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1988]

## GOVERNMENT INTERVENTION IN LABOR MARKETS: A PROPERTY RIGHTS PERSPECTIVE

DANIEL J. MITCHELL†

### I. INTRODUCTION

**T**HE question of whether labor laws should be applied to small business fundamentally assumes that present laws are acceptable. A large body of economic and philosophical research would disagree with this assumption, however, and instead suggest that the relevant inquiry is whether it is appropriate for the government to intervene in any labor markets.<sup>1</sup> Current labor laws restrict individual freedom. It is my contention that government should not interfere with certain personal decisions, including the freedom of employers and employees to contract freely, unfettered by labor regulations.

This article begins with a brief philosophical overview of the fundamental notion of freedom. Next, it explores the freedom to contract which has not traditionally been afforded the same protection as other fundamental rights and with which both unions and government interfere. This article then applies various economic and legal principles to some small business issues and concludes that government intervention is an improper solution. The best means of achieving economic prosperity is complete deregulation of all labor markets both large and small.

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1. See, e.g., C. HOOVER, *THE ECONOMY, LIBERTY AND THE STATE* 325-94 (1959) (less state interference in economy allows maximization of personal liberty); J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 944-47 (J. Robson ed. 1965) [hereinafter *PRINCIPLES OF POLITICAL ECONOMY*] (government should not interfere with labor market because consumers and workers have immediate interests in its efficient function and can best react to market signals unhindered by governmental meddling); C. NISHIYAMA & K. LEUBE, *THE ESSENCE OF HAYEK* 53-100 (1984) (social justice and liberty are maximized by decentralized market allowing its participants freedom of decisionmaking rather than restraining market through cumbersome, inefficient governmental intrusion); A. SMITH, *THE WEALTH OF NATIONS* 3-86 (1776) (labor markets which are determined by supply and demand can best fill needed occupations and skills by offering relatively higher wages).

(1043)

## II. FREEDOM AND THE FREE MARKET SYSTEM

Before specifically addressing labor law, a brief discussion of the philosophical approach underlying this article is necessary and, hopefully, will be fruitful. Simply stated, those who wish to use the power of government to infringe upon the rights of life, liberty and property<sup>2</sup> should bear the burden of demonstrating the need for government involvement.<sup>3</sup> To the maximum extent possible, we should follow the classical liberal prescription of very limited government where people are free "to truck, barter and exchange."<sup>4</sup> An individual should be free to do what he wishes with his life, liberty and property so long as he does not adversely interfere with other individuals' similar rights.<sup>5</sup>

Most advocates of this approach place a very high value on freedom,<sup>6</sup> and view any proposals that would require the freedom

2. The fifth and fourteenth amendments restrict the power of federal and state governments providing that, "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV § 1. For a thorough analysis of judicial interpretations of protected rights and due process under the fifth and fourteenth amendments, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 560-86, 1302-1421 (2d ed. 1988) and the cases cited therein.

3. See *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 1, at 937 (authoritative form of government action has limited sphere of legitimate use and requires strong necessity to justify in every instance). *But see* *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938) (regulatory legislation affecting ordinary commercial transactions is constitutional unless facts are proven which preclude assumption that legislation rests upon rational basis within knowledge and experience of legislators).

4. A. SMITH, *supra* note 1, at 13. Smith contends that the exercise of this freedom, motivated primarily by the self-interests of individuals with different talents, advances society. *Id.* at 13-16.

5. See J.S. MILL, *ON LIBERTY* 10-11 (Norton ed. 1975) [hereinafter *ON LIBERTY*] ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."); *see also* Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1970) (discussing attitude of American courts toward use of Mill's criterion as basis for proscribing state regulation of individual conduct). For a discussion of Mill's theory as it relates to the fundamental right of privacy, see L. TRIBE, *supra* note 2, at 1303.

6. See, e.g., *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 1, at 3 (freedom and maximization of wealth are connected; Mill commenting: "A people has sometimes become free, because it had first grown wealthy; or wealthy, because it had first become free."). *But see* C. HOOVER, *supra* note 1. Hoover admits that it has generally been assumed by laissez-faire proponents that any intrusion by the state would serve to limit personal freedom. *Id.* at 325. In fact, after an examination of such traditional socialist economies as that of the Soviet Union, Nazi Germany and some Fascist systems, Hoover notes that this correlation existed primarily because these economic systems had been established by small tyrannical governments. *Id.* at 334. Hoover acknowledges, however, that these experiences do not conclusively prove that a collectivist system which com-

of individuals to be restricted with great suspicion. Note, however, that tolerance of others' freedom is not the same as approval of others' action. A free society might not impose penalties upon those who abuse drugs, but that is not to say that individuals in society do not have the freedom to exercise moral suasion, ostracism and other forms of voluntary control on those who violate social norms.<sup>7</sup> The same principle would operate to inhibit those who would abuse the right to free speech or other rights. Indeed, advocates of a free society would argue that such societal controls are more effective than governmental coercion in regulating social behavior.<sup>8</sup>

Similarly, such uncontrolled freedom in an economic setting could also result in behavior few would condone. For instance, a free society would permit the owner of a business to discriminate in hiring, firing, compensating and promoting employees. As morally repugnant as such practices are, others should not be able to invoke some "societal" right to justify imposing their moral values on an individual simply because they disagree with how an individual disposes of his property.<sup>9</sup> This reflects the

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mences through peaceful, democratic means would necessarily lead to a reduction of personal liberty. *Id.* Furthermore, Hoover advances three reasons why the expansion of the state's role in Western countries in recent times has not resulted in a net diminution in personal liberty. First, most state action represents limitations on "business" rather than on "personal liberties." Second, state economic intervention has usually followed a prior increase in power by other economic organizations, namely corporations, over individuals. Third, state encroachment has been gradual and has not resulted in any economic crisis. *Id.* at 346-51.

7. PRINCIPLES OF POLITICAL ECONOMY, *supra* note 1, at 941-43. Mill notes that collectivist action by people in certain areas promotes dynamism and reduces government dependence because people understand their own businesses and interests better than government could ever be expected to do. *Id.*

8. *Id.* at 944. Mill suggests that persons immediately interested in regulating their own behavior are better able to repel tyranny because those in government tend to divert their energies toward political ambitions and the petty vanities of office. *Id.*

9. *But see* 42 U.S.C. § 2000e-2 (1982). Federal law prohibits discriminatory practices. Specifically, the Civil Rights Act of 1964 provides in pertinent part: It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* See, e.g., *Baggett v. Program Resources, Inc.*, 806 F.2d 178 (8th Cir. 1986) (employer failed to demonstrate that failure to hire former female employee was

same principles as Voltaire's famous statement, "I may disapprove of what you say, but I will defend to the death your right to say it."<sup>10</sup>

However, a market system will punish those who discriminate. In the market, individuals and businesses bear the costs of their actions. Therefore, any individual who discriminates in favor of a less qualified person simply because he does not like the skin color of another who is more highly qualified will bear the costs in terms of lower profits. It may sound unsophisticated to people who feel superior to those engaged in commerce and trade, but most people do not care what color a person's skin is so long as his money is green. Can the market eliminate such discrimination? It would be preposterous to make such a claim, but it is very likely that a market system is the best way to minimize discrimination and other morally reprehensible behavior.<sup>11</sup>

### III. THE THREAT TO THE FREEDOM OF CONTRACT FROM GOVERNMENT ACTION AND MAJORITY RULE

There are some who would argue that certain rights are not as important as others.<sup>12</sup> The right to free speech,<sup>13</sup> on one hand,

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nondiscriminatory); *Drazewski v. Waukegan Dev. Center*, 651 F. Supp. 754 (N.D. Ill. 1986) (where employer knew of employee's inability to work Saturdays, discharge for her refusal to work on Sabbath established prima facie case of religious discrimination); *Thurber v. Jack Reilly's, Inc.*, 521 F. Supp. 238 (D. Mass. 1981) (by failing to promote employee because of her sex, despite her qualifications, employer intentionally discriminated against her on basis of gender), *aff'd*, 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984). For an analysis of the law of employment discrimination, see B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (1983). For a discussion of federal law requiring payment of a minimum wage, see *infra* notes 37-45 and accompanying text.

10. J. BARTLETT, *FAMILIAR QUOTATIONS* 418 (14th ed. 1968).

11. See *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 1, at 394-96 (competitive industries such as textile manufacturers hire women to avoid paying non-competitive higher wage for men). *But see* H. JOHNSON, *ON ECONOMICS AND SOCIETY* 30 (1975) (premium jobs in labor market require high level of education which system of discrimination prevents those discriminated against from obtaining).

12. The United States Supreme Court has concluded that some rights are fundamental and thus deserve greater protection from governmental infringement than do others. *Compare, e.g., Roe v. Wade*, 410 U.S. 113, 153, 164 (1973) (statute prohibiting abortions in all cases other than to save mother's life violated women's fundamental right of privacy under fourteenth amendment due process clause) and *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (statute prohibiting use of contraceptives found over-inclusive and violative of fourteenth amendment due process right to privacy within marital relationship) *with West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (freedom of contract is not fundamental right protected under United States Constitution).

However, all rights are property rights. The right to privacy, for example, is a form of property right which stems from ownership of oneself. Thus, from a

should be defended, but freedom of contract,<sup>14</sup> on the other hand, is not equally important. This dichotomy of rights is indefensible. All rights are property rights. The principle of self-ownership makes what are commonly referred to as individual rights simply specific forms of property rights. It is a person's ownership of himself which gives him the right to speak as he wishes, to choose the religion he wishes and to behave the way he wishes.<sup>15</sup> The courts and legal profession deserve much credit for maintaining and protecting those rights against government, but they should be equally criticized for neglecting other rights.

To many observers it is a fortunate coincidence that a system based upon complete respect for all rights is also one which maximizes prosperity, production and opportunity.<sup>16</sup> The history of the world offers substantive evidence, however, that freedom and prosperity do tend to jointly exist and that the less government that is involved, the more prosperity there will be.<sup>17</sup> Furthermore, while systems based upon freedom do not guarantee equality of results, the less fortunate in freer societies are usually better off than the well-to-do in more collectivist societies. In societies with greater degrees of government control, it is possible to use the power of the state to enrich an individual at the expense of another. However, in a free market economy, a person can only enrich himself by simultaneously making someone else better off.<sup>18</sup>

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property rights perspective, it is logically inconsistent to provide greater protection to one subset of property rights than to another. For a discussion of the property rights perspective, see *infra* notes 13-15 and accompanying text.

13. The first amendment establishes the fundamental right of free speech. See U.S. CONST. amend I. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." *Id.*

14. See *West Coast Hotel*, 300 U.S. at 391. In *West Coast Hotel*, the Supreme Court noted that the Constitution does not mention freedom of contract, but rather "speaks of liberty and prohibits the deprivation of liberty without due process of law." *Id.* Moreover, the Court added that "freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses." *Id.* at 392 (citation omitted).

15. For an exposition of first amendment protections guaranteeing freedom of speech, religion and association, see G. GUNTHER, *CONSTITUTIONAL LAW* 972-1531 (11th ed. 1985).

16. For a discussion of potentially conflicting views on the connection between government intervention in the economy and prosperity, see *supra* note 6.

17. See C. HOOVER, *supra* note 1, at 325-56 (noting that personal liberty was significantly curtailed in traditional socialist countries whereas there was no significant curtailment in more prosperous Western countries).

18. See *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 1, at 6. Mill contends that if an individual desires something he does not possess, he must first find another who has what he wants and is willing to barter for it. *Id.* But see A.

Notwithstanding the evidence linking less government with prosperity, many classical liberals believe freedom, not prosperity, is the most important characteristic of a society. For instance, imagine a scenario where executing every left-handed person would result in a twenty-five percent increase in Gross National Product. A utilitarian system based strictly upon results might decide executions were a good idea.<sup>19</sup> A society which has freedom as its highest priority would unilaterally reject such a proposal. Fortunately, the areas where freedom and prosperity are in conflict are exceedingly few,<sup>20</sup> while freedom and government are almost always in conflict.<sup>21</sup>

The classical liberal society is also opposed to the "tyranny of the majority."<sup>22</sup> Rights, including property rights, should not be subject to majority rule. A worker's freedom to enter into a contract should not be overruled by the majority any more than a

BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 14-15 (1985) (theoretically, when exchange in ideal market reaches state of equilibrium, no one could be better off without someone being made worse off).

19. See R. HARRISON, BENTHAM 168 (1983) (fundamental axiom guiding state action is: "[I]t is the greatest happiness of the greatest number that is the measure of right and wrong") (quoting J. BENTHAM, FRAGMENT ON GOVERNMENT 393 (1776)).

20. See M. ROTHBARD, AMERICA'S GREAT DEPRESSION (1975) (Rothbard contends that Great Depression was caused by government intervention in economy, not by failure of private sector and that only course to assure rapid recovery in any depression is strict policy of governmental nonintervention); see also Boettke & Ellig, *The Business of Government and Government as a Business*, in A NATION IN DEBT 272-86 (R. Fink ed. 1987) (authors contend that deficit problem is fundamentally expenditure problem and that privatization of federal government services including monetary system would aid in control and reduction of federal deficit); Hayet, *Inflation, Misdirection of Labor, and Unemployment*, in A NATION IN DEBT 143-53 (R. Fink ed. 1987) (high and stable level of employment can only be achieved through reestablishment of properly functioning market where free play of wages and prices establish corresponding supply and demand). But see M. BLEANEY, THE RISE AND FALL OF KEYNESIAN ECONOMICS 40-80 (1985) (examination of efforts of various traditional free market nations to escape evils of Great Depression indicates that private sector efforts failed; only by implementing various state public works programs could capitalist economics stimulate aggregate demand to position of equilibrium).

21. See PRINCIPLES OF POLITICAL ECONOMY, *supra* note 1, at 936-37 (distinguishing between two types of government action in economy: (1) "authoritarian" action which infringes upon individual freedom by dictating conduct; and (2) "informational" action which allows market participants to make more informed decisions by giving advice and promulgating information).

22. See F. BERGER, HAPPINESS, JUSTICE, AND FREEDOM 194-95 (1984). Although Mill advanced representational government, justice requires that the minority be given a voice in matters affecting their rights. *Id.* The fear is that a representational government which elects only majority representatives effectively precludes minorities from any further influence on government so that efforts need to be made to ensure that every group of people is represented proportionately. *Id.*

communist's free speech should be subject to the whims of the majority. Indeed, protection of rights against the tyranny of the majority is a key feature of a republican form of government.<sup>23</sup> James Madison foresaw the future when he warned: "Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property."<sup>24</sup>

A system based upon the principle of majority rule will always pose a threat to the minority.<sup>25</sup> Whether it was the voters in the South getting legislatures to enact Jim Crow laws (usually over the objections of the private businesses which would lose the patronage of black customers) or the voters of today seeking legislation to enrich themselves at the expense of their fellow man, majority rule is not a morally defensible system.

The collectivist mindset recoils at this notion, assuming that if the system is not majority rule, then it must be minority rule. The salient point in this argument is that government should never interfere with certain individual decisions. Whether the system is majority rule, a republic or a dictatorship, government has no role interfering with certain inalienable rights.<sup>26</sup> This phi-

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23. See U.S. CONST. amends. I-X (constitutional rights not subject to infringement by Congress); see generally A. MILLER, *DEMOCRATIC DICTATORSHIP* 111-22 (1981) (predicting end to liberal democracy given increase in power of executive branch and bureaucracy which undercuts traditional parliamentary government).

24. See J. LEWIS, *LIBERTY RECLAIMED: A NEW LOOK AT AMERICAN POLITICS* 7 (1984).

25. *Id.* Lewis states:

This opposition to Democracy on the part of our Founding Fathers was not based on a hatred of human liberty or individual rights. On the contrary it was their love of liberty and individual rights which caused them to reject Democracy. In a Democracy the majority rules and majorities are notorious for rejecting and trampling on the rights of minorities. The Founding Fathers, because they believed that all people have equal rights, did not believe that the size of a mob endowed it with any power to deny rights to the minority.

*Id.* at 7-8.

26. *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 1, at 938. Mill states: [T]here is a circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep: there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that



osophy contributed heavily to America's early government and was appreciated by many of the Founding Fathers.<sup>27</sup>

#### IV. GOVERNMENTAL INTERFERENCE WITH THE FREEDOM OF CONTRACT

I classify my approach to labor law as the moderate approach. To the right of this approach are situated those who might like to outlaw unions,<sup>28</sup> pass laws to limit unions<sup>29</sup> or otherwise use the power of the state to bias the system in favor of employers.<sup>30</sup> To the left are situated those who want to do just the opposite. Their agenda is to use the power of the state to bias the system in favor of unions by passing laws which interfere with free choice.<sup>31</sup> My position is one of strict neutrality. The government should not take sides in employer-employee issues. As moderate as my position is, most people today feel that it is the business of government to actively intervene on behalf of labor. Thus, my position is likely to be seen as conservative.

Succinctly stated, I believe that government should not limit the freedom of employers and employees to enter into whatever

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part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.

*Id.*

27. See D. HUTCHINSON, *THE FOUNDATIONS OF THE CONSTITUTION* 286-321 (1975) (colonial experience together with view of Framers resulted in express protections of individual rights from governmental interference in Bill of Rights).

28. See R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 40 (1984) (in political sphere, there are numerous employer associations which often oppose goals of AFL-CIO and labor movement in general).

29. See M. REYNOLDS, *POWER AND PRIVILEGE* 264-66 (1984) (rather than outlaw or repress unions, solution is to deregulate them to point where workers and worker organizations are treated in manner consistent with way in which everyone else is treated under contract and tort law); see also Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 *STAN. L. REV.* 1123, 1127 (1986) (Congress passed Taft-Hartley Act of 1947 to counteract what many saw as excessive power of post-Wagner unions).

30. See generally Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 *HARV. J. ON LEGIS.* 1, 12 (1986) (President Reagan's appointees to National Labor Relations Board have been fairly pro-employer in their sentiments). For a reference to several economists who take a generally negative view of labor unions, see R. FREEMAN & J. MEDOFF, *supra* note 28, at 261 n.1.

31. See R. FREEMAN & J. MEDOFF, *supra* note 28, at 22 (although unions are politically forceful in certain markets and have been very influential in passage of general social legislation, they have been largely unable to obtain special interest legislation favorable to them over opposition of business groups). For a reference to several economists with a generally positive view of labor unions, see *id.* at 261 n.2.

contracts they feel are in their respective interests. The role of government is to enforce the contracts. This means that an employer should not be forced to recognize a union if he chooses not to.<sup>32</sup> Nor should he be prohibited from hiring, firing, promoting or demoting whomever he wants, for whatever reason he wants.<sup>33</sup>

Fundamentally, this is a question of property rights. If another person owns a business, I do not have a right to interfere with his choices as to what he does with his property—so long as he does not interfere with my rights of life, liberty and property.

Similarly, a property rights perspective also would reject so-called right-to-work laws<sup>34</sup> which infringe upon the employers' freedom of contract to hire only union members<sup>35</sup> which is something employers may wish to do since it can lower transaction costs. The classical liberal position would also permit secondary boycotts<sup>36</sup> so long as such activities are the result of uncoerced

32. *But see* 29 U.S.C. § 158(a)(5) (1982) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .").

33. For a discussion of current law prohibiting such discriminatory practices, see *supra* note 9 and accompanying text.

34. *See* 29 U.S.C. § 164(b) (1982) (federal law expressly allows state to enact legislation prohibiting agreements requiring membership in labor organization as condition of employment); 51 C.J.S. *Labor Relations* § 10 (1967 & Supp. 1988) (outlining state legislation and cases interpreting right-to-work laws).

35. Advocates of right-to-work laws argue that an employee's right to be free from forced membership in a union outweighs an employer's interest in hiring whomever he chooses. For example, in *Finney v. Hawkins* the Virginia court stated:

There was evidence to be found in the acts of many States and of the Federal Congress to support the view that discrimination against employees because they did or did not belong to a union was against the public interest and should not be allowed. . . . Basically, agreements involving such discrimination are hostile to our free enterprise system and to individual liberty of choice and action. Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process.

189 Va. 878, 888, 54 S.E.2d 872, 877 (1949).

36. A secondary boycott is a union pressure tactic through which a union exerts economic pressure upon a second employer with whom it has no dispute in order to compel this employer to cease doing business with the target employer with whom the union does have a dispute. Federal law prohibits secondary boycotts. 29 U.S.C. § 158(b)(4), (e) (1982). *But see* Herman, *Erosion of Trade Union Freedom Under the Law*, 44 GUILD PRACTITIONER 60, 62 (1987) (secondary boycotts neither inherently evil nor unfair, but common-sense responses by organized labor to come to each other's aid during strikes).

agreement between private institutions. A property rights perspective also gives the individual complete discretion to negotiate with all potential employers making the choice he feels is in his self interest.

#### V. APPLICATION OF THE FREE MARKET AND FREEDOM OF CONTRACT FRAMEWORK TO SMALL BUSINESS

In this section, I will apply this legal and economic framework to small businesses, although it is applicable to larger businesses as well. The simplest way to do this is to select a few issues and to examine how those issues actually affect employees and employers.

One of the most popular government restrictions on labor markets is the minimum wage.<sup>37</sup> Most people believe that the government is acting in the interests of the poor when it passes laws to artificially raise wages.<sup>38</sup> The actual results of the minimum wage, however, are vastly different than supporters would like to believe. One of the major effects of higher minimum wages is to reduce employment opportunities for the least fortunate in our society.<sup>39</sup> If an individual is young, poorly educated and a minority, his services may not be worth \$3.35 per hour to

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37. See 29 U.S.C. § 206 (1982 & Supp. 1985) (federal law requiring all employers, with certain exceptions, to pay all employees at least designated minimum hourly rate which is currently \$3.35 per hour).

38. In fact, a review of the legislative history indicates that Congress's intent in providing minimum wage legislation was to aid the poor. See H.R. REP. NO. 151, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 3201. Specifically, it states:

The passage of the Fair Labor Standards Act of 1938 was heralded as a very important step toward protecting working Americans from poverty. By fixing a floor below which wages could not fall, it was expected that individuals who worked full time, year-round, would be guaranteed an income on which one could maintain a minimum living standard and not find it necessary to either rely upon Government assistance, if available, or go without basic necessities.

*Id.* at 3214. However, legislative history, which tries to find the public interest rationale for legislation, is very naive. Testimony of specific interest groups and impassioned congressional speeches do not necessarily reveal the true purposes behind the passage of legislation. This is definitely true in the case of the minimum wage. For some introductory comments on why minimum wage increases are really passed, see W. WILLIAMS, *THE STATE AGAINST BLACKS* (1982); M. KIBBE, *THE MINIMUM WAGE: WASHINGTON'S PERENNIAL MYTH* (May 23, 1988) (Cato Institute, Policy Analysis No. 106).

39. See M. REYNOLDS, *supra* note 29, at 143 (recent econometric study claims that decline in black teenage employment during 1950's and 1960's occurred in agriculture in South and that federal minimum wage acted as barrier to employment opportunities outside agriculture) (citing Cogan, *The Decline in Black Teenage Employment: 1950-1970*, 72 AM. ECON. REV. 621-38 (1982)). Cf. Hashimoto, *The Minimum Wage Law and Youth Crimes: Time-Series Evidence*, 30 J.L. & ECON. 443,

an employer. Therefore, if the government says that he cannot go to a potential employer and offer his services at \$3.00 per hour, he is out of luck. The lower rungs of the proverbial ladder of opportunity have been raised out of reach.

This raises a very interesting question: Why do unions, very few of whose members earn anything near the minimum wage, expend so many resources lobbying for higher minimum wages?<sup>40</sup> Some would claim that concern for their fellow workers, however misguided, drives their efforts.<sup>41</sup> Economic analysis would dispute this, and suggest that the desire to increase the costs of competing nonunion labor is a stronger motive.<sup>42</sup> One of the permanent challenges facing unions trying to maintain above average wages for their members is how to prevent employers from simply hiring less expensive nonunion employees. One way of accomplishing this is to raise the wages of nonunion employees to reduce the disparity.<sup>43</sup> That, in addition to all of the other legal impediments erected by current labor law,<sup>44</sup> discourages employers from hiring nonunion labor and gives the union more

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461 (1987) (past increases in federal minimum wage appear to have increased teenage arrests for certain crimes relative to arrests for all age groups).

40. *But see* C. NOYES, *ECONOMIC FREEDOM* 205 (1943) (certain segments of organized labor originally opposed minimum wage laws since they felt minimum wages would become "practical maximums" and thus, undermine efforts aimed at recruiting new members).

41. *See* M. REYNOLDS, *supra* note 29, at 142-43 (support of minimum wage legislation by organized labor widely advertised as evidence of unions' concern for welfare of all workers, but actual effect is to deny inexperienced workers opportunities which would allow them to increase their skills and productivity).

42. *See id.* at 142-44. In addition, Reynolds believes that the real anti-competitive effect on the labor market is that the higher minimum wage prevents new entrants in the labor market from gaining valuable experience and training through nonunion employment. *Id.* Thus, by denying new entrants the opportunity to gain experience, the skilled or semi-skilled labor force can determine the size of the experienced labor pool. *Id.*

43. *See* G. TYLER, *A LEGISLATIVE CAMPAIGN FOR A FEDERAL MINIMUM WAGE* 1 (1959) (higher minimum wage needed to close wage differential between union and nonunion jobs so as to curtail unemployment, wage cuts and wage freezes in unionized industries).

44. *See, e.g.*, 29 U.S.C. § 158(a) (1982). Section 158 provides in pertinent part as follows:

- (a) It shall be an unfair labor practice for an employer—
  - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [rights to self-organization, collective bargaining, etc.];
  - (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
  - (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

leverage. Finally, of course, since wage differentials exist, any success the unions have in increasing the costs of lower paid labor will put upward pressure on their wages.<sup>45</sup>

Another labor issue which is being hotly debated is mandated health insurance benefits.<sup>46</sup> With all the evidence of how national health care has failed around the world, proponents have switched their efforts to legislation which would coerce all employers into providing health insurance for employees.<sup>47</sup> Figures show that about one-seventh of the population, approximately thirty-seven million people, are not covered by health insurance.<sup>48</sup>

There are two major problems with this approach. It assumes that greedy businesses could be providing those benefits now, but because we lack the progressive legislation forcing them to do so, they do not. This is highly unlikely. Many businesses, particularly small businesses, do not generate substantial profits. It is very likely that they simply cannot afford to pay more, and if forced, they will have to lay off employees, raise prices (if they can) or possibly go out of business. One estimate of the expense of this legislation concludes that public and private sector costs will increase by thirty to forty billion dollars yearly.<sup>49</sup>

Moreover, the issue is not simply one of cost. Mandated

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees . . . .

*Id.*

45. See G. TYLER, *supra* note 43, at 1 (higher minimum wage would preserve employment in unionized plant and lay groundwork for future increases in union contract).

46. See S. 1265, 100th Cong., 1st Sess., 133 CONG. REC. S7055 (1987).

47. See ROBERT R. NATHAN ASSOC., INC., EXECUTIVE SUMMARY OF THE PRIVATE AND PUBLIC SECTOR COSTS OF PROPOSED LEGISLATION CALLING FOR ADDITIONAL BENEFITS FOR EMPLOYEES (January 1988) (prepared for the National Foundation for the Study of Employment Policy). The mandated health insurance bill applies to all employers other than the federal government. *Id.* at 1. The bill requires employers to provide specified health benefits including in-patient and out-patient health care by physicians and hospitals, diagnostic and screening tests, as well as prenatal and well-baby care. *Id.* Full-time employees (those working at least 17.5 hours per week) are entitled to benefits. *Id.* Employers pay at least eighty percent of the insurance premiums. Employees pay the remainder. *Id.* at 2.

48. *Id.* at 5.

49. See *id.* at 5. The National Foundation for the Study of Employment Policy has noted that the increase in labor compensation costs resulting from mandated benefits and similar legislation would most severely impact small businesses. NATIONAL FOUNDATION FOR THE STUDY OF ECONOMIC POLICY, THE NATHAN STUDIES: AN OVERVIEW 2 (1988).

health benefits also infringe upon the rights of employers and employees to negotiate between themselves to determine an optimal wage-and-benefits package. If the government mandates health benefits, that may simply force cutbacks in wages or other benefits which employees may value more highly than health insurance.

Not all of these issues can be divided along liberal or conservative lines. As I mentioned before, the moderate, neutrality approach to which I adhere does not believe in right-to-work laws. Some would argue that nobody should be forced to join a union as a condition of employment. The relevant issue in this instance, however, is not whether one can be forced to join a union, because a person cannot; if he does not like the union, he can refuse the job. The real issue is whether a business and its employees should have the freedom to choose to sign contracts which have union membership as a condition of employment.<sup>50</sup>

The issues I mention here only touch upon the problems of unnecessary and counterproductive government regulations. Small businesses, because of their size, are hurt more than big businesses, but that is not the important point. The important point is that small businesses will become even more hampered if forced to comply with current labor laws.

## VI. PROPOSAL: DEREGULATION OF ALL BUSINESS

Undoubtedly, there is something inequitable about small businesses being exempt from regulations that are applied to larger businesses. Such an arrangement creates distortions in an economy by altering relative prices. The answer to this problem, however, is not to bring small business under this unworkable regulatory umbrella. Instead, there is a compelling argument that larger employers should be freed from the controls and regulations under which they currently labor.

What if the only choice were between the current system, where small businesses benefit from exemptions, and having all businesses equally regulated and controlled? Given these alternatives, I would favor the current framework. Although it may seem unfair to larger employers, it would merely compound the problems by subjecting small businesses to the same harsh labor laws. The relevant analogy is whether I would free half the prisoners in the gulag even though that might be unfair to the re-

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50. For a discussion of right-to-work laws, see *supra* notes 34-35 and accompanying text.

maintaining victims of oppression. Freedom for some is better than freedom for none.

Proposals for wholesale elimination of current labor laws require some understanding and explanation of the practices, institutions and results that such a step would bring to labor markets. Standard neoclassical economics advocates that flexible labor markets will enhance economic efficiency.<sup>51</sup> Output should expand, resources will be better utilized and additional gains to trading will be realized.<sup>52</sup>

Deregulation of labor markets will not mean slave wages and robber barons. It is common for even educated people to assume that, without government "protections," businesses would work together to force wages down to subsistence levels.<sup>53</sup> Of all the economic flaws in such an assumption,<sup>54</sup> it can be best refuted by asking why businesses have not already used such tactics to force all wages down to the minimum wage?

Simply stated, competition forces employers to provide attractive wages to workers. Their labor is an input in the production process. Just as capital, entrepreneurship and other inputs demand a return, labor also demands a return for its input. It is not a coincidence that workers in countries that believe capitalism exploits labor are generally worse off than are workers in the supposedly exploitative countries.<sup>55</sup>

As a general rule, a free society will promote the evolution of institutions which promote prosperity and order. The works of Friedrich Hayek and Oliver Williamson ably explain how the spontaneous order of a market system will result in the evolution of institutions which facilitate wealth creation and production.<sup>56</sup>

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51. See A. BUCHANAN, *supra* note 18, at 14-18 (some aspects of efficient markets are that competition among producers reduces costs of production, competition among entrepreneurs reduces transaction costs and need for information by all market participants creates market for information which enables individuals and groups to economize; free market enables economy to maximize overall outputs relative to initial overall inputs).

52. *Id.*

53. See PRINCIPLES OF POLITICAL ECONOMY, *supra* note 1, at 340-43 (examining Ricardo's assumption that wages in free market economy are tied to price of food to maintain population).

54. See *id.* Mill discounted the assertion that wages in a free market economy will be driven down eventually to a subsistence level. *Id.* Rather, he believed that wages are primarily determined by the supply and demand for labor. *Id.* at 337.

55. For a comparison of capitalist, free-market economies and state-run communist economies, see *supra* note 6 and accompanying text.

56. See generally 3 F. HAYEK, LAW, LEGISLATION AND LIBERTY 74-75 (1979) (competition, if not prevented by deliberate government policies, tends to pro-

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Therefore, while we can only make general predictions about how new developments will affect labor markets, we can be confident that the spontaneous order of the market will generate results which will benefit society.

Empirical evidence and economic theory suggest that government intervention has worked against the interest of the overall populace. The insights explained by public choice theory illustrate how the power of government is much more likely to be used for the benefit of special interest groups rather than for the needs of the general population.<sup>57</sup>

Policymakers face a choice between three systems. The first, complete government control, has been deservedly discounted by the sheer weight of the evidence. The second, government intervention, is an ad hoc approach which has traditionally been opposed on a case-by-case basis. There is sufficient theory and evidence to reject this approach in favor of the third and preferable approach—nonintervention based upon respect for property rights.

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duce state of affairs where everything will be produced that someone knows how to produce and which can be sold profitably, everything produced is by persons who can do so as cheaply as possible and everything will be sold at lowest possible prices); O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 1-42 (1985) (analyzing capitalistic institutions in terms of transaction-costs economics theory which advocates that economizing is central to success of economic organizations).

57. For an introduction to public choice theory, see Gwartney & Wagner, *The Public Choice Revolution*, *THE INTERCOLLEGIATE REV.* 17-26 (Spring 1988). "Special interest issues . . . provide substantial personal gain to a concentrated group of beneficiaries at a cost which is spread widely among voters . . ." *Id.* at 20. "The special interest effect helps to explain the presence of tariffs and quotas on steel, automobiles, textiles, and several other products." *Id.* at 21.



