Chapter 2

Private Government

Communist Dictatorships in Our Midst

Imagine a government that assigns almost everyone a superior whom they must obey. Although superiors give most inferiors a routine to follow, there is no rule of law. Orders may be arbitrary and can change at any time, without prior notice or opportunity to appeal. Superiors are unaccountable to those they order around. They are neither elected nor removable by their inferiors. Inferiors have no right to complain in court about how they are being treated, except in a few narrowly defined cases. They also have no right to be consulted about the orders they are given.

There are multiple ranks in the society ruled by this government. The content of the orders people receive varies, depending on their rank. Higher-ranked individuals may be granted considerable freedom in deciding how to carry out their orders, and may issue some orders to some inferiors. The most highly ranked individual takes no orders but issues many. The lowest-ranked may have their bodily movements and speech minutely regulated for most of the day.

This government does not recognize a personal or private sphere of autonomy free from sanction. It may prescribe a dress code and forbid certain hairstyles. Everyone lives under surveillance, to ensure that they are complying with orders. Superiors may snoop into inferiors' e-mail and record their phone conversations. Suspicionless searches of their bodies and personal effects may be routine. They can be ordered to submit to medical testing. The government may dictate the language spoken and forbid communication in any other language. It may forbid certain topics of discussion. People can be sanctioned for their consensual sexual activity or for their choice of spouse or life partner. They can be sanctioned for their political activity and required to engage in political activity they do not agree with.

The economic system of the society run by this government is communist. The government owns all the nonlabor means of production in the society it governs. It organizes production by means of central planning. The form of the government is a dictatorship. In some cases, the dictator is appointed by an oligarchy. In other cases, the dictator is self-appointed.

Although the control that this government exercises over its members is pervasive, its sanctioning powers are limited. It cannot execute or imprison anyone for violating orders. It can demote people to lower ranks. The most common sanction is exile. Individuals are also free to emigrate, although if they do, there is usually no going back. Exile or emigration can have severe collateral consequences. The vast majority have no realistic option but to try to immigrate to another communist dictatorship, although there are many to choose from. A few manage to escape into anarchic hinterlands, or set up their own dictatorships.

This government mostly secures compliance with carrots. Because it controls all the income in the society, it pays more to

people who follow orders particularly well and promotes them to higher rank. Because it controls communication, it also has a propaganda apparatus that often persuades many to support the regime. This need not amount to brainwashing. In many cases, people willingly support the regime and comply with its orders because they identify with and profit from it. Others support the regime because, although they are subordinate to some superior, they get to exercise dominion over inferiors. It should not be surprising that support for the regime for these reasons tends to increase, the more highly ranked a person is.

Would people subject to such a government be free? I expect that most people in the United States would think not. Yet most work under just such a government: it is the modern workplace, as it exists for most establishments in the United States. The dictator is the chief executive officer (CEO), superiors are managers, subordinates are workers. The oligarchy that appoints the CEO exists for publicly owned corporations: it is the board of directors. The punishment of exile is being fired. The economic system of the modern workplace is communist, because the government—that is, the establishment—owns all the assets,[1] and the top of the establishment hierarchy designs the production plan, which subordinates execute. There are no internal markets in the modern workplace. Indeed, the boundary of the firm is *defined* as the point at which markets end and authoritarian centralized planning and direction begin.[2]

Most workers in the United States are governed by communist dictatorships in their work lives. Usually, those dictatorships have the legal authority to regulate workers' off-hour lives as well—their political activities, speech, choice of sexual partner, use of recreational drugs, alcohol, smoking, and exercise. Because most employers exercise this off-hours authority irregularly, arbitrarily, and without warning, most workers

are unaware of how sweeping it is. Most believe, for example, that their boss cannot fire them for their off-hours Facebook postings, or for supporting a political candidate their boss opposes. Yet only about half of U.S. workers enjoy even partial protection of their off-duty speech from employer meddling.[3] Far fewer enjoy legal protection of their speech on the job, except in narrowly defined circumstances. Even where they are entitled to legal protection, as in speech promoting union activity, their legal rights are often a virtual dead letter due to lax enforcement: employers determined to keep out unions immediately fire any workers who dare mention them, and the costs of litigation make it impossible for workers to hold them accountable for this.

I expect that this description of communist dictatorships in our midst, pervasively governing our lives, often to a far greater degree of control than the state, would be deeply surprising to most people. Certainly many U.S. CEOs, who think of themselves as libertarian individualists, would be surprised to see themselves depicted as dictators of little communist governments. Why do we not recognize such a pervasive part of our social landscape for what it is? Should we not subject these forms of government to at least as much critical scrutiny as we pay to the democratic state? My project in this lecture is to explain why public discourse and political philosophy largely neglect the pervasiveness of authoritarian governance in our work and off-hours lives and why we should return our attention to it, and to sketch some thoughts as to what we should do about it—for neglect of these issues is relatively recent. They were hot topics of public discourse, academic and legal theorizing, and political agitation from the Industrial Revolution through the New Deal. Now they are the province of members of marginalized academic subfields—labor historians, labor law

scholars, and some labor economists—along with a few labor lawyers and labor activists.

Our currently dominant tools for discerning our work lives were manufactured before the Industrial Revolution and originally designed as viewfinders to the future. They were rejected as useless by organized labor movements that arose in recognition of the fundamental irreversible changes in workers' prospects brought about by the Industrial Revolution. They have been redeployed since the grave decline of organized labor movements, but now as blinders on our actual institutional landscape of work. We need different instruments to discern the normatively relevant features of our current institutions of workplace governance. In particular, we need to revive the concept of *private government*.

Private Government: The Very Idea

Most modern workplaces are private governments. By this, I do not mean merely that they are in the so-called private sector, and have some internal structure of authority—as specified, for instance, in the rules for corporate governance. I refer rather to a particular sort of constitution of government, under which its subjects are unfree.

The notion of *private government* may seem a contradiction in terms. In the impoverished vocabulary of contemporary public discourse, and to a considerable extent in contemporary political philosophy, *government* is often treated as synonymous with the state, which, by supposed definition, is part of the *public sphere*. The supposed counterpart *private sphere* is the place where, it is imagined, government ends, and hence where individual liberty begins. Here is a characteristic expression of this view in U.S. public discourse: "Giving up our very freedom

for a system that allow[s] the government to further meddle in our private lives . . . [is] not the answer. . . . Every single thing government does to increase its own power increases the size of *its slice* of the liberty pie. . . . Since there are only two slices, every time the government's slice of the liberty pie grows, the citizens' slice is *reduced*."[4] That is according to Ken Cuccinelli, the former attorney general of Virginia. But nothing hangs on him. He is merely expressing a view widely accepted in public discourse, certainly among libertarians, but not only among them. Let's unpack the confusions.

First, government exists wherever some have the authority to issue orders to others, backed by sanctions, in one or more domains of life.[5] The modern *state* is merely one form of government among others, defined by Max Weber as "a compulsory organization" that asserts a monopoly on determining the legitimate use of force over a territory.[6] Popular usage before the nineteenth century is much clearer about the government/state distinction than we are today. Here is John Adams, replying to Abigail's famous letter asking him to "remember the ladies":

> We have been told that our struggle has loosened the bonds of government every where; that children and apprentices were disobedient; that schools and colleges were grown turbulent; that Indians slighted their guardians, and negroes grew insolent to their masters. But your letter was the first intimation that another tribe, more numerous and powerful than all the rest, were grown discontented. . . . Depend upon it, we know better than to repeal our masculine systems.[7]

Here Adams frankly acknowledges that government is "every where"—parents (and *govern*esses) exercise government over children, masters over apprentices, teachers over students,

guardians over Indians, masters over slaves, husbands over wives. We have seen from my previous lecture that this understanding of the scope of government was equally familiar to actors in seventeenth-century England.

Now consider the public/private distinction. If something is legitimately kept private *from* you, that means it is none of your business. This entails at least one of the following: you are not entitled to know about it, your interests have no standing in decisions regarding it, you aren't entitled to make decisions regarding it or to hold those who do accountable for the effect their decisions have on you. If it is private *to* you, that means it *is* your business, *and* you may exclude others from making it any of theirs. This entails at least one of the following: you are entitled to keep others from knowing about it; you need not consider others' interests in making decisions regarding it; you are not accountable to others for your decisions regarding it; you are entitled to exclude others from making decisions regarding it.

If something is *public*, that means it is the business of a more or less well-defined group of people (members of *the public*), such that no one is entitled to exclude any member of the group from making it their business. Publicity in the informational sense typically extends much further than publicity with respect to standing, decision making, and accountability. The latter three categories refer to the governance of the thing in question. Its public status, with respect to governance, involves means by which the public asserts standing to make claims regarding its governance, and organizes itself to make collective decisions regarding it, and/or hold accountable the individuals elected or appointed to make such decisions.

Privacy is relative to persons. A thing that is private with respect to some persons may be public with respect to others. A

private club is private from nonmembers, but generally a public thing to its members: the club will typically have meetings to which its members are invited, in which they learn about the club's activities and finances, insist that their interests be taken into account in its operations, make decisions about it, and hold officers of the club accountable. It follows that there is no single public sphere or a single private sphere in society. There are many spheres, and which are public or private depends on who you are.[8]

Today we associate the state with "the" public sphere, and things that are not the state's business, but individuals' own business, with "the" private sphere. Insofar as these associations are thought to be inherent, the idea of *private government* would appear to be contradictory. Isn't everything in the *private sphere* part of individual liberty, and everything subject to *public* (government, confusedly limited to state) control a constraint on individual liberty? That is Cuccinelli's idea, which reflects associations entrenched in contemporary public discourse.

But of course the association of the state with the public sphere is not inherent. It is a contingent social achievement of immense importance. The centuries-long struggles for popular sovereignty and a republican form of government are attempts to make the state a public thing: something that is the people's business, transparent to them, servant to their interests, in which they have a voice and the power to hold rulers accountable. Authoritarian governments insist on the opposite—that the affairs of state are the private business of the rulers.

This point generalizes to *all* governments, not just governments run by the state. You are subject to *private government* wherever (1) you are subordinate to authorities who can order you around and sanction you for not complying over some

domain of your life, and (2) the authorities treat it as none of your business, across a wide range of cases, what orders it issues or why it sanctions you. A government is private with respect to a subject if it can issue orders, backed by sanctions, to that subject in some domain of that subject's life, and that subject has no say in how that government operates and no standing to demand that their interests be taken into account, other than perhaps in narrowly defined circumstances, in the decisions that government makes. Private government is government that has arbitrary, unaccountable power over those it governs. This of course is a matter of degree. Its powers may be checked in certain ways by other governments, by social norms, and by other pressures.

Note that *the privacy of a government is defined relative to the governed, not relative to the state*. The notion of governments that are kept private from the state is much more familiar: we speak of corporate governance, church governance, and so forth, in referring to legal entities that are private in relation to the state. That notion of private government abstracts from the people who are governed and their relation to these governments. It focuses only on the fact that the state is kept out of decision-making in these governments. My definition of private government focuses on the fact that, in many of these governments, the governed are kept out of decision-making as well.

Now consider the connections of government to freedom. Cuccinelli depicts a zero-sum trade-off between the liberties of the state and those of its citizens. But there are at least three concepts of freedom: negative, positive, and republican. If you have negative freedom, no one is interfering with your actions. If you have positive freedom, you have a rich menu of options effectively accessible to you, given your resources.[9] If you have republican freedom, no one is dominating you—you are subject

to no one's arbitrary, unaccountable will.[10] These three kinds of freedom are distinct. A lone person on a desert island has perfect negative and republican freedom, but virtually no positive freedom, because there is nothing to do but eat coconuts. An absolute monarch's favorites may enjoy great negative and positive freedom if he has granted them generous privileges and well-paid sinecures. But they still lack republican freedom, since he can take their perks away and toss them into a dungeon on a whim. Citizens of prosperous social democracies have considerable positive and republican freedom, but are subject to numerous negative liberty constraints, in the form of complex state regulations that constrain their choices in numerous aspects of their lives.

All three kinds of freedom are valuable. There are sound reasons to make trade-offs among them. If we focus purely on negative liberty, and purely concerning rival goods, it *might* seem that Cuccinelli is correct that the size of the liberty pie is fixed: one agent's liberty over rival good *G* would seem to preclude another's liberty over it. But this is to confuse negative *liberties* with *exclusive rights*. There is nothing incoherent about a Hobbesian state of nature, in which everyone has the negative liberty to take, or compete for possession of, every rival good. That would be a social state of perfect negative liberty: it is a state of anarchist communism, in which the world is an unregulated commons. Such a condition would also be catastrophic. Production would collapse if anyone were free to take whatever anyone else had worked to produce. Even the natural resources of the earth would rapidly be depleted in an unregulated commons. Without property rights—rights to exclude others—people would therefore be very poor and insecure. Opportunities—*positive* liberties—are vastly greater with the establishment of a system of property rights.

This is a standard argument for a regime of private property rights. It is impeccable. Yet its logical entailments are often overlooked. Every establishment of a private property *right* entails a correlative duty, coercively enforceable by individuals or the state, that others refrain from meddling with another's property without the owner's permission. Private property rights thus entail massive net losses in negative liberty, relative to the state of maximum negative liberty. If Lalitha has private property in a parcel of land, her liberty over that parcel is secured by an *exclusive right* at the cost of the identical negative liberty of seven billion others over that parcel. If we are good libertarians and insist that the justification of any constraint on liberty must appeal to some other more important liberty, then the libertarian case for private property depends on accepting that positive liberty very often rightly overrides negative liberty. It follows that even massive state constraints on negative liberty (in the form of enforcements of private property rights) can increase total liberty (in an accounting that weights positive liberty more highly than negative, as any accounting that can justify private property in terms of freedom must).

State-enforced constraints on negative liberty can also increase total liberty through their enhancement of republican freedom. This is a venerable argument from the republican tradition: without robust protection of private property rights (which, as we have seen, entail massive net losses of negative liberty), a republican form of government is insecure, because the state is liable to degenerate into despotism, exercising arbitrary power over its subjects. This argument has been carried over in modern libertarian writing.[11]

This form of argument is equally applicable to substate private governments. If one finds oneself subject to private government—a state of republican unfreedom—one can enhance

one's freedom by placing negative liberty constraints on the power of one's private governors to order one around or impose sanctions on one's refusal to comply. This may involve state regulation of private governments. For example, a state's imposition of a requirement on employers that they refrain from discriminating against employees on the basis of their sexual orientation or identity enhances the republican and negative freedom of workers to express their sexual identities and choose their sexual and life partners. It also enhances their positive liberties, by enabling more people to move out of the closet, and thereby increasing opportunities for LGBT people to engage with others of like sexual orientation. The state's imposition of negative liberty constraints on some people can thereby enhance all three liberties of many more.

Private government is, thus, a perfectly coherent concept. To grasp it, we need to reject the false narrowing of the scope of government to the state, recognize that one's liberty can be constrained by private governors in domains of activity kept private from the state, and that increased state constraints on people's negative liberties can generate massive net gains in individual positive and republican freedoms. It can even generate net gains in their negative liberties, to the extent that the people being constrained by the state are private governors over others.

Workplace Government and the Theory of the Firm as Ideological Blinder

Employees are pervasively subject to private government, as I have defined it. Why is this so? As far as the legal authority of the employer to govern employees was concerned, the Industrial Revolution did not mark a significant break. Legally speaking,

employers have always been authoritarian rulers, as an extension of their patriarchal rights to govern their households.

The Industrial Revolution moved the primary site of paid work from the household to the factory. In principle, this could have been a liberating moment, insofar as it opened the possibility of separating the governance of the workplace from the governance of the home. Yet industrial employers retained their legal entitlement to govern their employees' domestic lives. In the early twentieth century, the Ford Motor Company established a Sociological Department, dedicated to inspecting employees' homes unannounced, to ensure that they were leading orderly lives. Workers were eligible for Ford's famous $5 daily wage only if they kept their homes clean, ate diets deemed healthy, abstained from drinking, used the bathtub appropriately, did not take in boarders, avoided spending too much on foreign relatives, and were assimilated to American cultural norms.[12]

Workers today might breathe a sigh of relief, except that most are still subject to employer governance of their private lives. In some cases, this is explicit, as in employer-provided health insurance plans. Under the Affordable Care Act (ACA), employers may impose a 30 percent premium penalty on covered workers if they do not comply with employer-imposed wellness programs, which may prescribe exercise programs, diets, and abstinence from alcohol and other substances. In accordance with this provision, Penn State University recently threatened to impose a $100 per month surcharge on workers who did not answer a health survey that included questions about their marital situation, sexual conduct, pregnancy plans, and personal finances.[13] In other cases, employer authority over workers' off-duty lives is implicit, a by-product of the employment-at-will rule: since employers may fire workers for

any or no reason, they may fire them for their sexual activities, partner choice, or any other choice workers think of as private from their employer, unless the state has enacted a law specifically forbidding employer discrimination on these grounds. Workplace authoritarianism is still with us.

The pro-market egalitarian aspiration toward nearly universal self-employment aimed to liberate workers from such governance by opening opportunities for nearly everyone to become their own boss. Why did it fail? Why are workers subject to dictatorship? Within economics, the theory of the firm is supposed to answer this question. It purports to offer politically neutral, technical, economic reasons why most production is undertaken by hierarchical organizations, with workers subordinate to bosses, rather than by autonomous individual workers. The theory of the firm contains important insights into the organization of production in advanced economies. However, it fails to explain the sweeping scope of authority that employers have over workers. What is worse, its practitioners sometimes even *deny* that workers lie under the authority of their bosses, in terms that reflect and reinforce an illusion of workers' freedom that also characterizes much of public discourse. Both the theory of the firm, and public discourse, are missing an important reality: that workers are subject to their employers' *private government*.

The pro-market egalitarian dream failed in part due to economies of scale. The technological changes that drove the Industrial Revolution involved huge concentrations of capital. A steam-powered cotton mill, steel foundry, cement or chemical factory, or railway must be worked by many hands. The case is no different for modern workplaces such as airports, hospitals, pharmaceutical labs, and computer assembly factories, as well as lower-tech workplaces such as amusement parks,

slaughterhouses, conference hotels, and big-box retail stores. The greater efficiency of production using large, indivisible capital inputs explains why few individual workers can afford to supply their own capital. It explains why, contrary to the pro-market egalitarian hope, the enterprises responsible for most production are not sole proprietorships.

But economies of scale do not explain why production is not managed by independent contractors acting without external supervision, who rent their capital. One could imagine a manufacturing enterprise renting its floor space and machinery and supplying materials to a set of self-employed independent contractors. Each contractor would produce a part or stage of the product for sale to contractors at the next stage of production. The final contractor would sell the finished product to wholesalers, or perhaps back to the capital supplier. Some New England factories operated on a system like this from the Civil War to World War I. They were superseded by hierarchically organized firms. According to the theory of the firm, this is due to the excessive costs of contracting between suppliers of factors of production.[14] In the failed New England system, independent contractors faced each other in a series of bilateral monopolies, which led to opportunistic negotiations. The demand to periodically renegotiate rates led contractors to hoard information and delay innovation for strategic reasons. Independent contractors wore out the machinery too quickly, failed to tightly coordinate their production with workers at other stages of production (leading to excess inventory of intermediate products), and lacked incentives to innovate, both with respect to saving materials and with respect to new products.[15]

The modern firm solves these problems by replacing contractual relations among workers, and between workers and owners of other factors of production, with centralized

authority. A manager, or hierarchy of managers, issues orders to workers in pursuit of centralized objectives. This enables close coordination of different workers and internalizes the benefits of all types of innovation within the firm as a whole. Managers can monitor workers to ensure that they work hard, cooperate with fellow workers, and do not waste capital. Because they exercise open-ended authority over workers, they can redeploy workers' efforts as needed to implement innovations, replace absentees, and deal with unforeseen difficulties. Authority relations eliminate the costs associated with constant negotiation and contracting among the participants in the firm's production. To put the point another way, the key to the superior efficiency of hierarchy is the open-ended authority of managers. It is impossible to specify in advance all of the contingencies that may require an alteration in an initial understanding of what a worker must do. Efficient employment contracts are therefore necessarily incomplete: they do not specify precisely everything a worker might be asked to do.

While this theory explains why firms exist and why they are constituted by hierarchies of authority, it does not explain the sweeping scope of employers' authority over workers in the United States. It does not explain, for example, why employers continue to have authority over workers' off-duty lives, given that their choice of sexual partner, political candidate, or Facebook posting has nothing to do with productive efficiency. Even worse, theorists of the firm appear not to even recognize how authoritarian firm governance is. Major theorists soft-pedal or even deny the very authority they are supposed to be trying to explain.

Consider Ronald Coase, the originator of the theory of the firm. He acknowledges that firms are "islands of conscious power."[16] The employment contract is one in which the worker

"agrees to obey the directions of an entrepreneur." But, he insists, "the essence of the contract is that it should only state the limits to the powers of the entrepreneur."[17] This suggests that the limits of the employer's powers are an object of negotiation or at least communication between the parties. In the vast majority of cases, outside the contexts of collective bargaining or for higher-level employees, this is not true. Most workers are hired without any negotiation over the content of the employer's authority, and without a written or oral contract specifying any limits to it. If they receive an employee handbook indicating such limits, the inclusion of a simple disclaimer (which is standard practice) is sufficient to nullify any implied contract exception to at-will employment in most states.[18] No wonder they are shocked and outraged when their boss fires them for being too attractive,[19] for failing to show up at a political rally in support of the boss's favored political candidate,[20] even because their daughter was raped by a friend of the boss.[21]

What, then, determines the scope and limits of the employer's authority, if it is not a meeting of minds of the parties? The state does so, through a complex system of laws—not only labor law, but laws regulating corporate governance, workplace safety, fringe benefits, discrimination, and other matters. In the United States, the default employment contract is employment at will. There are a few exceptions in federal law to this doctrine, notably concerning discrimination, family and medical leave, and labor union activity. For the most part, however, at-will employment, which entitles employers to fire workers for any or no reason, grants the employer sweeping legal authority not only over workers' lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede *all* of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the

employment relationship. Employers' authority over workers, outside of collective bargaining and a few other contexts, such as university professors' tenure, is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal. The *state* has established the constitution of the government of the workplace: it is a form of private government.

Resistance to recognizing this reality appears to be widespread among theorists of the firm. Here, for example, is what Armen Alchian and Harold Demsetz say in their classic paper on the subject:

> It is common to see the firm characterized by the power to settle issues by fiat, by authority, or by disciplinary action. . . . This is delusion. The firm . . . has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can "punish" you only by withdrawing future business or by seeking redress in the courts for any failure to honor our exchange agreement. That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping purchases from him or sue him for delivering faulty products. What then is the content of the presumed power to manage and assign workers to various tasks? Exactly the same as one little consumer's power to manage and assign his grocer to various tasks. . . . To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like telling a grocer to sell me this brand of tuna rather than that brand of bread. I have no contract to continue to purchase

> from the grocer and neither the employer nor the employee is bound by any contractual obligations to continue their relationship.[22]

Alchian and Demsetz appear to be claiming that wherever individuals are free to exit a relationship, authority cannot exist within it. This is like saying that Mussolini was not a dictator, because Italians could emigrate. While emigration rights may give governors an interest in voluntarily restraining their power, such rights hardly dissolve it.[23]

Alternatively, their claim might be that where the only sanctions for disobedience are exile, or a civil suit, authority does not exist. That would come as a surprise to those subject to the innumerable state regulations that are backed only by civil sanctions. Nor would a state regulation lack authority if the only sanction for violating it were to force one out of one's job. Finally, managers have numerous other sanctions at their disposal besides firing and suing: they can and often do demote employees; cut their pay; assign them inconvenient hours or too many or too few hours; assign them more dangerous, dirty, menial, or grueling tasks; increase their pace of work; set them up to fail; and, within very broad limits, humiliate and harass them.

Perhaps the thought is that where consent mediates the relationship between the parties, the relationship cannot be one of subordination to authority. That would be a surprise to the entire social contract tradition, which is precisely about how the people can consent to government. Or is the idea that authority exists only where subordinates obey orders blindly and automatically? But then it exists hardly anywhere. Even the most repressive regimes mostly rely on means besides sheer terror and brainwashing to elicit compliance with their orders, focusing more on persuasion and rewards.

Alchian and Demsetz may be hoodwinked by the superficial symmetry of the employment contract: under employment-at-will, workers, too, may quit for any or no reason. This leads them to represent quitting as equivalent to firing one's boss. But workers have no power to remove the boss from his position within the firm. And quitting often imposes even greater costs on workers than being fired does, for it makes them ineligible for unemployment insurance. It is an odd kind of countervailing power that workers supposedly have to check their bosses' power, when they typically suffer more from imposing it than they would suffer from the worst sanction bosses can impose on them. Threats, to be effective, need to be credible.

The irony is that Alchian and Demsetz are offering a theory of the firm. The question the theory is supposed to answer is why production is not handled entirely by market transactions among independent, self-employed people, but rather by authority relations. That is, it is supposed to explain why the hope of pro-market pre–Industrial Revolution egalitarians did not pan out. Alchian and Demsetz cannot bear the full authoritarian implications of recognizing the boundary between the market and the firm, even in a paper devoted to explaining it. So they attempt to extend the metaphor of the market to the internal relations of the firm and pretend that every interaction at work is mediated by negotiation between managers and workers. Yet the whole point of the firm, according to the theory, is to eliminate the costs of markets—of setting internal prices via negotiation over every transaction among workers and between workers and managers.

Alchian and Demsetz are hardly alone. Michael Jensen and William Meckling agree with them that authority has nothing to do with the firm; it is merely a nexus of contracts among independent individuals.[24] John Tomasi, writing today, continues

to promote the image of employees as akin to independent contractors, freely negotiating the terms of their contract with their employers, to obtain work conditions tailor-made to their idiosyncratic specifications.[25] While workers at the top of the corporate hierarchy enjoy such freedom, as well as a handful of elite athletes, entertainers, and star academics, Tomasi ignores the fact that the vast majority of workers not represented by unions do not negotiate terms of the employer's authority at all. Why would employers bother, when, by state fiat, workers automatically cede all liberties not reserved to them by the state, upon accepting an offer of work?

Not just theorists of the firm, but public discourse too, tend to represent employees as if they were independent contractors.[26] This makes it seem as if the workplace is a continuation of arm's-length market transactions, as if the labor contract were no different from a purchase from Smith's butcher, baker, or brewer. Alchian and Demsetz are explicit about this, in drawing the analogy of the employment relation with the customer–grocer relation. But the butcher, baker, and brewer remain independent from their customers after selling their goods. In the employment contract, by contrast, the workers cannot separate themselves from the labor they have sold; in purchasing command over labor, employers purchase command over people.

What accounts for this error? The answer is, in part, that a representation of what egalitarians hoped market society would deliver for workers before the Industrial Revolution has been blindly carried over to the post–Industrial Revolution world. People continue to deploy the same justification of market society—that it would secure the personal independence of workers from arbitrary authority—long after it failed to deliver on its original aspiration. The result is a kind of political

hemiagnosia: like those patients who cannot perceive one-half of their bodies, a large class of libertarian-leaning thinkers and politicians, with considerable public following, cannot perceive half of the economy: they cannot perceive the half that takes place *beyond* the market, *after* the employment contract is accepted.

This tendency was reinforced by a narrowing of egalitarian vision in the transition to the Industrial Revolution. While the Levellers and other radicals of the mid-seventeenth century agitated against all kinds of arbitrary government, Thomas Paine mainly narrowed his critique to state abuses. Similarly, the Republican Party kept speaking mainly on behalf of the interests of businesspeople and those who hoped to be in business for themselves, even after it was clear that the overwhelming majority of workers had no realistic prospect of attaining this status, and that the most influential businesspeople were not, as Lincoln hoped, sole proprietors (with at most a few employees, the majority of whom were destined to rise to self-employed status after a few years), but managers in large organizations, governing workers destined to be wage laborers for their entire working lives. Thus, a political agenda that once promised equalizing as well as liberating outcomes turned into one that reinforced private, arbitrary, unaccountable government over the vast majority.

Finally, nineteenth-century laissez-faire liberals, with their bizarre combination of hostility toward state power and enthusiasm for hyperdisciplinary total institutions, attempted to reconcile these contradictory tendencies by limiting their focus to the entry and exit conditions of the labor contract, while blackboxing what actually went on in the factories. In fact, they did drive a dramatic improvement in workers' freedom of entry and exit.[27] Under the traditional common law of master and

servant, employees were bound to their employers by contracts of one year (apprentices and indentured servants for longer), could quit before then only on pain of losing all their accrued wages, and were not entitled to keep wages from moonlighting. Other employers were forbidden to bid for their labor while they were still under contract.[28] Workers were liberated from these constraints over the course of the nineteenth century.[29]

This liberation, as is well-known, was a double-edged sword. Employers, too, were liberated from any obligation to employ workers. As already noted, the worst the workers could do to the boss often involved suffering at least as much as the worst the boss could do to them. For the bulk of workers, who lived at the bottom of the hierarchy, this was not much of a threat advantage, unless it was exercised collectively in a strike. They had no realistic hope under these conditions for liberation from workplace authoritarianism.

No wonder a central struggle of British workers in the mid-nineteenth century was for limits on the length of the working day—even more than for higher wages. This was true, even though workers at this period of the Industrial Revolution were suffering through "Engels's pause"—the first fifty to sixty years of the Industrial Revolution during which wages failed to grow.[30] My focus, like theirs, is not on issues of wages or distributive justice. It is on workers' freedom. If the Industrial Revolution meant they could not be their own bosses at work, at least they could try to limit the length of the working day so that they would have some hours during which they could choose for themselves, rather than follow someone else's orders.[31]

That was an immediate aim of European workers' movements in the mid-nineteenth century. As the century unfolded, workers largely abandoned their pro-market, individualistic egalitarian dream and turned to socialist, collectivist alternatives—that

is, to restructuring the internal governance of the workplace. The problem was that the options open to workers consisted almost exclusively of private governments. Laissez-faire liberals, touting the freedom of the free market, told workers: choose your Leviathan. That is like telling the citizens of the Communist bloc of Eastern Europe that their freedom could be secured by a right to emigrate to any country—as long as they stayed behind the Iron Curtain. Population movements would likely have put some pressure on Communist rulers to soften their rule. But why should Leviathan set the baseline against which competition took place? No liberal or libertarian would be satisfied with a competitive equilibrium set against this baseline, where the choice of state governments is concerned. Workers' movements rejected it for nonstate governments as well.

To their objection, libertarians and laissez-faire liberals had no credible answer. Let us not fool ourselves into supposing that the competitive equilibrium of labor relations was ever established by politically neutral market forces mediated by pure freedom of contract, with nothing but the free play of individuals' idiosyncratic preferences determining the outcome. This is a delusion as great as the one that imagines that the workplace is not authoritarian. Every competitive equilibrium is established against a background assignment of property rights and other rights established by the state. The state supplies the indispensable legal infrastructure of developed economies as a kind of public good, and is needed to do so to facilitate cooperation on the vast scales that characterize today's rich and sophisticated economies.[32] Thus, it is the state that establishes the default constitution of workplace governance. It is a form of authoritarian, private government, in which, under employment-at-will, workers cede *all* their rights to their employers, except those specifically reserved for them by law.

Freedom of entry and exit from any employment relation is not sufficient to justify the outcome. To see this, consider an analogous case for the law of coverture, which the state had long established as the default marriage contract.[33] Under coverture, a woman, upon marrying her husband, lost all rights to own property and make contracts in her own name. Her husband had the right to confine her movements, confiscate any wages she might earn, beat her, and rape her. Divorce was very difficult to obtain. The marriage contract was valid only if voluntarily accepted by both parties. It was a contract into subjection, entailing the wife's submission to the private government of her husband. Imagine a modification of this patriarchal governance regime, allowing either spouse to divorce at will and allowing any clause of the default contract to be altered by a prenuptial agreement. This is like the modification that laissez-faire liberals added to the private government of the workplace. Women would certainly have sufficient reason to object that their liberties would still not be respected under this modification, in that it preserves a patriarchal baseline, in which men still hold virtually all the cards. It would allow a lucky few to escape subjection to their husbands, but that is not enough to justify the patriarchal authority the vast majority of men would retain over their wives.[34] Consent to an option within a set cannot justify the option set itself.

Back to the Future

My historical investigation explains why a certain libertarian way of thinking about market society and its promise made considerable sense in its original context prior to the Industrial Revolution, and why it was reasonable for egalitarians to support it at that time. But the Industrial Revolution destroyed

the context in which that vision made sense. The new context perverted what was once a liberating, egalitarian vision into support for pervasive workplace authoritarianism—arbitrary, hierarchical, private government. The evolving rhetoric of laissez-faire liberalism that arose in the nineteenth century papered over the real issues and represented, in Orwellian fashion, subjection as freedom.

Workers' movements from the mid-nineteenth century through World War II were not fooled by this.[35] That is not to say that they all had sound ideas for how to solve the problem. I have no space to recount the follies of democratic state socialism.[36] Nor do I have space to recount the catastrophes of state communism, which were dominated by the same totalitarian vision of the original designers of total institutions—only dramatically scaled up, more violent, and unmixed with any skepticism about state power. Like the original designers, state communists looked to ideals of neither liberty nor equality, but rather to utilitarian progress and the perfectibility of human beings under the force of private government.

My point is rather that, with the drastic decline of organized labor, and especially with the triumph of ostensibly free markets since the end of the Cold War, public and academic discourse has largely lost sight of the problem that organized workers in the nineteenth century saw clearly: the pervasiveness of private government at work. Here most of us are, toiling under the authority of communist dictators, and we do not see the reality for what it is.

No doubt many of us, especially most of those who are reading these lectures, do not find the situation so bad. My readers, most likely, are tenured or tenure-track professors, who, almost uniquely among unorganized workers in the United States, enjoy due process rights and a level of autonomy at work that

is unmatched almost anywhere else among employees.[37] Or, if they are college students or graduates, they are or likely will be the dictators or higher-ranked officials of private governments. Or they will escape the system and belong to the thin ranks of the self-employed who have no employees of their own. The people I am worried about are the 25 percent of employees who understand that they are subject to dictatorship at work,[38] and the other 55 percent or so who are neither securely self-employed nor upper-level managers, nor the tiny elite tier of nonmanagerial stars (athletes, entertainers, superstar academics) who have the power to dictate employment contracts to their specification, nor even the ever-shrinking class of workers under ever-retrenching collective bargaining agreements. That 55 percent is only one arbitrary and oppressive managerial decision away from realizing what the 25 percent already know. But this 80 percent receives almost no recognition in contemporary public and academic discourse.

I do not claim that private governments at work are as powerful as states. Their sanctioning powers are lower, and the costs of emigration from oppressive private governments are generally lower than the costs of emigration from states. Yet private governments impose a far more minute, exacting, and sweeping regulation of employees than democratic states do in any domain outside of prisons and the military. Private governments impose controls on workers that are unconstitutional for democratic states to impose on citizens who are not convicts or in the military.

The negative liberties most workers enjoy de facto are considerably greater than the ones they are legally entitled to under their employers. Market pressures, social norms, lack of interest, and simple decency keep most employers from exercising the full scope of their authority. We should care nevertheless

about the insecurity of employees' liberty. They work in a state of republican unfreedom, their liberties vulnerable to cancellation without justification, notice, process, or appeal. That they enjoy substantially greater negative liberty than they are legally entitled to no more justifies their lack of republican liberty than the fact that most wives enjoyed greater freedoms than they were legally entitled to justified coverture—or even coverture modified by free divorce.

Suppose people find themselves under private government. This is a state of republican unfreedom, of subjection to the arbitrary will of another. It is also usually a state of substantial constraints on negative liberty. By what means could people attain their freedom? One way would be to end subjection to government altogether. When the government is a state, this is the anarchist answer. We have seen that when the government is an employer, the answer of many egalitarians before the Industrial Revolution was to advance a property regime that promotes self-employment, perhaps even to make self-employment a nearly universally accessible opportunity, at least for men. This amounts to promoting anarchy as the primary form of workplace order.

The theory of the firm explains why this approach cannot preserve the productive advantages of large-scale production. Some kind of incompletely specified authority over groups of workers is needed to replace market relations within the firm. However, the theory of the firm, although it explains the necessity of hierarchy, neither explains nor justifies private government in the workplace. That the constitution of workplace government is both arbitrary and dictatorial is not dictated by efficiency or freedom of contract, but rather by the state. Freedom of contract no more explains the equilibrium workplace constitution than freedom to marry explained women's subjection to patriarchy under coverture.

In other words, in the great contest between individualism and collectivism regarding the mode of production, collectivism won, decisively. Now nearly all production is undertaken by teams of workers using large, indivisible forms of capital equipment held in common. The activities of these teams are governed by managers according to a centralized production plan. This was an outcome of the Industrial Revolution, and equally much embraced by capitalists and socialists. That advocates of capitalism continue to speak as if their preferred system of production upholds "individualism" is simply a symptom of institutional hemiagnosia, the misdeployment of a hopeful preindustrial vision of what market society would deliver as if it described our current reality, which replaces market relations with governance relations across wide domains of production.

Workers in the nineteenth century turned from individualistic to collectivist solutions to workplace governance because they saw that interpersonal authority—governments over groups of workers—was inescapable in the new industrial order. If government is inescapable or necessary for solving certain important problems, the only way to make people free under that government is to make that government a public thing, accountable to the governed. The task is to replace private government with public government.

When the government is a state, we have some fairly good ideas of how to proceed: the entire history of democracy under the rule of law is a series of experiments in how to make the government of the state a public thing, and the people free under the state. These experiments continue to this day.

But what if the government is an employer? Here matters are more uncertain. There are four general strategies for advancing and protecting the liberties and interests of the governed under any type of government: (1) exit, (2) the rule of

law, (3) substantive constitutional rights, and (4) voice. Let us consider each in turn.

Exit is usually touted as a prime libertarian strategy for protecting individual rights. By forcing governments to compete for subjects, exit rights put pressure on governments to offer their subjects better deals. "The defense against oppressive hours, pay, working conditions, or treatment is the right to change employers."[39] Given this fact, it is surprising how comfortable some libertarians are with the validity of contracts into slavery, from which exit is disallowed.[40] In their view, freedom of contract trumps the freedom of individuals under government, or even the freedom to leave that government. While contracts into slavery and peonage are no longer valid, other contractual barriers to exit are common and growing. Noncompete clauses, which bar employees from working for other employers in the same industry for a period of years, have spread from technical professions (where nearly half of employees are subject to them) to jobs such as sandwich maker, pesticide sprayer, summer camp counselor, and hairstylist.[41] While employers can no longer hold workers in bondage, they can imprison workers' human capital. California is one of the few states that prohibit noncompete clauses. As the dynamism of its economy proves, such contractual barriers to exit are not needed for economic growth, and probably undermine it.[42] There should be a strong legal presumption against such barriers to exit, to protect workers' freedom to exit their employers' government.

The rule of law is a complex ideal encompassing several protections of subjects' liberties: (a) Authority may be exercised only through laws duly passed and publicized in advance, rather than arbitrary orders issued without any process. (b) Subjects are at liberty to do anything not specifically pro-

hibited by law. (c) Laws are generally applicable to everyone in similar circumstances. (d) Subjects have rights of due process before suffering any sanctions for noncompliance. Not all of these protections, which were devised with state authority in mind, can be readily transferred to the employment context. Most of the solutions to problems the state must address involve regulations that leave open to individuals a vast array of options for selecting both ends and means. By contrast, efficient production nearly always requires close coordination of activities according to centralized objectives, directed by managers exercising discretionary authority. This frequently entails that the authority of managers over workers be both intensive (limiting workers to highly particular movements and words, not allowing them to pursue their own personal objectives at work or even to select their own means to a prescribed end) and incompletely specified. The state imposes traffic laws that leave people free to choose their own destinations, routes, and purposes. Walmart tells its drivers what they have to pick up, when and where they have to deliver it, and what route they have to take. In addition, managers need incompletely specified authority to rapidly reassign different tasks to different workers to address new circumstances. Finally, excessively costly procedural protections against firing also discourage hiring. All these obstacles to applying rule-of-law protections in the workplace empower employers to abuse their authority, subject workers to humiliating treatment, and impose excessive constraints on their freedom.

At the same time, it is easy to exaggerate the obstacles to imposing rule-of-law protections at work. Larger organizations generally have employee handbooks and standard practice guides that streamline authority along legalistic lines. Equal protection and due process rights already exist for workers in

larger organizations with respect to limited issues. A worker who has been sexually harassed by her boss normally has recourse to intrafirm procedures for resolving her complaint. Such protections reflect a worldwide "blurring of boundaries" among business, nonprofit, and state organizations, which appears to be driven not simply by legal changes, but by cultural imperatives of scientific management and ideas of individual rights and organizational responsibilities.[43] Some but not all of these managerial developments are salutary. They are proper subjects of investigation for political theory, once we get beyond the subject's narrow focus on the state.

A just workplace constitution should incorporate basic constitutional rights, akin to a bill of rights against employers. To some extent, the Fair Labor Standards Act, anti-discrimination laws, and other workplace regulations already serve this function. A workers' bill of rights could be strengthened by the addition of more robust protections of workers' freedom to engage in off-duty activities, such as exercising their political rights, free speech,[44] and sexual choices. Similar protections for employee privacy could be extended in the workplace during work breaks. The Occupational Safety and Health Administration (OSHA) prohibitions of particularly degrading, dangerous, and onerous working conditions can be viewed as part of a workers' bill of rights. Nabisco once threatened its female production line workers with three-day suspensions for using the bathroom, and ordered them to urinate in their clothes instead.[45] It was only in 1998 that OSHA issued a regulation requiring employers to recognize workers' right to use a bathroom, after cases such as Nabisco's aroused public outrage. Workers in Europe are protected from harassment of all kinds by anti-mobbing laws.[46] This gives them far more robust workplace constitutional rights than workers in the United States,

who may be legally harassed as long as their harassers do not discriminate by race, gender, or other protected identities in choosing their victims.

There are limits, however, to how far a bill of rights can go in protecting workers from abuse. Because they prescribe uniformity across workplaces, they can at best offer a minimal floor. In practice, they are also grossly underenforced for the least advantaged workers.[47] Furthermore, such laws do not provide for worker participation in governance at the firm level. They merely impose limits on employer dictatorship.

For these reasons, there is no adequate substitute for recognizing workers' voice in their government. Voice can more readily adapt workplace rules to local conditions than state regulations can, while incorporating respect for workers' freedom, interests, and dignity. Just because workplace governance requires a hierarchy of offices does not mean that higher officeholders must be unaccountable to the governed, or that the governed should not play any role in managerial decision-making. In the United States, two models for workers' voice have received the most attention: workplace democracy and labor unions. Workplace democracy, in the form of worker-owned and -managed firms, has long stood as an ideal for many egalitarians.[48] While much could be done to devise laws more accommodating of this structure, some of its costs may be difficult to surmount. In particular, the costs of negotiation among workers with asymmetrical interests (for example, due to possession of different skills) appear to be high.[49]

In the United States, collective bargaining has been the primary way workers have secured voice within the government of the workplace. However, even at its peak in 1954, only 28.3 percent of workers were represented by a labor union.[50] Today, only 11.1 percent of all workers and 6.6 percent of private

sector workers are represented.[51] Although laws could be revised to make it easier for workers to organize into a union, this does not address difficulties inherent to the U.S. labor union model. The U.S. model organizes workers at the firm level rather than the industry level. Firms vigorously resist unionization to avoid a competitive disadvantage with nonunionized firms.[52] Labor unions also impose inefficiencies due to their monopoly power.[53] They also take an adversarial stance toward management—one that makes not only managers but also many workers uncomfortable. At the same time, they often provide the only effective voice employees have in workplace governance.

It is possible to design a workplace constitution in which workers have a nonadversarial voice in workplace governance, without raising concerns about monopolization. The overwhelming majority of workers in the United States would like to have such a voice: 85 percent would like firm governance to be "run jointly" by management and workers.[54] In the United States, such a constitution is illegal under the National Labor Relations Act, which prohibits company unions. Yet this structure is commonplace in Europe. Germany's system of codetermination, begun in the Weimar era and elaborately developed since World War II, offers one highly successful model.[55]

It is not my intention in this lecture to defend any particular model of worker participation in firm governance. My point is rather to expose a deep failure in current ways of thinking about how government fits into Americans' lives. We do not live in the market society imagined by Paine and Lincoln, which offered an appealing vision of what a free society of equals would look like, combining individualistic libertarian and egalitarian ideals. Government is everywhere, not just in the form of the state, but even more pervasively in the workplace. Yet public

discourse and much of political theory pretends that this is not so. It pretends that the constitution of workplace government is somehow the object of voluntary negotiation between workers and employers. This is true only for a tiny proportion of privileged workers. The vast majority are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers.

It is high time that public discourse acknowledged this reality and the costs to workers' freedom and dignity that private government imposes on them. It is high time that political theorists turned their attention to the private governments of the workplace. Since the Levellers, egalitarian social movements have insisted that if government is necessary, it must be made a public thing to all the governed—accountable to them, responsive to their interests, and open to their participation. They were shrewd enough to recognize the pervasiveness of private government in their lives. It is time to go back to the future in recovering such recognition and experimenting with ways to remedy it.