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Alfred S. Konefsky

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Essay

“As Best to Subserve Their Own Interests”: Lemuel Shaw, Labor Conspiracy, and Fellow Servants

ALFRED S. KONEFSKY

Over thirty years ago, Leonard Levy, building explicitly on suggestions first offered by Walter Nelles,¹ and implicitly on observations made by Roscoe Pound,² commented on the unusual conjunction of two decisions announced within weeks of each other in 1842 by Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court.³ The cases, *Farwell v. Boston & Worcester Railroad*,⁴ which helped create the fellow servant rule in the United States, and *Commonwealth v. Hunt*,⁵ which involved a prosecution for criminal conspiracy for organizing a labor union as a closed shop, seemed at odds. *Hunt* appeared to expand worker rights to collective action, while *Farwell* appeared to restrict worker rights to compensation from workplace injuries. Shaw's apparent protection of a worker's right to organize, “a pro-worker stance,” seemed to conflict with his refusal to recognize a worker's right to recover for an industrial accident in particular circumstances, “an anti-worker stance.” The question is obvious—how can these decisions be made compatible, or does their incompatibility have to be accepted with a shrug of the shoulders and a nod toward the evolutionary progress of the common law?

Alfred S. Konefsky is a professor of law at the State University of New York at Buffalo.

Old Explanations

Several explanations of Shaw's decision in *Hunt* had been offered before Levy's biography of Shaw. Nelles, for example, suggested that tariff protection was the driving force behind Shaw's opinion. Assuming that worker support for the protective tariff was essential for its passage, Nelles argued that "the pro-labor decision was the price of warding off a radical movement in politics that would capitalize upon workers' grievances and jeopardize the protective tariff on Massachusetts textiles."⁶ Levy dismissed Nelles's "tariff" theory, finding it "less easy to explain the actual decision—so favorable to workers—which came from a bench composed exclusively of Federalist-Whigs, presided over by Lemuel Shaw, all of whom shared the outlook of the propertied classes and were trained in the crusty conservatism of the common law."⁷ More to the point, Levy found it "even more perplexing because it followed on the heels of *Farwell* . . . , which forced workers to bear the cost of injuries caused by the negligence of fellow servants, and correspondingly reduced industry's overhead expenses."⁸ As Nelles had said many years before when pointing out the apparent contradiction between *Farwell* and *Hunt*, Shaw was "no sentimental friend of the poor workingman."⁹

Similarly, Levy dismissed the codification theory, or more accurately, Shaw's attempt to deflect a codification movement threatening to undermine the sanctity of the common law, as the impulse behind the *Hunt* decision. The "codification" theory sought to demonstrate that judge-made rules were capable of responding to the forces of change, thereby making codification—legislative or democratic rules accommodating political change—unnecessary. Despite the suggestiveness of Mark Howe's work,¹⁰ particularly Howe's juxtaposition of pro-codification readings with the *Hunt* case, Levy concluded that Shaw was not seeking to defuse the political attack on the common law. Levy argued, among other things, that the codification "threat," if indeed it was a threat, was no longer palpable in Massachusetts by 1842. Nevertheless, the problem of *Farwell* was not far from Levy's mind. In explaining why "Shaw's decision as a check upon the forces of codification must be cautiously advanced," Levy noted once again that "*Hunt* was decided in the same term of the Court as the case that gave life to the fellow-servant rule. That rule was not calculated to earn the gratitude of the workers or to disarm the legal reformers. It gave them fresh evidence of the harshness and upper-class favoritism of the 'judge-made' law. If Shaw's opinions were given with a half an eye on the codification

movement, . . . his two labor decisions tended to cancel each other out, the one a boon and the other, almost simultaneously, a bane."¹¹

In recent years, the pro-labor/anti-labor dichotomy of *Hunt* and *Farwell* has been raised again, but this time in an attempt to resolve the dilemma. Wythe Holt, in a section of his article on labor conspiracy cases entitled "The Puzzle of Hunt," asks how Shaw, in his "seemingly pro-labor opinion in *Hunt*," could have brought "himself even partially to favour the very workers who, one week before the decision in *Hunt* was announced, had been severely damaged by his own anti-labor ruling in *Farwell* . . . ?"¹² Holt's answer is relatively straightforward: a demonstration that in *Hunt* "Shaw's opinion was not really pro-labor."¹³ Christopher Tomlins has also addressed the apparent discrepancy in outcome between *Hunt* and *Farwell* in his book, *The State and the Unions*. In a brief footnote, he makes the following claim: "The perspective adopted here resolves the apparent contradiction between Shaw's 'pro-labor' opinion in [*Hunt*] and his simultaneous reaffirmation of the 'anti-labor' fellow servant rule in *Farwell*. . . . Both decisions, of course, were affirmations of freedom of contract."¹⁴

Tomlins is correct in identifying "freedom of contract" as the unifying principle out of which both opinions grew. His own analysis, distinguishing *Hunt* as an opinion ratifying "voluntarism," that is, sanctioning the activity of "freely acting individuals" gathering together for legal purposes in a union,¹⁵ is a valuable insight. It is, however, only a partial insight into the power of contract ideology. Shaw's opinion in *Hunt* goes much deeper, for it is congruent with the "freedom of contract in the marketplace ideology" that others have identified in his opinion in *Farwell*.¹⁶ Tomlins, however, has clarified the problem: *Hunt* and *Farwell* should no longer be analyzed as pro-labor or anti-labor. They may be described in that fashion, but to do so misses the point. They are opinions that reveal more in their similarities than in their differences. The unifying power of the contractual argument in both opinions provides us with greater insight into the growth and impact of market ideology in the legal culture of the period. In this analysis, Shaw is revealed as a sophisticated manipulator of the images of a declining republicanism and an ascending economic liberalism, a manipulator in service of establishing freely bargaining agents as the paradigm for analyzing legal relations.

The Opinions

The starting point for establishing the links between *Farwell* and *Hunt* is in the language and concepts of the opinions themselves.

Farwell

The story in *Farwell* is a familiar one. Nicholas Farwell, an engineer for the Boston and Worcester Railroad, had his right hand “crush[ed] and destroy[ed]”¹⁷ during a derailment caused, according to Farwell, by the negligent actions of his fellow servant, Whitcomb the switchman, who placed a track switch in the wrong position. Farwell sought compensation from the railroad, not from Whitcomb, who threw the switch. In rejecting Farwell’s theory of liability, Shaw held that the railroad was not liable for an injury inflicted by a fellow servant, even assuming that the injury was negligently caused by one of the railroad’s own employees. In the course of his opinion, Shaw left little doubt that if the actions of its employee caused injury to a third person—a passenger or “stranger” rather than a fellow servant—the railroad would be legally responsible. What course of reasoning led Shaw to this result?

Farwell’s lawyer, C. G. Loring, argued that “the plaintiff does not put his case on the ground of the defendants’ liability to passengers, nor upon the general principle which renders principals liable for the acts of their agents; but on the ground, that a master, by the nature of his contract with a servant, stipulates for the safety of the servant’s employment, so far as the master can regulate the matter.”¹⁸

Shaw took his cue from “learned counsel for the plaintiff.”¹⁹ In the space of a few paragraphs, Shaw created the analytical apparatus to govern future discussion of the issues. There could be only two ways of analyzing the problem: respondeat superior or contract. First, Shaw established that respondeat superior was not an acceptable legal theory in this context. A master was normally “answerable” for the negligent acts of his servant, if the injury was done to a “stranger,” someone not in privity to the master. The rule was “founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another. . . .”²⁰ However, “the great principle,” amounting almost to a moral duty, seemed to Shaw only to apply to strangers; those in privity to the master were treated differently. Respondeat superior did not apply in *Farwell* because of its inapplicability to the facts of the case—no strangers were involved. In addition, Shaw noted that the plaintiff, through counsel, had conceded that respondeat superior did not apply. There was an alternative governing principle to be applied in cases involving “a servant bringing his action against his own employer . . . for an injury arising in the course of that employment,”²¹ and that was the “contract between them.”²²

"The claim," Shaw announced, "is placed, and must be maintained, if maintained at all, on the ground of contract."²³ What kind of contract? Shaw invoked just two types, express and implied, dismissing the express contract possibility in one sentence: "As there is no express contract between the parties, applicable to this point," we are left only with a possible claim of "implied contract . . . arising out of the relation of master and servant." Implied contract meant "an implied promise, arising from the duty of the master to be responsible to each person employed by him" in the fellow servant situation.²⁴

Contract must have been important to Shaw, because until this point in the opinion, he had rejected a standard tort principle and been unable to find an express agreement. Yet he had allowed the contract idea to survive in an "implied" state. Shaw seemed to be saying that contract must be found somewhere because it has independent significance sufficient to take precedence over the "duty" of a master to a servant—a duty once fraught with overtones of hierarchy and status. Loring, in his argument for Farwell, tried to incorporate this duty into his assertion that the master "by the nature of his contract with a servant, stipulates for the safety of the servant's employment, so far as the master can regulate the matter."²⁵

Even as Loring built his case on implied contract, he could not entirely escape notions of status that placed the "master" in a position to "regulate the matter." Shaw, in accepting Loring's invitation to imply a contract, decided that the "nature" of such a contract would look different. Instead of the master stipulating for the servant's safety, Shaw found contract terms more consonant with his understanding of what "arise[s] out of the relation of master and servant."²⁶ "To say that the master shall be responsible because the damage is caused by his agents," he asserted, "is assuming the very point which remains to be proved."²⁷ In Shaw's analysis, the implied contract limited liability rather than created it because the parties were assumed to have allocated the risks in a particular way. The result may be a move from one kind of dependent status to another. Instead of status to contract, we have status to status, with contract easing the way.

Shaw made it very clear that this "implied contract" was a "legal presumption"²⁸—a fiction. It was not simply that a contract would be implied, but that the terms of the contract would also be implied. Therefore, Shaw had to find these implied terms. What were they? "The general rule . . . is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal

presumption, the compensation is adjusted accordingly.”²⁹ In other words, while there is no evidence as to what the parties actually agreed to, or whether they even thought of this particular type of arrangement, we have a powerful mental model of how these things should be worked out between employer and employee. The model says they bargained it out and reached an agreement as to where the risks fall. “These are perils,” Shaw reassured us, “which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.”³⁰ Therefore, by agreement between themselves, the parties have already decided the issue of legal injury and compensation. To impose a tort duty, would, in effect, upset the expectations of the parties, appearing almost as a retroactive readjustment.

The assumption that “perils [were] . . . provided for in the rate of compensation,” was important because Shaw asserted that “the basis on which implied promises are raised” amounted to “duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances.”³¹ He argued that “[p]olicy and general convenience” would define “the rights and obligations arising out of particular relations,”³² or, a new kind of status, an implied contract in the absence of formal agreements between the parties. As a result, in a legal sense, the plaintiff’s employment “was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment”³³—a “voluntary undertaking,” which was assumed to have occurred upon acceptance of employment.

Shaw’s logic was to reject respondeat superior in his search for a plausible contract agreement. He also rejected any evidence of express contract, leaving implied contract as the basis for his decision. Contractual presumptions pervade the opinion. Shaw believed that individuals bargain in the marketplace, working out the details of their contractual arrangements and rationally calculating the risks and compensation accordingly. There is no recognition of disparity in power, or class, or status. People simply meet and resolve their differences on a common ground. They buy and sell what each one wants. They are not dependent or bound, but independent and free, enough so that judges can infer how they would have acted if they actually bargained. This, Shaw argued, is how people think, decide, and act, and it can be sanctioned legally. Shaw could assume people acted this way because he was convinced that the exchange and market model of human interaction was beyond question. People governed their lives through

freedom of contract; the legal system, by implying a contract in the *Farwell* case, ratified the process.

Commonwealth v. Hunt

Leonard Levy has admirably summarized the circumstances leading to the indictment of the union for conspiracy.

[The] case was instigated, in 1840, not by an employer but by a disgruntled employee, one Jeremiah Horne, a member of the Boston Journeymen Bootmakers' Society. The union fined Horne for having done some extra work without pay, an infraction of union rules. The fine was removed after Horne's employer recompensed him, but he seems to have borne a grudge. Soon fined again for another infraction, he refused to pay despite the advice of his employer who even offered to give him the money. The union countered by expelling Horne, requiring that he sign its rules and pay fines totaling seven dollars as a condition of his reinstatement. When he stubbornly persisted in his defiance, again rejecting his employer's advice to become a member in good standing, the union insisted that he be fired. The employer, probably anxious to avoid a strike, complied; he knew the union's rule that its members would not work for anyone employing a non-member whose discharge had been demanded. Horne then complained to the District Attorney, Samuel D. Parker, who seems to have mustered a loathing for workers' organizations. . . .³⁴

As a result, an indictment was shortly forthcoming.

Was the attempt by the union, "to maintain what a later age called a closed shop,"³⁵ an illegal conspiracy? Shaw's classic test required that "a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."³⁶ Either unlawful purpose, or the use of unlawful means to accomplish a lawful purpose, would do. Shaw found neither an unlawful purpose nor an unlawful means in the activities of the Journeymen Bootmakers as enumerated in the indictment. No illegal purpose or means had been alleged in the indictment, and no charge of conspiracy was therefore sustainable.

The formation of a combination by journeymen was not in itself an unlawful act. . . . Whether a combination was a criminal conspiracy or not depended on its purposes. In this case the prosecution had treated the society's constitution as proof in itself of criminality, and had not specified any illegal purpose. But all that the constitution showed was that the society's purpose was to induce all those engaged in the

bootmaking trade to join. This provided no proof of illegality, but only of intent to strengthen the power of the society. Such power might be used for "damaging or pernicious" purposes or for "useful and honorable" ones. But in either event it was the objects of a society, as expressed in its constitution or articulated during a strike, which henceforth would determine its legal status.³⁷

Why didn't Shaw believe that the bootmakers were engaged in an illegal conspiracy? What rationale did he adopt to support his insight? The answers seem to lie in Shaw's application of freedom of contract to the circumstances in *Hunt*. As he examined the various counts in the indictment, Shaw made a number of observations.

Shaw understood that members of the union "would not work for a person, who, after due notice, should employ a journeyman not a member of their society."³⁸ As to whether these were illegal means, Shaw said: "The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests."³⁹ Each individual had a right to contract; an aggregate of those rights, exercised with lawful purpose or means, should not change anything in a legal sense. Groups, like individuals, should be allowed within certain limits to pursue their own self-interests, in fact, they were expected and encouraged to do so.⁴⁰

To reinforce this notion, Shaw turned to a different situation. "We do not understand that the agreement was, that the defendants would refuse to work for an employer, to whom they were bound by contract for a certain time, in violation of that contract. . . . It is perfectly consistent . . . that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his employment, if such employer, when free to act, should engage with a workman, . . . not a member of the association. If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question."⁴¹ All their activity amounted to under the indictment "was an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labor."⁴²

Shaw accomplished much in a few short pages. First he juxtaposed what he concluded was a legitimate activity—gathering together to decide whether or not to enter freely into contracts in the marketplace—with what might be an illegitimate purpose or means: violating or breaking contracts by stopping work. Second, he suggested that either

in entering or violating agreements, the idea of freedom of contract predominated. As clear as it was that workers were free to contract, it was equally clear that breaking contracts was intolerable. The market system might flounder if contract violations were countenanced. The assertion that people had an "acknowledged right to contract with others for their labor" meant little if those contracts could be violated with impunity. The sanctity of the promise had to be protected: agreements should be encouraged, violations discouraged.

To highlight the dichotomy between entering and breaking contracts, Shaw then discussed *Boston Glass v. Binney*, a case in which one employer allegedly enticed an employee to leave another employer in violation of his contract. The case, Shaw said, "acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract."⁴³ In other words, Shaw supported the workers in their quest to contract freely within the conventions of mid-nineteenth-century Massachusetts life, but also supported the contract a worker freely entered. In any event, Shaw established that unions under certain circumstances belonged in the marketplace as potential contracting entities.

Finally, Shaw dealt with the count in the indictment alleging that the purpose of the conspiracy was "to impoverish" others illegally, in particular Horne, the "disgruntled" bootmaker.

The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent. . . .⁴⁴

The idea of competition grew out of the idea of freedom of contract. People were free to maximize their interests; competition followed,

and, so the theory went, the public would benefit from greater choice and reduced costs. Some might be hurt, but the harm was a result of the natural operation of the marketplace, not of any activity that was formally illegal. Leonard Levy has noted that "Shaw was sufficiently objective to take into account what any realist must understand, that in the normal relations between employers and employees, bargaining inevitably involves restraints and pressures of a sort, as did competition itself. . . ."⁴⁵ From "the premise that competition among businessmen benefits the public, although some persons may suffer, Shaw had implied that competition among employers and employees, and among employees themselves, also benefits the public, although some may suffer."⁴⁶ As Levy analyzed it, "[t]he whole process was justified by the supposition that when men freely pursued their own interests, individually or in combination, society generally stood to gain."⁴⁷

In *Farwell*, Shaw had assumed that it was important to imply the existence of a contract to insure that in certain situations all concerned parties would benefit. If the employer and employee had not formally agreed on a contract, Shaw would impose his understanding of what he thought they would have agreed on if they had the opportunity. In *Hunt*, Shaw seemed to say that everyone should have the opportunity to enter freely into contracts. If people wished to pursue their self-interests, either by choosing when to contract or when not to contract, that behavior was as appropriate and legitimate for groups as it was for individuals. What was important was to encourage participation in the marketplace. In *Hunt*, Shaw suggested that if labor groups behaved in a certain way they belonged in the marketplace, just as individuals did. Labor unions, like individuals, were freely contracting entities.

If Shaw assumed a contractual universe in *Farwell*, he had also to allow the freedom to contract in *Hunt*. Though Shaw clearly feared at this time that group norms or activities might cause social dislocation,⁴⁸ he did not seem primarily concerned about it. The bootmakers did not appear to be threatening collective action that was coercive in a legal sense; they were just individuals acting together as they had every right to act individually. As Tomlins perceived, "in place of a corporative body restraining trade by its very nature," Shaw "found nothing but a group of free individuals who had agreed to improve their economic welfare by jointly refusing to work for employers of non-confederates."⁴⁹ Instead of analyzing how this group could distort the freedom to contract in a number of ways by aggregating, Shaw chose to emphasize their legitimacy "insofar as they had become and remained associations of free acting individuals."⁵⁰ The bootmakers were simply a voluntary, self-governing body.

In *Hunt* and *Farwell*, Shaw did not adopt a pro-labor or anti-labor stance, rather he analyzed the cases within a freedom of contract ideology which encompassed all kinds and forms of contractual activity. But a question remains: Why did Shaw frame the two cases within the same mode of analysis?

New Explanations

Over the last two decades, the study of the early republic has been dominated by historiographical discussions of two powerful paradigms: republicanism and liberalism. In addition to developing the constituent elements of each, historians have also ventured to guess as to the relationship between the two models of thought. An extended analysis of the historiographical debates would be inappropriate here, but a brief look at the complex categories of republicanism and liberalism might provide a framework for determining how Shaw constructed the opinions in *Farwell* and *Hunt*.

Shaw had his feet planted in both the eighteenth and nineteenth centuries—a better metaphor might be that he had one foot planted in each century. An earlier historiography might have referred to him as a “transitional” figure. At the very least, republicanism and liberalism had a profound impact during his lifetime.⁵¹ There is, of course, a risk of misusing or abusing the explanatory categories themselves. Republicanism and liberalism may have been called on to explain too much, to have become over-inclusive, and to have lost some of their explanatory bite. However, by employing them as suggestive devices, we might be able to shed new light on a conceptual universe that once appeared to historians as contradictory, confusing, or unexplainable.

The problem in employing the concepts of republicanism and liberalism for purposes of this brief essay is to articulate a working definition of them that will lend direction, but not one so truncated as to be simplistic—a shorthand that sufficiently conveys meaning out of a rich ongoing debate. There are several working definitions that fit these criteria by conveying much of the complexity of the concepts, but retaining sufficient precision to be useful in suggesting Shaw’s patterns of thought. The definitions come from G. Edward White’s recent volume on the Marshall Court,⁵² and from the labor historian Sean Wilentz.

White argues that “Marshall Court jurisprudence can be seen as heavily influenced by a special version of republicanism, a version that represented a fusion of classical republicanism and other trans-Atlantic

ideologies.”⁵³ White is sensitive to what he describes as the “accommodation of republican theory to cultural change.” He has skillfully taken into account modern historiography on the subject, deftly bringing together and summarizing various strands of republicanism to explain how the Marshall Court justices approached their jurisprudence.⁵⁴

There are three elements to White’s use of the theory of republicanism, and the first is an understanding of classical republicanism:

The basic premise of classical republicanism was that in the ideal form of government, a republic, individual liberty and self-fulfillment would be achieved through civic virtue, the active participation by citizens in political life. The purpose of a representative government was to ensure this citizen participation and to eradicate unrepresentative centers of power, such as institutions modeled on monarchical courts, that spawned corruption. Classical republicanism also advocated the wider distribution of property among citizens so as to forestall the kind of dependence that led to demagoguery and mass unrest. But both civic participation and the distribution of wealth were to be limited by the imperatives of social class: the virtuous citizens that managed a republic were to be enlisted from a relatively narrow circle of educated, propertied, socially prominent persons who would represent others.⁵⁵

Second, White demonstrates that this classical republicanism fused with a number of trans-Atlantic ideologies to form a “special version of republicanism.” In particular, he argues that “the concept of virtue subordinated individual self-interest to the good of society as a whole, and citizen participation was essentially a disinterested exercise. Here classical republicanism found its posture in awkward juxtaposition to the loosening of hierarchical economic relationships that marked the emergence of a capitalist economy. . . .”⁵⁶ This “loosening” signified the rise of liberalism, one of the trans-Atlantic ideologies fusing with republicanism.

The redefinition of the value of individual economic activity in a market has been identified as the dominant factor in fostering the emergence of an ideology that was in a sense competitive with classical republicanism. . . . Liberalism, in its eighteenth- and early-nineteenth-century forms, was founded on the premise that individual self-fulfillment could be best encouraged by allowing individuals to pursue their economic, and to some extent their political, self-interests. Liberalism was an ideology of permissiveness rather than an ideology of restraint: it encouraged free markets, restricted governmental intervention in the affairs of individual citizens, and to a limited degree promoted a broadening of the political base of government. While liberalism shared with classical republicanism a sense that property was an important foundation of society, its advocates tended to emphasize the role of property as a source of economic freedom

and productivity rather than as a source of political and social stability. Liberalism also tended to encourage the pursuit of commerce for both individual self-fulfillment and social improvement; commerce had been identified by classical republicanism as a source of luxury and decay. It is possible to characterize many of the important debates of early-nineteenth-century political economy, such as the role of corporations or the status of economic transactions based on credit, as being clashes between classical republican and liberal points of view.⁵⁷

Third, White shows how “American republican theory” accommodated cultural change, for example, through “the proposition that economic activity should simultaneously protect property rights and be responsive to commerce.”⁵⁸ On this subject, White summarizes a critical problem.

The principal characteristic of early-nineteenth-century American economic life was the emergence of a capitalist market economy, in which relationships were principally defined by bargaining power in the exchange of goods and services rather than by pre-existing social status. The advent of market capitalism was noted by contemporaries, many of whom identified a market economy as a transforming feature of American society. Two broad sets of responses to the emerging market economy may be noted: a classical republican and a liberal response. The first response tended to see the market and its institutions, such as the corporation, as a threat to republican virtue. The marketplace was a potential source of corruption, an arena in which unchecked self-interest could flourish, a vehicle for the sudden redistribution of property and wealth, and a distraction from civic pursuits. The latter response embraced the market and made it a source not only of increased prosperity, wealth, and “improvements,” but as a forum in which equality, in the form of enhanced competitive opportunities, could be promoted and economic privilege broken down. Few economic theorists articulated a wholly republican or wholly liberal response to the market; most theoretical positions were a blend of the two responses. But the responses framed discussions of economic theory in the early nineteenth century.⁵⁹

These excerpts provide useful historical portraits of republicanism, liberalism, and the tensions between the two produced by the events of nineteenth-century American life.

Sean Wilentz, however, adds another important dimension to the discussion and demonstrates how organizing political ideologies, like republicanism, had thoroughly permeated nineteenth-century society. Wilentz notes in analyzing artisan festivals in New York City between 1788 and 1837:

Most striking were the ways in which the artisans invoked the key

concepts of the Atlantic republican tradition, "independence," "virtue," "commonwealth" (or "community"), and "citizenship." Independence, they explained, stood not only for the freedom to ply their trades outside the shackles of British power, but also for the freedom to work without the internal restraints and corrupt privilege characteristic of monarchies. As they honored the interdependence of their own workshop labors, the craftsmen listened to endless perorations on how American mechanics lived in a land of personal independence and equal rights where, as one General Society member put it, no "offensive government" would turn the artisans into dependent "vassals and slaves." Yet as they spoke of independence, the artisans also shied away from endorsing the pursuit of self-interest for its own sake. Each citizen, artisan spokesmen explained, had to put the interests of the entire community before his own, exercising what they called, in classical republican style, "virtue." "Be virtuous," the Reverend Samuel Miller enjoined his artisan audience in 1795, to be followed two years later by the master sailmaker George Warner's declaration that those who sought personal gain alone were unvirtuous, "distinct from the general interests of the community." Ambition for power or riches, later speakers confirmed, would only leave America, like the republics of antiquity, "enervated by luxury [and] depressed by tyranny," a land where "the [poor] will be found in a state of vassalage and dependence on the [rich]." The only way to secure the Republic, they concluded, was for virtuous men of middling property, those whom Warner described as men who lived in "a state of mediocrity," to be active citizens, engaged in the political process.⁶⁰

White focuses on the development of republicanism and liberalism in the ideas of elites, particularly political elites—officeholders, theorists, and others, who had a certain facility in the formulation and manipulation of political symbols. Wilentz reminds us that citizens other than elites had a stake in the political discourse, took it seriously, and tried to shape it to their own ends. In part, what Wilentz describes is the attempt by the working-class population to seize the high road of republican rhetoric for their own, to infuse it with their meaning. Republicanism was thus embraced by the many, as well as the few.

Christopher Tomlins has recently built on Wilentz's insights:

The incipient trade communities of the seaboard cities fragmented in the fifty years after the Revolution as commercial investment in domestic industry transformed the relations of workshop production, bringing about the homogenization of journeymen and smaller masters and dividing them from the new generation of capitalist employers who now controlled productive enterprise. This fragmentation was rendered particularly significant by its occurrence within an ideological context dominated by heated debates over the meaning of the idioms of "liberty" and "independence" so central to republican thought. To many of the

revolutionary generation, the liberty and independence which they celebrated had promised the establishment of conditions which would enable free men to contract with one another on a basis of real equality by guaranteeing their economic and social independence. For others, however, a revolution fought in behalf of liberty and property necessarily sanctified the liberty of individuals to use their property *productively*, free from the restraints of collective regulation. To the latter, that is, revolutionary liberty stood for liberty of industry—entrepreneurial licence. Republican guarantees of independence and autonomy meant no more than the provision of means whereby individuals might constitute and regulate their own lives and property through the medium of contract. They did not encompass measures to ensure their substantive equality in the bargaining which took place.

To the journeymen, the entrepreneurial interpretation of republicanism was triply unattractive. It was hostile to the traditions of the trade community, for these implied the legitimacy of restraints on individual liberty and property; it justified the production and marketing innovations which were undermining the status of journeymen within their own trades; and ultimately it threatened the revolutionary achievement itself, for as the journeymen conceived it revolutionary society was founded on virtue, and the major foundation of virtue was their own manly independence. Their answer was to recast the central concepts of revolutionary republicanism as explicitly collective phenomena.⁶¹

The most meaningful contours of the rhetoric of republicanism and its aftermath seem clear in the hands of White and Wilentz, but do they provide any insight into Shaw's opinions in *Hunt* and *Farwell*? These opinions are examples of the ambiguities of republicanism modified by liberalism, and demonstrate that pro- and anti-labor are not the most appropriate categories from which to start dissecting the opinions. The starting point ought to be the shared values that led to Shaw's struggle to analyze the legal problems in the two cases as similar and unified and not as dissimilar and inconsistent. The strains of thought that dominated Shaw's legal rhetoric reveal the various influences upon him. A strong measure of liberalism is present, modifying, though not completely, traditional understandings of republicanism. Shaw, at least implicitly, fused the two traditions.

The crucial, constituent elements in Shaw's opinions are virtue, self-interest, independence, and equality. But their presence is telling, indicating how their meaning has changed over time. In the past, "virtue" demanded that self-interest be "subordinated . . . to the good of society as a whole."⁶² Now Shaw claimed that people were expected to act in a manner "as best to subserve their own interests."⁶³ Were such actions lacking in virtue? Virtue, after all, assumes a sacrifice of

self-interest for the benefit of the whole. Shaw, however, was not suggesting that virtue was moribund. He was saying that the relationship between interest and virtue had been transformed, if not redefined. The problem remained the same—how does society guarantee that the “whole” prospers? But virtue was beginning to look different, to take on a new meaning in political economy. “Economic freedom,” which in Shaw’s words was being “free to work for whom [you] please,”⁶⁴ lead to “productivity,” and “individual self-fulfillment” was linked to “social improvement.”⁶⁵ The pursuit of self-interest was no longer subordinated to the whole; instead the assumption was that self-interest served the whole, and society generally benefitted from its pursuit.

Shaw’s reference to “competition” is instructive as to how the “whole” benefited from self-interest. Shaw claimed that some economic injury to individuals may occur because of competition, but that “it is through that competition, that the best interests of trade and industry are promoted.” More important, the “object” of competition may be “public spirited.”⁶⁶ Pursuing self-interest may promote the best interests of both “trade” and the “public,” as goods are more widely distributed and “prosperity” occurs. The greater “social improvement” was the goal, if not the rationalization.

Other rhetorical problems quickly fell into place. Dependency was still frowned on; the wider distribution of property guaranteeing stability countered the active pursuit of commerce. Shaw was still concerned with order, but focused more on the economic vehicles that created independent actors, “free to work . . . , or not to work.”⁶⁷ The opportunity to participate in the marketplace promoted “independence,” rejecting the old world notions of deference, hierarchy, and social status, along with the fear of dependency.⁶⁸

The language of independence and freedom, the exchange or bargaining world of contract that Shaw described in *Farwell* and *Hunt*, also carried within it the ambiguous ideas of “equality” or “equal rights.” Being free to bargain in the marketplace meant, in theory, the opportunity to be dealt with equally, though there were few, if any, guarantees about the result of bargaining. As Wilentz and Tomlins point out, the rhetoric of equality was central to the artisanal understanding of republicanism, an understanding that differed from the entrepreneurial implications of the pursuit of self-interest. Artisans were suspicious of appeals to self-interest which were not tied, as in the past, to notions of community, nor were they satisfied with the “recasting” of the relationship between interests and community. But their insistence on independence and equality could not be ignored. Shaw, in recognizing

in *Hunt* that the union was not engaged in illegal activity, was at least implicitly recognizing the tradition out of which the “independence and equality” argument grew. Shaw, in effect, said that unions fit as part of the universe of freely bargaining actors. In particular they were voluntary, self-governing individuals in a body constituted to represent their interests, a kind of republican island community on its own. If workers were really serious about being treated equally, Shaw would treat them as equal and free, and admit them into the marketplace, like everyone else, and just like Nicholas Farwell too.⁶⁹

This is the complicated world of meaning, a changing one, perhaps contradictory and certainly contested, that Shaw brought with him to *Farwell* and *Hunt*. The outcomes of the cases were not predetermined, but if the opinions are examined in light of what we now know about the republican and liberal ideologies current in Shaw’s time, it is easier to understand why the opinions are more unified and connected than previously thought, and how Shaw might have concluded that they could be analyzed similarly.

Within a decade or so of Shaw’s decisions in *Farwell* and *Hunt*, Massachusetts held a constitutional convention at which Henry Williams of Taunton invoked the following image:

In a free government like ours, employment is simply a contract between parties having equal rights. The operative agrees to perform a certain amount of work in consideration of receiving a certain amount of money. The work to be performed is, by the contract, an equivalent for the money to be paid. The relation, when properly entered into, is therefore one of mutual benefit. The employed is under no greater obligation to the employer than the employer is to the employed. . . . In the eye of the law, they are both freemen—citizens having equal rights, and brethren having one common destiny.⁷⁰

The argument was stated as an unassailable truth, based on common observation of everyday life. Like Shaw’s assumption in *Farwell* about how contract bargains must work, Williams asserted that “the work to be performed is, by the contract, an equivalent for the money to be paid.” The relationship was of “mutual benefit”—each party individually believing he or she had something to gain. Williams’s imagery, as in *Hunt*, was of “freemen,” with “equal rights,” “brethren” bound together for their “mutual benefit” because, like the old republican norms, a redefined virtue held them together, sharing “one common destiny”—presumably the interest of both individuals and society as a whole. In *Hunt* and *Farwell*, Shaw subtly transformed these ideas, making them more presentable and intelligible for generations to come.

NOTES

I would like to thank Jim Atleson, Dianne Avery, Jack Schlegel, and Rob Steinfeld for contributing valuable suggestions.

1. Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128, 1151-52 (1932).
2. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 86-88 (1938).
3. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 192, 199 (1957).
4. 45 Mass. (4 Met.) 49 (1842).
5. 45 Mass. (4 Met.) 111 (1842).
6. L. LEVY, *supra* note 3, at 192.
7. *Id.*
8. *Id.*
9. Nelles, *supra* note 1, at 1151.
10. M. HOWE, READINGS IN AMERICAN LEGAL HISTORY 433-529 (1949).
11. L. LEVY, *supra* note 3, at 199.
12. Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591, 639 (1984).
13. *Id.* at 640. Raymond Hogler also refers to the perception that historically the two cases appear to be an "anomaly." Hogler, *Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System*, 91 DICK. L. REV. 697, 733 (1987).
14. C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960, at 44 n.40 (1985). Oddly enough in the conclusion of his book, Levy himself comes close to suggesting something along these lines, though he seems to refer to it more generally as "individualism."

Despite the conflicting impact of the two decisions on labor's fortunes and the fact that they are not comparable from a legal standpoint they harmonize as a part of Shaw's thought. He regarded the worker as a free agent competing with his employer as to the terms of employment, at liberty to refuse work if his demands were not met. As the best judge of his own welfare, he might assume risks, combine in a closed shop, or make other choices. For Shaw, workers possessed the same freedom of action enjoyed by employers against labor and against business rivals. Although the fellow-servant and trade-union decisions had the effect of dividing two loaves, the baker fashioned them from similar ingredients, legal ones excepted.

- L. LEVY, *supra* note 3, at 325.
15. C. TOMLINS, *supra* note 14, at 44.
16. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 209-10 (1977).
17. *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 50 (1842).
18. *Id.* at 51. Horwitz claimed, of Loring's argument, that "rarely in the history of American law has so significant a case... been so thoroughly determined by the intellectual impoverishment of counsel." He is, of course, referring to Loring's concession that respondeat superior did not apply. Though Loring's concession was fatal, it is possible to look at his argument, stressing contractarian principles, as an attempt to highlight, and therefore, capitalize on the most contemporary, even trendy, shift in the doctrinal winds. It may be impoverishment, but if it is, he got trapped in the shifting

currents. Respondeat superior may have looked like a winner theoretically, but not once Shaw examined it. Also Loring may have been trying to launch a preemptive strike. If the contractarian movement was so overwhelming, as Horwitz argues, Loring did not have much choice. M. HORWITZ, *supra* note 15, at 210.

19. *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 56 (1842).

20. *Id.* at 55-56.

21. *Id.* at 56.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 51.

26. *Id.* at 56.

27. *Id.* at 57.

28. *Id.*

29. *Id.*

30. *Id.* There was a quaint old Massachusetts practice in certain kinds of property cases of throwing the risks of various injuries back on property owners, who, it was assumed, should have foreseen those risks and protected themselves accordingly. See *Thurston v. Hancock*, 12 Mass. 220 (1815), and *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823).

31. *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 58 (1842).

32. *Id.*

33. *Id.* at 59.

34. L. LEVY, *supra* note 3, at 185.

35. *Id.* at 185-86.

36. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842).

37. C. TOMLINS, *supra* note 14, at 42.

38. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 130 (1842).

39. *Id.*

40. C. TOMLINS, *supra* note 14, at 42-44; see discussions in text, *supra*, at note 16.

41. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 130-31 (1842).

42. *Id.* at 131.

43. *Id.* at 133.

44. *Id.* at 134.

45. L. LEVY, *supra* note 3, at 190-91.

46. *Id.* at 191.

47. *Id.* at 204.

48. C. TOMLINS, *supra* note 14, at 38-42, and Tomlins, *Criminal Conspiracy and Early Labor Combinations: Massachusetts, 1824-1840*, 28 LAB. HIST. 370 (1987).

49. C. TOMLINS, *supra* note 14, at 44.

50. *Id.*

51. In this way, I think Shaw is different from his contemporary, Joseph Story, who seemed to resent, after a while, being in the nineteenth century. You might say he was dragged kicking and screaming forward in time. See R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1985), and Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1134-45 (1988).

52. G. WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* (1988).

53. *Id.* at 49.

54. *Id.* at 48-49, nn.95, 96.

55. *Id.* at 49-50.

56. *Id.* at 50.

57. *Id.* at 50–51.

58. *Id.* at 49.

59. *Id.* at 61.

60. Wilentz, *Artisan Republican Festivals and the Rise of Class Conflict in New York City, 1788–1837*, in *WORKING-CLASS AMERICA* 37, 49 (M. Frisch & D. Walkowitz ed. 1983). In particular, Wilentz is interested in the

need to understand how workers rearticulated widely held republican beliefs into a critique of American capitalism. It is one thing to take account, as have several fine studies, of what Foner calls “the contradiction between republican thought and the expansion of capitalist production and market relations.” It is quite another to show how these contradictions arose and why workers grappled with them in the ways that they did. Put another way, the history of American working-class republicanism has yet to be explained fully as a *process* of ideological confrontation, negotiation, and redefinition, a fitful process that changed the meanings of old terms as much as it revived them, and that only gradually pitted employers against employees. To analyze this process, it is vital to examine the common roots of both radical republicanism and the entrepreneurs’ republican defense of emerging industrial capitalism and then to see how entrepreneurial republicanism tested and helped to forge—and was in turn tested and forged by—the very different republican notions of labor radicals.

Id. at 38.

Along the way, Wilentz argues that

Through the early nineteenth century, the New York artisans’ economic liberalism, the “middle-class” possessive individualism so often ascribed to them as a matter of course, was tempered by an older spirit of cooperation in the workshop and republican notions of virtue and commonwealth. The breakdown and eventual bifurcation of this set of ideals signified far more than the evocation of “equal rights” and the spirit of 1776 so often stressed by historians. Through the mid-1820s, artisan republicanism stood for an entire moral order, based on the interlocking concepts of independence, virtue, and citizenship and closely related to the “pre-capitalist” features of artisan production and distribution.

Id. at 63.

The evocation by historians of “equal rights” that Wilentz refers to includes A. DAWLEY, *CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN* (1976) (a study of Lynn shoemakers). See generally, S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850* (1984).

61. C. TOMLINS, *supra* note 14, at 34–35. See also Tomlins, *supra* note 48, and Wilentz, *Conspiracy, Power, and the Early Labor Movement: The People v. James Melvin et al., 1811*, 24 *LAB. HIST.* 572 (1983).

62. G. WHITE, *supra* note 52, at 50.

63. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 130 (1842).

64. *Id.*

65. G. WHITE, *supra* note 52, at 51.

66. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 134 (1842).

67. *Id.* at 130.

68. White perceptively asks “Why would the new, ‘equal’ competitors not eventually sort themselves out into another hierarchy, this one determined by the market?” G. WHITE, *supra* note 52, at 68.

69. Obviously arguments could be and were raised, in a variety of ways, against the rights of unions. I do not mean to suggest for a moment that Shaw was not aware of them; I think, at least at this point, he was occupied with a paradigm that tended to make him include unions within a way of thinking rather than exclude them. For contemporaneous legal arguments against the union in the *Hunt* case that Shaw certainly knew about, see Tomlins, *supra* note 48. *See also*, C. TOMLINS, *supra* note 14, at 40–44.

70. The subject of the debate was the qualification of voters. 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS, IN THE STATE CONVENTION, ASSEMBLED MAY 4TH 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 285 (1853), also as quoted in Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 351 (1989).