idea that "labor" and "work" may be understood comprehensively, as they were before the eighteenth century, to include the varied activities during any historical period that are performed under the order or direction of someone else (Williams 1983, 177). From there proceeds the following observation: labor is a bridge between the realm of government institutions and elites and the ongoing activities of social life. Governments in whatever form depend for their functioning on the labor of individuals, both in their internal operations and with respect to diverse goals they may pursue. Individuals perform work according to established routines, within organizations, and for rewards, sanctioned by the state. A change in these activities or a change in demands on the part of government elites will cause adjustments on one or both sides.

An idea related to the primacy of labor has been presented by Talcott Parsons as part of his system of social action. According to Parsons, the element of mutual reliance on labor activities by state and society is expressed in the concept of *services*. Within this system, the personal commitment to work is described as the primary output of the household to the polity, the polity being that social subsystem dedicated to goal attainment; and the combination of this personal commitment with other factors is the primary output of the economy to the polity (Parsons 1969). Parsons' notion is more abstract than what is proposed here, which contemplates specific institutional settings—the government, the workplace, the family—although my perspective would not be inconsistent with his framework but rather a concrete instance of it.

Where Parsons sees services obtained in society through the processes of exchange, the primacy of labor is proposed to distinguish modes of labor regulation within given regimes, allowing for coercion as such, not as a species of exchange. The unwillingness to characterize labor relations in terms of exchange is related to the definition of its essential condition, subordination. Elements of exchange may often—and in some labor regimes may regularly—be present; but the employee performs within a structure of authority and may be dismissed for nonperformance or other reasons, often through the will of one side. By contrast, property relations are distinguished by the condition of autonomy. Property is, likewise, not autonomous in an absolute sense, being subject to both legal and market forces; but autonomy (or "relative autonomy") characterizes property, and that allows exchange, rather than coercion, to be its dominant transaction with the outside world. Labor and property are related: property is often a precondition of hiring labor; labor may be a means to property; employees may be treated in law as if they were property; employment may exhibit a security akin to property.

Changing social arrangements under the American Constitution may be analyzed comfortably within this framework. The systems of free and slave labor, for example, coexisted on the presumption of propertylike characteristics in the system of public officeholding, imposing personal liability for the performance of duty on those who enforced controversial laws. The widening project of national government would modify all three. The same is true of the background of English development. The clerical institutions challenged by Henry VIII performed a variety of services still associated with the public domain (e.g., teaching, administering wills, poor relief). The monopoly privileges opposed by England's "new men of commerce" in the mid–seventeenth century had been commonly assigned to royal clerks and other functionaries in lieu of salaries and pensions (Price 1913).

The third answer, the *primacy of labor*, will be problematic only if its analytic generality tends to water down the impact of the specific argument, namely, that labor relations, as colloquially understood in contemporary American culture, have driven major constitutional change. There is no contradiction between the general and the specific. The changing structures and activities of work have been no less potent elements in political change for their terminological narrowing over centuries.

RESPECTING PROPERTY

Granted the connection claimed between labor relations and constitutional turning points—and even if one accepts the explanations tendered—there remains a conspicuous hole in the account. Where are *Fletcher* v. *Peck* (1810), *Dartmouth College* v. *Woodward* (1819), *Sturges* v. *Crowninshield* (1819), *McCulloch* v. *Maryland* (1819), *Gibbons* v. *Ogden* (1824), and *Charles River Bridge* (1837)? How can these celebrated cases—and later cases like them—be excluded from the discussion when they are the best evidence for the alternative social perspective, which is that American constitutional development has concerned, above all, property in its various forms and its protective adjustment to a democratic order?

No exception is taken here to the observation that

property has "enjoyed an elevated position in the pantheon of constitutional values recognized by the highest Court in the land" (McCann 1982, 147). However, I shall put forward and briefly defend two propositions. First, the Court's famous decisions arising from disputes over property have served to affirm and clarify the constitutional status quo; they are not turning points in the sense of the decisions enumerated earlier arising from disputes over labor. As with labor, the association between property and the consolidation of existing constitutional arrangements was not fortuitous but historically structured. Second, these property cases themselves reveal the imprint of an earlier period, when activities that in the nineteenth century were thought of as property had been seen in relation to the state as services—that is, in terms compatible with an argument for the primacy of labor.

Evidence for the proposition that the Court's property decisions clarified and reinforced the status quo will be found in *Fletcher* v. *Peck*, which overturned a Georgia statute repealing an earlier sale of lands as a violation of the contracts clause of the U.S. Constitution. Georgia's ceding the disputed lands to Congress, the raging rhetoric of party factions, the corruption surrounding the original grant—all account for the role of *Fletcher* v. *Peck* in the dramaturgy of states against nation, Congress against presidency, virtue against power. Because the Court had struck down state legislation only once before, its decision was a stinging reminder of the power of the national judiciary.[20] Decided seven years after *Marbury*, however, there was no longer a question that the Court had authority to invalidate unconstitutional statutes. On this point, the *Fletcher* opinion was unanimous, gathering even the vote of Justice William Johnson of South Carolina, Jefferson's appointee, who was often at odds with the Marshall Court's consolidationist tendencies.

Perhaps the more important issue for the status of property in constitutional development is whether the decision in *Fletcher* v. *Peck* constrained future state legislation. The Court held that the contracts clause covered benefits that statutes bestowed, and it legally equated "grants" with "contracts" and "public contracts" with "private contracts." But this was not a novel ruling in the United States, having been foreshadowed by an earlier Marshall opinion.[21] Nor was there serious dispute that a legislature could not, apart from unusual circumstances like the corruption attending the Yazoo grant, take land from its owners without compensation. Even the most bitter opponent of the outcome in *Fletcher*, John Randolph, would have agreed with Marshall that such action would be contrary to "general principles which are common to our free institutions"—in Justice Johnson's words, "the reason and nature of things" (1810, 139, 143).[22]

Statements like these were familiar in the Court's jurisprudence. Justice Chase, for example, in *Calder* v. *Bull* said there "are certain principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to . . . take away security for personal liberty, or private property, for the protection whereof the government was established" (1798, 388). Events like Shay's rebellion and several state laws under the Confederation had indicated a more radical tack; they were exactly what the Constitution was designed to prevent and had prevented successfully. No egregious case like *Fletcher* had arisen in two decades; the founding generation had by now stopped fretting about the excesses of republicanism.[23]

Additional evidence for the consolidating, rather than restructuring, role of the Court's property decisions is provided by *Dartmouth College* v. *Woodward*. Overturning a New Hampshire statute that changed provisions in a prerevolutionary royal charter, *Dartmouth College* held that the Constitution's contract clause protected not only individual property owners but also corporations with charters granted for unlimited periods. The decision provided scaffolding for future business organization and, as such, was a vital holding in favor of economic development. But it marked no constitutional turning point, either in doctrine or in principle. No new substantive rights were involved; corporations as well as individuals remained subject to eminent domain and other traditional state encroachments.

Justice Story, in his concurring opinion, invited legislatures to write their powers of revocation into corporate charters they might grant in the future, a suggestion quickly followed by most states. But the precaution had only symbolic significance. Corporate property was equally secure before and after *Dartmouth College*. In this respect, what the decision affirmed was not so much the Constitution's harmony with property values but rather its harmony with a culture that could be expected to protect property without the judiciary's need to intervene.

A third decision, *Charles River Bridge* v. *Warren Bridge*, established that United States courts would construe existing charters strictly in all cases that determined property rights against the state. But again, especially given the proactive measures available to legislators after *Dartmouth College*, it is difficult to regard *Charles River Bridge* as a constitutional departure. *Dartmouth College* had concerned a charitable and educational enterprise that owned land and was associated with religion; the New Hampshire legislature had altered the physical site, the governing board, and the very name of the college. *Charles River Bridge* concerned rights to a public waterway, a subject anciently under state aegis; the plaintiff's bridge was slated to become state-owned after a period of years. The Court had simply declined to find, against a new and competing bridge, unstated monopoly rights that the plaintiff company claimed under common law and under a disputed seventeenth-century grant.

English precedents with respect to tolls, rates, and dock dues held that where the public was charged with a burden, the legislature's intention to impose it must be explicitly and distinctly shown (Dwarris

1848, 646–48). Several years before, Justice Marshall had endorsed this rule for the Court as it applied to taxation.[24] *Charles River Bridge* extended it to the state's interest in public improvements. The decision demonstrated the Taney Court's aggressive commercial spirit against old monopoly privileges and favored some property holders over others. Its principal impact, however, like that of *Dartmouth College*, was on corporate lawyers and other legislative draftsmen. Like *Fletcher* v. *Peck* and *Dartmouth College*, *Charles River Bridge* was an occasion to fit changing economic reality within existing constitutional structures; it represented no about-face in national direction, no leaning against any constitutional or social wind.

These conclusions could be extended to *McCulloch* v. *Maryland*. McCulloch gave full expression to the doctrine of implied congressional powers that Alexander Hamilton asserted during the chartering of the first Bank of the United States and Justice Marshall supported on the Court as early as 1805.[25] The decision also supported the growing power of the central judiciary presaged in *Marbury* v. *Madison*, as did *Gibbons* v. *Ogden*, which declared Congress's precedence over the states in the regulation of franchises on interstate waterways. This was a signal holding but a holding well in keeping with the original constitutional aim of avoiding state hindrances to commerce.[26] *Sturges* v. *Crowninshield's* overturning a state bankruptcy statute was a temporary setback to commercial interests but only by virtue of a Court majority against a policy imposed retroactively; its holding was for all practical purposes reversed within a decade.[27] None of these decisions strayed from the English constitutional development that Americans considered their patrimony. This included a latitude for legislators to regulate commerce free of common law precedent, a reticence toward (though not a barrier against) monopoly, and a hearty respect for property rights as a social principle. Controversies over particular property claims led to lawsuits; no antiproperty precepts existed or emerged; no reconstitution was entailed or envisioned.

Earlier, in order to explain their constitutional effects, I have placed the Court's labor decisions in historical and theoretical context. A brief imposition of the same framework on the property decisions will suggest its analytic range. Carrying forward, rather than changing, fundamental law, the property decisions bear the earmarks of previous transitions, before the framing of the Constitution.

Speaking only of private commerce, and setting aside public facilities like bridges, grist mills, and toll roads of ancient usage: medieval financial and industrial enterprises, like all other social activities, were at the disposal of the monarch for a diversity of political and economic ends. Prior to their reigning-in by Parliament, Elizabeth and the early Stuarts promoted monopoly privileges as an important method for compensating supporters of the royal house. Increasingly, these projects took the form of joint-stock companies, making them the legal forerunners to early corporations in the United States. The overall pattern—of accomplishing government purposes through economically lucrative patronage—was much older and pervaded English public administration into the nineteenth century.

Invoking this history, Justice Story's dissent in *Charles River Bridge* turned on whether the first bridge company's grant was in the nature of a "bounty," for which no services were required on the part of the recipient, in which case, based on English precedents, the state must be conceded to hold in reserve all unspecified rights; or whether the grant was for services, in which case contracts must be construed in favor of the grantee. On this reasoning, he argued that the company was entitled to its tolls as ongoing compensation for having built the bridge (1837, 589). Story agreed with Taney that the practices of English royalty could have no binding effect on American corporations, and his argument about services was turned aside by the majority. Nevertheless, it is significant that a judge as distinguished as he continued to sort out rights and duties on the old design.

Because *Charles River Bridge* concerned a public waterway, it is perhaps more convincing to see the same idea of services in *Dartmouth College*, which arose from a private undertaking, though on a charter from George III. For its defense, the New Hampshire legislature relied on the distinction between protections afforded landed property—at common law and in such American precedents as *Fletcher* v. *Peck*, *New Jersey* v. *Wilson* (1812), and *Terrett* v. *Taylor* (1815)—and the rights of corporations.[28] Against Webster's argument that the College trustees, who were the plaintiffs in the case, held their powers as their own inviolable property, counsel for New Hampshire asserted that corporate trustees were "public agents." Just as the state could, upon harsh penalties, constitutionally force citizens to serve in the militia and in town offices, it could likewise "compel [the trustees] to serve;" as agents, trustees had no more right to complain if their number were increased than did judges if the judiciary was enlarged. The Superior Court of New Hampshire voiced the same labor-based idea: "These trustees are the servants of the publick, and the servant is not to resist the will of his master, in a matter that concerns that master alone."[29]

Chief Justice Marshall pursued a different line of reasoning in his *Dartmouth* opinion to find rights for the trustees. Shifting attention to the original donors of the property, he found that a contract existed between them and the king, based on an expectation of immutable powers in the trustees as the donors' representatives. He went on, however, to deny that the trustees lacked beneficial interests of their own. According to the terms of the charter, said Marshall, some trustees would be professors with salaries, in which case they could claim violation of their own contracts for services (1819, 339). In other words, rights against the state would be vested in employees, not of the state directly, but of the corporation

that the state charter had brought into being. Marshall refrained from pressing this argument, saying it was sufficient to rest his decision on the trustees as the representatives of the donors. Had he persisted, he might have counted among his accolades the title of founding father of American labor law.

The point in all this is not to suggest that legislators in the early nineteenth century planned forcibly to draft the services of businessmen or that judges could not tell corporations apart from workshops. What is important is that they were closer to a period when most activities were characterized by subordination rather than autonomy, compensation as well as profits, insecurity instead of protected rights. Several centuries earlier, land had become largely exempt from these disabilities. Beginning in the mid-seventeenth century, commercial entrepreneurs obtained similar privileges for their holdings. However, for some time afterward, it did not seem awkward to speak of business and corporations in the old terms, as services rather than property, in contrast to today when their interests seem so firmly entrenched.

In the study of institutions, history and theory are mutually illuminating. Against the English background, property relations under the U.S. Constitution are seen to have been established and paradigmatic, labor relations to have been unsettling and reconstructive. The prominence of labor relations, however—and its explanation—encourages a scrutiny of the Court's property decisions that uncovers an understanding older than the Constitution, according to which activities later defined as property and culturally synonymous with individual autonomy were, in an earlier period, conditioned on a subordination associated more recently with employment. On the one hand, this historical uncovering is itself a process of interpretation, guided by abstract, i.e., transhistorical, definitions of labor and property. On the other hand, the primacy of labor in this uncovering takes on added temporal, i.e., historical, dimension.

History and theory merge in the assertion that employment, with its characteristics of subordination, compensation, and discharge, is a model on which societies have historically organized purposeful activities of all kinds and at all social levels. This suggests that labor relations are indefinitely various and that their description will offer a full and comparable picture of political institutions, in time and over time.

Notes

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1. Recent among a myriad of titles that embrace this theme in diverse ways are Nedelsky 1990 and Ackerman 1991.

2. These core principles include individual self-determination, no established ranks in society, and the political sovereignty of the citizenry.

3. Important groundwork for this perspective is provided by the rich scholarship of the last two decades on labor and the American state (see, e.g., Forbath 1989; Hattam 1993; Klare 1978; Tomlins 1985). In a sense, the most innovative thrust of these studies cuts in the opposite direction from the discussion here; that is, it highlights the influence of state structures and policies on the strategy and fortunes of the labor movement, rather than the reverse. On the other hand, by actively exploring state-society linkages which labor's failure to challenge had preoccupied earlier scholars), this recent work opens to theorizing the relationship of government and labor historically and with regard to a fuller range of work relations. In a related vein of research, Tushnet (1981) and VanderVelde (1989) have uncovered new political-legal connections between slavery and white labor. Though not within a self-conscious labor framework, Cover (1975) offers a fascinating juxtaposition of slavery and public employment (judges).

4. Such a listing of turning points by no means exhausts the possibilities of the labor perspective. It will hardly be necessary to dwell on the Civil War amendments—their pervasive constitutional impact and their direct association with black slavery—in order to call up their relevance to our argument. In that connection, one could list certain "antilandmarks"—decisions that signal the arresting of constitutional changes underway, such as *United States* v. *Cruikshank* (1876) and the *Civil Rights Cases* (1883). These cases are interesting not only for their treatment of slavery's residues but for their reliance on the employment relation between government and its officers to define state action and curb national protection of the newly freed. It is also possible to establish labor's presence in Court decisions that are not so much markers of constitutional realignment as they are foundational to later development. In this category, for instance, is the place of labor radicalism in the emergence of First Amendment jurisprudence at the end of World War I, exemplified by *Schenck* v. *United States* (1919) and *Abrams* v. *United States* (1919).

5. A study of the U.S. Supreme Court's invalidation of state statutes between 1879 and 1910 indicates that the anti-business measures disputed were, on the whole, upheld by their local state high courts (Gates 1987, 271). By contrast, a listing of state labor statutes passed between 1885 and 1900 shows a pattern of division between legislatures and judiciaries: approximately three times as many were invalidated by state high courts as were upheld (Forbath 1989, app. A). The U. S. Supreme Court sustained almost as many instances of government price fixing as it invalidated, a considerably more positive record than the Court's treatment of labor statutes (Strong 1986, 273–92). The exceptions to labor's dismal record before the Court are two decisions upholding hour limits for special categories: *Holden* v. *Hardy* (1898), about underground miners in Utah and *Muller* v. *Oregon* (1908), about Oregon women.

6. *Jones* v. *People* 1884.

7. *Godcharles* v. *Wigeman* 1886.

8. Justice Field might have had a better argument if the law had made the monopoly the only employer of butchers. But it provided for them to rent space from the franchisee.

9. An interesting exception suggesting the prominence of labor in the Court's decision making is found in the regulation of grain futures. Congress initially regulated grain-futures sales by legislating prohibitive penalties against practices other than those prescribed. This measure aimed to circumvent the Court's earlier interdiction—in *Hammer* v. *Dagenhart* (1918), which struck down a national child labor law—against using the commerce power to perform police functions. The same "taxation" approach was used in a rewritten child labor law, after which both statutes were struck down by the Court on the same day, in *Hill* v. *Wallace* (1920) and *Bailey* v. *Drexel Furniture* (1920). Congress then rewrote the grain-futures act as a measure designed to prevent obstructions of commerce, and it was upheld in *Stafford* v. *Wallace* (1922).

10. The phrase is from *In re Neagle*, which upheld the legality of employing a U.S. marshal to guard a Supreme Court justice (1890, 69). The other instance was *In re Debs*, upholding executive authority "to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care" (1895, 181–82). Plenary authority was affirmed for Congress in similarly sweeping terms in the *Chinese Exclusion Case*, upholding a statute that contravened a U.S. treaty with China by prohibiting the importation of Chinese laborers (1889, 603–4).

11. Examples are *Wickard* v. *Filburn* 1942 and and *Heart of Atlanta Motel* v. *United States* 1964.

12. On this requirement as applied to the Clayton Act, sec. 20, see *Duplex Printing Press* v. *Deering* 1921.

13. *Hammer* v. *Dagenhart* 1918.

14. *McLaurin* v. *Oklahoma State Regents* 1950; *Sweatt* v. *Painter* 1950. The plaintiff's brief in *Sweatt* v. *Painter* states, "If [Negroes] have the chance to rise above the cotton picking, the manual labor, and the domestic service to which our white society has consigned their race, it is almost as important to them as life itself that they have the opportunity to do so" (quoted in Kluger 1977, 276). "Educational Inequalities Must Go!," an early position paper written in 1935 by NAACP leader Charles Houston, declared, "One of the great tragedies of the Depression has been humiliation and suffering which public authorities have inflicted upon trained Negroes, denying them employment at their trades on public works and forcing them to accept menial low-pay jobs as an alternative to starvation" (ibid., 193).

15. *Patterson* v. *McLean Credit Union* 1989 (limiting protection of Title VII of the 1964 Civil Rights Act to employment discrimination at the point of hiring); *Ward's Cove Packing* v. *Antonio* 1989 (shifting the burden to the employee to prove an inadmissible reason for stratifying workers de facto along racial lines); and *City of Richmond* v. *J. A. Croson Company* 1989 (imposing an equal-protection bar to affirmative action based on race in the absence of direct evidence of past racial discrimination). The last case denied that allocating a proportion of city construction contracts to minority businessmen bore the necessary relation to difficulties minorities had participating in the industry due to hiring practices and to blocked access to training programs and labor unions (p. 498–99).

16. *Transportation Union* v. *Long Island Railroad* 1982.

17. The litigation over reproductive rights, beginning with *Griswold*, has been fueled by a concern on the part of both litigants and judges for doctors' freedom to perform their expert labor without fear of penalty (Garrow 1994). A continuation of this line of decisions may be expected in Court cases determining the rights of persons with nontraditional sexual orientations, and in particular when engaged in the work of military service.

18. American law did not receive all English statutes as of a given date but only those that were "general" in nature and "applicable" to the condition of the new nation. Because these qualifiers were satisfied piecemeal, as judges applied them in litigation, it is possible only to surmise why certain legislation was discarded. Presumably the English master-and-servant statutes fell by the wayside on both counts, being detailed as to industry and locale.

19. *Somerset* v. *Stewart* 1772.

20. The first instance was a state law that conflicted with a federal treaty, *Ware* v. *Hylton* (1796).

21. "This [sale of land to settlers, providing conditions of residence, etc.] is a contract; and though a state is a party it ought to be construed according to those well established principles which regulate contracts generally" (*Huidekoper's Lessee* v. *Douglass* 1805, 70).

22. *Fletcher's* holding was likewise consistent with contemporary English equity opinion on the security of bona fide purchasers of land. *Stanhope* v. *Earl Verney* 1761, 85; *Jerrard* v. *Saunders* 1794, 458; see also Pomeroy 1941, 3:6–7. Parliament's authority even to rescind commercial grants had been recently challenged, in constitutional terms that paralleled the American debate. See the debate on Fox's East India Company bill, especially the remarks of Edmund Burke, the bill's real author (*Parliamentary History* 1814, 23:1131 ff.). The distinction may have played a part in the minds of Randolph and other Yazoo repealers, for the greater part of the property was held not by settlers but by New England–based financiers and speculators (McGrath 1966, 38). In any case, *Fletcher* did concern land, and it set no new precedent in this respect.

23. Compare Justice Chase's upholding a Georgia statute against charges that it was a bill of attainder. Although the statute had resulted in the confiscation of property, Chase distinguished it as follows: "There is . . . a material difference between laws passed by the individual states, during the Revolution, and laws passed subsequent to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous test now applied" (*Cooper* v. *Telfair* 1800, 19). For the agreement among American leaders on the sanctity of property values see Nelson 1987.

24. *Providence Bank* v. *Billings* 1830.

25. *United States* v. *Fisher* 1805.

26. The Court's decisions on interstate commerce were regularly tangled up with questions of slavery. In the background of *Gibbons*, for example, was the problem of Southern states arresting free black seamen who came ashore in Southern cities. See *Elkison* v. *Deliesseline* (1823). This case is referenced in *Gibbons* and in Justice Johnson's dissent (1884, 215–16, 230–31). Another link to labor in the commerce cases concerns immigration. Thus, *New York* v. *Miln* (1837) upheld the right of a state to regulate passengers on seafaring vessels, based among other things on the prospect of unemployed immigrants becoming a charge on the city.

27. The reversal was in *Ogden* v. *Saunders* (1827).

28. Farrar 1819, 82–98. *New Jersey* v. *Wilson* held that an exemption from taxation granted Native Americans as part of a treaty could not be rescinded when title passed to new owners. *Terrett* v. *Taylor* held that the Virginia legislature could not void an earlier statutory grant of land to the Episcopal Church. The changing character of "things" protected by core property forms is the theme of a different historical treatment by a political scientist of the Court's property decisions (Brigham 1983).

29. Farrar 1819, 36, 201–2, 217. A similar argument was made by William Wirt, in answer to an appeal to the U.S. Supreme Court. The trustees, he said, had given "their time and labour" to the college, that was all: "Every society has a right to the services of its members in places of publick trust and duty" (ibid., 292).

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