

## COMPULSORY TERMS IN PROPERTY

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**ABSTRACT**—The state’s imposition of compulsory terms in property relations—such as habitability warranties binding landlords and tenants and minimum wages binding employers and employees—has long been conceived by analysts generally situated on the political right as an affront to individual freedom and inevitably harmful to the terms’ intended beneficiaries. This critique, though, seems to have special purchase in public discourse today not only within its traditional circle of supporters on the right but, at least in some instances, for a sizable number on the left as well. The bipartisan acceptance of this critique is serving as a substantial roadblock to a wide range of reforms to the property system that take aim at resource inequities. Breathing life into these types of reform efforts, therefore, necessarily will require a renewed counterassault on this going critique’s foundations. Building on and contemporizing central insights of the legal realist and critical legal studies movements, this Essay explores some of the key characteristics of those circumstances in which the state’s compelling terms in social and market relationships surrounding property may well be justified on deontological or consequentialist grounds. In so doing, the Essay seeks to generate momentum toward a renewed discourse that eschews knee-jerk opposition to compulsory terms in property in favor of one that engages with the rationales for and against such terms in a context-sensitive fashion.

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INTRODUCTION

In a recent report titled *Big Government Policies that Hurt the Poor*, analysts affiliated with the Heritage Foundation’s Institute for Economic Freedom asserted that opportunities abound for America’s poor to “lift them[selves] out of poverty” if only “the government would just get out of the way.”<sup>1</sup> Among a series of alleged instances of untoward state intrusions, the report offers the common trope that “if a worker produces \$12 an hour in value for a firm, he will receive close to \$12 an hour [in wages]. But with mandatory \$15 starting wages, the firm will lay him off.”<sup>2</sup> “[G]overnment regulation and unwarranted intervention,” the report’s authors conclude, are “an attack on individual freedom” and “the primary barriers to progress.”<sup>3</sup>

The noted focus of this report’s ire—a minimum wage—is an example of what this Essay considers a compulsory term in property: a state-determined, nonwaivable right, privilege, or duty that exists upon and as a result of parties entering into a specific contractual relationship regarding access to resources. These contractual relationships, affecting both real and personal property, are broadly construed herein to include employer–employee, landlord–tenant, creditor–debtor, merchant–consumer, and the like. The Heritage Foundation report’s critique that compulsory terms of this nature are an affront to individual freedom and inevitably will hurt their

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<sup>1</sup> DAREN BAKST ET AL., *BIG GOVERNMENT POLICIES THAT HURT THE POOR AND HOW TO ADDRESS THEM* 1 (Darren Bakst & Patrick Tyrrell eds., 2017), <https://www.heritage.org/poverty-and-inequality/report/big-government-policies-hurt-the-poor-and-how-address-them> [<https://perma.cc/WF3H-VNLP>].

<sup>2</sup> *Id.* at 13.

<sup>3</sup> *Id.* at 9, 24.

intended beneficiaries is by no means new;<sup>4</sup> however, this critique seems to have special purchase in public discourse today, not only within its traditional circle of supporters generally situated on the political right<sup>5</sup> but, at least in some circumstances, for a sizable number on the left as well.<sup>6</sup>

The bipartisan acceptance of this critique serves as a substantial roadblock not only to the minimum wage increases on which the Heritage Foundation report concentrated but to a wide range of other reforms to the property system that take aim at resource inequities.<sup>7</sup> Breathing life into these types of reform efforts, therefore, necessarily will require a renewed counterassault on this going critique's foundations. Building on and contemporizing central insights of the legal realist and critical legal studies movements, this Essay explores some of the key characteristics of those circumstances in which the state's compelling terms in social and market relationships surrounding property may well be justified on deontological or consequentialist grounds.

The Essay proceeds as follows. Part I suggests that the standing argument against compulsory terms in property is constituted by three familiar core elements: a specific conception of freedom, an understanding

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<sup>4</sup> See Ilana Waxman, *Hale's Legacy: Why Private Property Is Not a Synonym for Liberty*, 57 HASTINGS L.J. 1009, 1010 (2006) ("During the late nineteenth and early twentieth centuries, it was legal orthodoxy that property owners had a natural right to use their property as they wished, and that state interference with that prerogative threatened the very basis of individual liberty.").

<sup>5</sup> See, e.g., Nathan Mayo, *A \$15 Minimum Wage Would Hurt Those It's Meant to Help*, CNN BUSINESS (Feb. 9, 2021, 9:42 AM), <https://www.cnn.com/2021/02/09/perspectives/15-minimum-wage-biden-hurt/index.html> [<https://perma.cc/4UTA-2PNY>]; Dan Hannan, *Minimum Wages Hurt the Poor*, WASH. EXAMINER (Feb. 22, 2021, 12:00 AM), <https://www.washingtonexaminer.com/opinion/minimum-wages-hurt-the-poor> [<https://perma.cc/2YT3-W7ES>]; Brad Polumbo, *Democrats Are Wrong: A \$15 Minimum Wage Will Hurt the Marginalized, Not Uplift Them*, NEWSWEEK (Feb. 9, 2021, 1:18 PM), <https://www.newsweek.com/democrats-are-wrong-15-minimum-wage-will-hurt-marginalized-not-uplift-them-opinion-1567975> [<https://perma.cc/8EXD-CPNM>]. Among academics, Robert Ellickson has been perhaps the foremost challenger to the implementation of compulsory terms in property relations over the past forty years. See, e.g., Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981); Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 321 (1991); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010); Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17 (1992).

<sup>6</sup> According to one of New Jersey's highest ranking Democrats in the aftermath of a fall 2021 election cycle that saw gains for Republican candidates, Democrats have heard the call that "voters are frustrated by mandates and government overreach" and will respond accordingly. See Susanne Cervenka, *Gopal Claims Victory in NJ 11th District Senate: 'This Should Be a Big Wake Up Call'*, ASBURY PARK PRESS (Nov. 5, 2021, 2:52 PM), <https://www.app.com/story/news/politics/elections/2021/11/05/vin-gopal-election-results-nj-11-district-senate-assembly-race/6300811001/> [<https://perma.cc/U5BB-RJWS>].

<sup>7</sup> By way of example, consider how very few inclusionary housing programs require developers to ensure that more than 20% of new residential units are affordable. See Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* 48 (Lincoln Inst. of Land Pol'y, Working Paper No. WP17ET1, 2017).

of the state as a paternalistic interventionist, and a view of the market as a decidedly private realm in which voluntary bargains between individuals maximize personal satisfaction in the aggregate. Parts II and III present a counterstance that, in direct correspondence with the constitutive elements of the standing oppositional view, emphasizes respect for competing conceptions of freedom, the contradictions of antipaternalistic expressions, and the promotion of just markets. The articulation of this counterstance is not to deny that compulsory terms in property may breed inefficiencies, distribute resources in ways that exacerbate extant inequalities, or alter individual choices that are better left unaltered. It is, rather, to contend that compulsory terms in property are not *inherently* problematic but instead, in the right circumstances, can provide general structural supports for the operation of a private property system and achieve specific situational successes in confronting property inequalities. The Essay offers the modest conclusion therefrom that knee-jerk opposition to compulsory terms in property is best replaced by engagement with the rationales for and against such terms in a context-sensitive fashion.

#### I. STANDING OPPOSITION TO COMPULSORY TERMS IN PROPERTY RELATIONS

As a threshold matter, it must be acknowledged that, at a broad level of generality, *all* law can be construed as compulsory. For purposes of this Essay, though, compulsory terms are understood to include those nonwaivable Hohfeldian correlatives—namely, rights–duties, privileges–no rights, and powers–exposures—that arise as a result of parties entering into a specific contractual relationship regarding access to resources.<sup>8</sup> They might, for instance, involve singling out a specific *right* that must be included in a specific type of contract and thereby imposing a *duty* on one party to the benefit of another (for example, compelling landlords to include a habitability warranty in residential leases for the benefit of tenants). Or they might involve outlawing the inclusion of a specific right in a specific type of contract—i.e., affording *no right*—and thereby *privileging* parties from the duty owed that right (for example, precluding sellers from requiring buyers to obtain their consent before the sale of a traditionally subdivided lot to a third party). Alternatively, they might involve affording *power* to some parties to make a specific demand of other parties and thereby *exposing* that latter class to an alteration of their market position (for example, providing

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<sup>8</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) [hereinafter Hohfeld, *Judicial Reasoning I*]; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917) [hereinafter Hohfeld, *Judicial Reasoning II*].

sellers of condominium units the right of first purchase upon buyers' decisions to sell). These terms can arise out of almost any lawmaking form, from judicial interpretation of constitutional provisions or the common law to statutory or regulatory pronouncements.<sup>9</sup>

The standing opposition to these compulsory terms in property takes a variety of nuanced forms. Such assorted strands, though, are tied together by what are now familiar, interrelated understandings of freedom, paternalism, and markets. From the perspective of those who support this oppositionist view—and admittedly painting with very broad strokes—this Part sets out these familiar understandings in turn.

### A. Freedom

How do we conceptualize what it means to be free? From the perspective of those who endorse the conventional opposition to compulsory terms in property relations, freedom, as John Stuart Mill preached, is characterized by individuals' ability to chart the course of their own lives.<sup>10</sup> This ability is a critical sentiment in American culture. The *Declaration of Independence*, after all, deems it “self-evident” that we hold the “unalienable Right[]” to our own “pursuit of Happiness.”<sup>11</sup> A morally just society, in Mill's terms, treats people as autonomous beings who are free to choose their own pathways in the course of this pursuit.

This conception of freedom underpinning the oppositionist's view has three tenets at its core: (1) persons cannot be forced to contract over resources and labor when they choose not to do so; (2) persons can contract over resources and labor when they choose to do so; and (3) enforcing contracts over resources and labor to which people voluntarily agree by definition

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<sup>9</sup> In light of its focus, this Essay naturally does not address the extent to which it is the judiciary's role to modernize outdated common law rules to accord with general policies underlying legislation enacted in a given area. See, e.g., *Vasquez v. Glassboro Serv. Ass'n*, 415 A.2d 1156, 1158, 1163 (N.J. 1980) (holding—in reliance on the state legislature's decision to afford traditional tenants process prior to eviction and “progressive attitude in providing legal protection for migrant farmworkers”—that an employment arrangement in which such workers live in barracks on their employer's land, though not a traditional landlord–tenant arrangement, implicitly includes a mandatory provision that terminated employees have a “reasonable opportunity to find shelter before dispossession”).

<sup>10</sup> JOHN STEWART MILL, *ON LIBERTY* 13 (Batoche Books Ltd. 2001) (1859) (“Over himself, over his own body and mind, the individual is sovereign.”); see also Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975) [hereinafter Epstein, *Unconscionability*] (defending the freedom of contract over the doctrine of unconscionability to guarantee individuals a “sphere of influence . . . without having to justify themselves to the state or to third parties”); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 59 (1995) (stating that the autonomy principle in property ownership results in “human happiness and productivity”); RICHARD PIPES, *PROPERTY AND FREEDOM* xiii (1999) (conducting a historical analysis to test the hypothesis that there is an intimate relationship between “public guarantees of ownership and individual liberty”).

<sup>11</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

serves the interests of the parties to those contracts by giving them what they want.<sup>12</sup> On these premises, our society is divided into a private realm in which individuals act and a public realm in which the state acts. It follows that, in the private realm, individuals make choices to buy, sell, trade, lease, and license property and property-adjacent resources with one another. Public-realm actions by the state generally are, in turn, relevant in the private realm only to the extent that they create negative duties to avoid harming others or enforce affirmative duties to which individuals voluntarily have bound themselves via contracts with other individuals.<sup>13</sup> Any further state actions are inherently interventionist and coercive.<sup>14</sup>

On this view, property owners are generally understood as being able to use their property as they wish, even if that use interferes with the interests, needs, or expectations of others. When individuals make the aforementioned choices to buy, sell, trade, lease, and license property, they largely do so on their own terms. Individuals, that is, are the primary allocators of property interests.<sup>15</sup> As the allocators of property interests, they are thus immunized from having their property bought, sold, traded, leased or licensed on terms that subvert their individual will.<sup>16</sup> If property is unequally distributed, that generally is a mere product of the individual choices freely made in the private realm. Thus, according to the oppositionists, inequalities in bargaining power that result from the unequal distribution of property are not a threat to freedom but thoroughly *consistent* with it.<sup>17</sup> That certain parties hold less bargaining power than others does not denigrate those parties' status as the best assessors of what they value and what trade-offs they want to make.<sup>18</sup>

### B. Antipaternalism

Determining what we, as individuals, value and are open to trading off necessarily involves subjective judgments regarding the pathways to

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<sup>12</sup> See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 568–69 (1982).

<sup>13</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728–29 (1976).

<sup>14</sup> See, e.g., Kennedy, *supra* note 12, at 569.

<sup>15</sup> Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1189 n.1 (1985).

<sup>16</sup> Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 3, 20 (1982).

<sup>17</sup> Gary Peller, *Privilege*, 104 GEO. L.J. 883, 889 (2016).

<sup>18</sup> See Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 107 (1986) (asserting that “just outcomes arise when people are permitted to do the best they can, given their circumstances”).

achieving our own happiness.<sup>19</sup> To the oppositionists, compulsory terms take those judgments out of individuals' hands on the basis of a specific substantive moral vision to which those individuals do not necessarily subscribe.<sup>20</sup> This course, they suggest, is particularly repugnant where compulsory terms reflect a perceived knowledge on the part of the state of what is best for the same parties—racial and ethnic minorities, the indigent, the disabled, etc.—whom the state has so routinely and magnificently oppressed across our nation's history.<sup>21</sup>

Consider, for instance, the New Jersey supreme court's decision in *Vasquez v. Glassboro Service Ass'n* to require employers to house migrant farmworkers fired from their jobs for poor performance while the employers go to court to evict those workers from barracks on the employers' property.<sup>22</sup> To the oppositionist, injecting such a compulsory term into the employment arrangement hurts those workers who work the hardest. On this view, workers who are confident in their ability to perform their employment tasks may well be happy to confer on the employer the right to summarily terminate and eject them in exchange for, say, higher wages or better working conditions, for they deem the possibility of summary termination and ejection a nullity given their work ethic. It necessarily follows therefrom that the *Vasquez* court's decision to determine the terms of the contract for them will paternalistically deprive these workers of the freedom to do the best they can for themselves in their circumstances.

### C. Markets

The foregoing Section suggested that, according to the oppositionists, antipaternalism promotes the particular deontological conception of freedom outlined in the Section that preceded it. But, on the oppositional view,

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<sup>19</sup> Robert Nozick deemed liberalism inherently associated with antipaternalism, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 58 (1974), as Bruce Ackerman meticulously explained. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10–12 (1980).

<sup>20</sup> See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1430–31 (1987) (describing child labor laws as “misguided initiatives that inflict[] harm upon the very persons they were ostensibly intended to benefit,” for children who cannot sell their labor may well be put to “[a]rduous labor, day and night,” in the home); Claire A. Hill, *Anti-Anti-Anti-Paternalism*, 2 N.Y.U. J.L. & LIBERTY 444, 449–50 (2007) (“Anti-paternalists seem ready to concede, at least for argument’s sake, that people might make mistakes and lack self-control. But they think what people choose still offers the best guide to what they really want, so that their choices should be respected.”).

<sup>21</sup> See, e.g., Walter Williams, *Black Americans Don’t Need White Guilt-Driven Paternalism*, ORANGE CNTY. REG. (June 26, 2020, 2:55 AM), <https://www.oregister.com/2020/06/26/black-americans-dont-need-white-guilt-driven-paternalism-walter-williams/> [<https://perma.cc/9K4H-8GWA>] (“Black people should be simply left alone as opposed to being smothered by the paternalism inspired by white guilt.”).

<sup>22</sup> 415 A.2d 1156, 1158 (N.J. 1980).

antipaternalism also advances a utilitarian objective: affording individuals extensive liberties to make decisions regarding their own property promotes an efficient allocation of resources.<sup>23</sup> Pareto-optimal exchanges—those that benefit at least one party and make no parties worse off—exist because people have different preferences.<sup>24</sup> Voluntary exchanges on the open market, then, the oppositionists suggest, both get the right resources and services into the hands of the people who value them most and get the right people working in the right jobs to maximize productivity.<sup>25</sup> It follows, on this view, that compulsory terms prevent some of these otherwise-inevitable beneficial exchanges from occurring by denying people the opportunity to advance their own interests via contractual relationships.<sup>26</sup>

Take, for a classic example, the implied warranty of habitability in residential leases. Where economically rational landlords are compelled to warrant the habitability of property leased for residential purposes, the oppositionist resolves that these landlords will be forced to raise the rent to offset the costs of providing that warranty or step away from the residential leasing market altogether, even when there are prospective tenants who would have preferred a lower rent and no such habitability warranty.<sup>27</sup> In this way, compulsory terms—with the limited exception of those aimed at mitigating clear external impacts on third parties—regularly hurt the parties they were intended to benefit by restricting these parties’ ability to engage in voluntary exchanges in pursuit of the things that they want.<sup>28</sup>

It is true, the oppositionist might concede, that, in some instances, parties in the weaker bargaining position advocate in the political realm for compulsory terms. Tenants’ rights groups were, after all, front and center in pushing for the habitability warranty in the late 1960s and early 1970s,<sup>29</sup> and

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<sup>23</sup> POSNER, *supra* note 5, at 13; Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967).

<sup>24</sup> See Epstein, *Unconscionability*, *supra* note 10, at 293.

<sup>25</sup> *Id.*; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 61 (1985); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 11–21 (2004).

<sup>26</sup> Cf. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–55 (2004) (asserting that affording owners the freedom to make their own bargains is socially advantageous because they are, due to their familiarity with the resources they own, best positioned to determine those resources’ best uses).

<sup>27</sup> Daniel P. Schwallie, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525, 525 (1989) (“[T]he warranty of habitability results in scarcer, more expensive housing for the poor.”).

<sup>28</sup> For a narrow conception of externalities, see, for example, Donald J. Boundreux & Roger Meiners, *Externality: Origins and Classifications*, 59 NAT. RES. J. 1, 3 (2019) (concluding that “the instances in which policy actions are justified to deal with what are purported to be externalities are very small”).

<sup>29</sup> See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 392 (2011).



in recent years we have seen a similar groundswell in the context of workers' rights.<sup>30</sup> Consider, for instance, the wage context: workers' rights groups are in the midst of a renewed push for increases in the federal minimum wage from the extant \$7.25/hour for nontipped workers and \$2.13/hour for tipped workers.<sup>31</sup> But to the oppositionists, such advocacy rests on the misguided belief that employers will not react in the market realm to the inclusion of that term by demanding concessions from workers on other variables in the same way that the push for a habitability warranty improperly assumed that landlords would not demand concessions from tenants. According to this oppositional view, wages are determined by the property rights of employers and the ability of workers to convince employers that sharing those rights is worth more to employers than it costs.<sup>32</sup> Bargaining in the market realm most accurately and transparently determines, they suggest, what work is worth.<sup>33</sup>

From this perspective, if workers are being paid a low amount, that is because there are others ready, willing, and able to work for those same wages, and those persons do not have enough to offer their employers to justify paying them more.<sup>34</sup> On this view, regulations, such as those declaring a minimum wage, rest atop the market model and generally serve to interfere with the otherwise free and clear choices made therein. It follows that where compulsory terms of this nature are baked into every deal, employers and prospective workers will either negotiate over other terms to reach an arrangement that is less appealing than the one they would have reached in the absence of such constraints or fail to reach an arrangement at all.<sup>35</sup> To the oppositionists, raising the minimum wage prompts some businesses to shut down and others to roll back benefits and reduce hiring, a deadly one-two

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<sup>30</sup> See, e.g., Kai Ryssdal & Richard Cunningham, *Is a New Labor Movement Brewing?*, MARKETPLACE (Oct. 1, 2021), <https://www.marketplace.org/2021/10/01/is-a-new-labor-movement-brewing/> [<https://perma.cc/U88U-C4BM>] (noting the increasing size and notoriety of the modern workers' rights movement).

<sup>31</sup> Claire Thornton, *Generation Z Workers Push for \$15 Minimum Wage as Congress, Biden Debate Pay for All Americans*, USA TODAY (Feb. 16, 2021, 9:57 AM), <https://www.usatoday.com/story/news/nation/2021/02/13/minimum-wage-15-pay-law-could-make-difference-gen-z-workers/6720428002/> [<https://perma.cc/7BD4-EJ3F>]; *Minimum Wages for Tipped Employees*, U.S. DEP'T LAB. (Jan. 1, 2022), <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped> [<https://perma.cc/QN6Z-2MEM>].

<sup>32</sup> See Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, MINN. L. REV. (forthcoming 2022) (manuscript at 25) (on file with author).

<sup>33</sup> *Id.* at 25–26.

<sup>34</sup> *Id.* at 25.

<sup>35</sup> See, e.g., JEFFREY CLEMENS, CATO INST., MAKING SENSE OF THE MINIMUM WAGE: A ROADMAP FOR NAVIGATING RECENT RESEARCH 9 (2019) (noting that “[a]nalyses of . . . recent minimum wage changes tend to find negative effects” on the generosity of employer-provided health insurance policies).

punch for workers and those seeking work.<sup>36</sup> From their vantage point, this simply is the law of supply and demand at work in the normal operation of a free market.<sup>37</sup>

## II. A MOST BASIC PRIMER ON ARGUMENT–COUNTERARGUMENT STRUCTURE

The previous Part broadly summated the standing opposition to compulsory terms in property as an affront to individual freedom and as a paternalistic intervention that ultimately will end up hurting the very parties that the imposition of those terms was designed to protect. The no-frills nature of this critique can suppress just how jarring it is: if we take this critique to its logical end, we should jettison so many of the compulsory terms that currently exist throughout property law. Yet the extent of that project, upon a mere brief reflection, is remarkable. Such an effort would require discarding not only those compulsory terms already broached herein—including the implied warranty of habitability and the minimum wage—but also the likes of the mandatory contributions that allow Social Security and Medicare to exist, the service requirements demanded of commercial establishments by public accommodations laws, the asset-distribution measures that assure that one party to a marriage is not left destitute upon death or divorce, the accessways afforded by easement law in the event of a sales contract that landlocks a parcel, and the numerous provisions that must be included in mortgages in the wake of the subprime mortgage crisis, to name just a few.

While some may question particular compulsory terms on this list, it is not evident that many people would endorse the breadth of the jettisoning effort just described.<sup>38</sup> Yet given the widespread reticence toward eliminating many existing compulsory terms in property relations, it bears exploring in future work whether there are root causes beyond a conscious sympathy with the substantive arguments presented in Part I that explain why there exists

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<sup>36</sup> See Navid Ghani, *The Impact of Minimum Wage on Small Businesses, Workers, and Employment in the United States*, 6 INT'L J. HUMANS. & SOC. SCI. 1, 2 (2016) (“The increase in minimum wage can also have drastic effects on the economy. If minimum wages increased to \$15 or more as are suggested by many, Americans will see a substantial increase in unemployment rates and product prices.”).

<sup>37</sup> Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) (explaining how proponents of this view describe it as merely allowing for “the natural working of economic events”).

<sup>38</sup> See, e.g., Frank Newport, *Social Security and American Public Opinion*, GALLUP (June 18, 2019), <https://news.gallup.com/opinion/polling-matters/258335/social-security-american-public-opinion.aspx> [<https://perma.cc/XNZ3-FJD5>] (noting a 2014 survey for the National Academy of Social Insurance found that 77% of respondents agreed that it is critical to preserve Social Security even if it means increasing taxes, which was consistent with a 2018 Pew Research Center poll finding 74% answering affirmatively).

such ardent opposition from so many to new compulsory terms that specifically target resource inequities related to rental housing, wages, and beyond.<sup>39</sup> However, the remaining two Parts of this Essay—Parts II and III—leave these questions surrounding any such nonsubstantive causes of this opposition to another day in an effort to concentrate on confronting the principles that constitute the opposition view on substantive grounds.

Part III articulates understandings of freedom, paternalism, and markets that are alternative to those undergirding the current opposition to compulsory terms. In so doing, it sets forth a counterargument framework of sorts that offers insight into the contexts within which compulsory terms might well be prudent. This framework—and it is but a framework that is in need, of course, of substantial elaboration and refinement in future work—offers the possibility of moving discourse away from generalized predispositions and toward contextualized justification. In going back to first principles in this way, it bears noting, the framework not only presents an opportunity to reemphasize why property law is rife with compulsory terms and to advocate for new such terms, but also presents the reciprocal prospect of deeming some existing compulsory terms—perhaps including even some of those mainstays set out above—ripe for the dustbin.

First, though, this Part—Part II—attempts to situate, if only highly summarily, the approach taken herein as motivated by a series of canonical contributions to argument–counterargument structures. In a world in which even many proponents of compulsory terms in property conceive of such terms as paternalistic interferences with individual freedoms (consider, for instance, the discourse on mask mandates impacting employer–employee and merchant–consumer relations on commercial properties over the course of the COVID-19 pandemic<sup>40</sup>), invoking the background insights of this structuralist literature offers the prospect of reconceiving of these terms in a more welcoming, justificatory light. Of course, to synthesize in a few short

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<sup>39</sup> Have, for instance, too many of us taken existing compulsory terms for granted to such an extent that we have pushed the various justifications for each of these terms to the corners of our minds and thereby allowed the standing opposition to take hold nearly unabated in the discourse regarding new compulsory terms? Alternatively, is there something about certain types of property interests (such as the right to charge rent or to pay wages) that instinctively prompts us to immunize them from all but the most nominal of compulsory terms? Or might we have some kind of unexamined predisposition in favor of certain kinds of parties (for example, those who take out mortgages to buy housing) over others (those who rent housing)?

<sup>40</sup> See, e.g., Caitlin Huey-Burns & Adam Brewster, *More Democratic Governors Ease Mask Requirements: “We Have to Learn to Live with COVID,”* CBS NEWS (Feb. 10, 2022, 8:23 AM), <https://www.cbsnews.com/news/covid-mask-requirements-democratic-governors/> [https://perma.cc/Q2LQ-7U5M] (quoting New York Representative Sean Maloney, chairman of the Democratic Congressional Campaign Committee, as he praised New York Governor Kathy Hochul’s lifting of the indoor mask mandate on commercial properties, noting it was “time to give people their lives back”).

paragraphs the sheer titanic work of the legal realism and critical legal studies movements upon which the argument-counterargument structure relied herein is indebted is in some ways a fool's errand. The depth of the debt, though, is too extensive not to at least identify several of the quintessential pillars of this work.

Among the many viable loci from which to start, Justice Oliver Wendell Holmes's critique of the conceptualist approach to legal reasoning seems especially suitable. In 1894, Holmes explained that a decision to recognize a privilege to compete or a right to be free from the harms of competition rests not on any neutral principle of property but on an assertion of social policy.<sup>41</sup> Two decades later, Professor Wesley Hohfeld generalized this critique in deeming law as consisting of a series of the aforementioned relational pairs, including, as in Holmes's illustration, the correlatives of (1) *privilege* and *no-right* and (2) *right* and *duty*.<sup>42</sup> Hohfeld's insights brought into clearer focus the reality that state engagement in the property system is, indeed, omnipresent. Respecting a privilege to compete by failing to recognize and enforce a right to be free from the harms of competition is, indeed, just as much a state choice as recognizing and enforcing that right.<sup>43</sup>

Beginning with his classic 1923 article, *Coercion and Distribution in a Supposedly Non-Coercive State*, and over the course of several decades to follow, Professor Robert Hale elaborated on the principles articulated by Holmes, Hohfeld, and their adherents in noting that property law reflects a compendium of regulatory choices about the instances in which owners can

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<sup>41</sup> See Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894) [hereinafter Holmes, *Privilege*]; see also Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (asserting that there is no neutral principle to determine whether one neighbor can block another's access to light and air).

<sup>42</sup> See Hohfeld, *Judicial Reasoning I*, *supra* note 8, at 16 (setting forth a series of relational pairs in law and depicting "their individual scope and application in concrete cases"); Hohfeld, *Judicial Reasoning II*, *supra* note 8, at 710 (expanding on the relational pairs). Under Hohfeld's framework, if one individual holds a specific entitlement (a right, privilege, power, or immunity), then the other person involved in that relationship holds the opposite of that entitlement (correlatively, a duty, no-right, liability, or disability). For a sample contemporary application, consider the well-known dispute in *Jacque v. Steenberg Homes, Inc.*, in which a residential construction company sought to drive across Jacque's barren field to deliver a mobile home to Jacque's neighbor. 563 N.W.2d 154, 156 (Wis. 1997). The court found that Jacque held the *right* to exclude Steenberg Homes from accessing Jacque's field, such that Steenberg Homes had a correlative *duty* not to interfere with Jacque's exclusionary right (and whereby Jacque could file a lawsuit to enforce that right upon Steenberg Homes should the company breach that duty). See *id.* at 159–60. However, a pilot may have the *privilege* of accessing Jacque's airspace above a certain altitude, in which case Jacque would have *no-right* to enforce against the pilot. For a similar discussion of this contemporary illustration of Hohfeldian principles, see Timothy M. Mulvaney, *A World of Distrust*, 120 COLUM. L. REV. F. 153, 155 n.9 (2020).

<sup>43</sup> Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 751–53 (1980) (praising Hohfeld for his critique of the distinction between the public and private realms).

impose harms and nonowners can be secure against them.<sup>44</sup> These choices, Hale explained, naturally have distributive effects and, therefore, form the context—by establishing parties’ bargaining power—for market exchange.<sup>45</sup> Holmes, Hohfeld, Hale, and others associated with the early days of the realist movement did not simply shine light on lawmaker discretion; they undercut the very idea that there is an identifiable realm of private property in which individual operatives engage free from state power and influence.<sup>46</sup>

In the wake of the realists’ upending of legal thought regarding property, how were parties in conflict over resources to advocate for their preferred policy choices, and to what arguments might the state turn in resolving those conflicts? In the mid-twentieth century, Professor Karl Llewellyn famously cast statutory construction arguments along two typecast lines of discourse, which he labeled “thrust and parry.”<sup>47</sup> In the 1970s and 1980s, Professor Duncan Kennedy built upon and extended Llewellyn’s framework in asserting that legal argument writ large rests on a series of reactive and predictable “bites” and “counter-bites.”<sup>48</sup> For a simple illustration, consider how oceanfront landowners might claim that a rule precluding beach access across privately owned land regardless of the circumstances is prudent given its ease of administration, while beachgoers might answer that a reasonable access standard offers needed equitable flexibility.<sup>49</sup> In this illustration, *ease of administration* is the bite, *equitable flexibility* the counter-bite.<sup>50</sup>

Kennedy deemed these bites and counter-bites as of “equal status as valid utterance.”<sup>51</sup> To critics in some corners, Kennedy’s framework leaves the very idea of legal decision-making a matter of “radical subjectivity” and

<sup>44</sup> See, e.g., Hale, *supra* note 37, at 471–72; ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 294–95 (1952); see also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927).

<sup>45</sup> See Hale, *supra* note 37, at 470–72; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 164 (1992); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1233 (1985).

<sup>46</sup> See Peller, *supra* note 17, at 901 (explaining the realists’ efforts to characterize the public-private divide as fallacious).

<sup>47</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

<sup>48</sup> Duncan Kennedy, *A Semiotics of Legal Argument*, in COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 309, 327–29, 352–53 (1994) (asserting that arguments for or against a given resolution to a legal dispute come in series of oppositional pairs).

<sup>49</sup> See Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 94 S. CAL. L. REV. 1, 22 (2020).

<sup>50</sup> *Id.* at 4–23; Kennedy, *supra* note 48, at 328.

<sup>51</sup> Kennedy, *supra* note 48, at 327.

thus impossibly indeterminate.<sup>52</sup> On this interpretation, when decision-makers rest their decisions on specific bites or counter-bites, they ironically are operating mechanically in a way that limits the prospects of transformative legal discourse on social issues.<sup>53</sup> In the face of these and like critiques, contemporary progressive property scholars have turned to what Professor Joseph William Singer calls “critical normativity” in ways that advance Kennedy’s contribution in important respects.<sup>54</sup> In understanding bites and counter-bites as graded categories dependent on contextualized norms (rather than stock claims that merely reflect the law’s general contradictory commitments), this work emphasizes the roles of culture and persuasion in ethical debate.<sup>55</sup>

According to this contemporary school of thought, law is not the mere exchange of argument bites and counter-bites but a forum for normative dialogue about what we value and how we realize those values. Property laws, as Professor Laura Underkuffler reminds us, reflect allocative choices on the state’s behalf in the face of competing private claims and differing personal interpretations of the shared values that property serves.<sup>56</sup> Policymakers have to give reasons for their allocative decisions that members within their particular legal cultures will be persuaded to understand as plausible and acceptable—if hard to swallow—by reasonable

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<sup>52</sup> Henk Botha, *Freedom and Constraint in Constitutional Adjudication*, 20 S. AFR. J. ON HUM. RTS. 249, 256 (2004); see also Sanford Levinson, *Escaping Liberalism: Easier Said than Done*, 96 HARV. L. REV. 1466, 1470–72 (1983) (book review) (arguing that Kennedy’s framework implies a nihilistic approach to separating legal decision-making from one’s own moral and political desires).

<sup>53</sup> Botha, *supra* note 52, at 258–59. Kennedy conceded some ground here, noting:

Legal argument . . . seems to be ‘speaking the subject’, rather than the reverse. It is hard to imagine that argument so firmly channelled into bites could reflect the full complexity either of the fact situation or the decision-maker’s ethical stance toward it. It is hard to image doing this kind of argument in utter good faith, that is, to imagine doing it without some cynical strategy in fitting foot to shoe.

*Id.* (quoting Kennedy, *supra* note 48, at 350).

<sup>54</sup> Joseph William Singer, *Critical Normativity*, 20 L. & CRITIQUE 27 (2009).

<sup>55</sup> The plethora of prominent works in this vein includes JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* (2003); Eric Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430 (2013); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENV’T L. 1 (1996); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); and Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009). In addition, see André van der Walt, *Property Theory and the Transformation of Property Law*, in 3 MODERN STUDIES IN PROPERTY LAW 361, 376 (Elizabeth Cooke ed., 2005), remarking that “a transformative property theory has to be a normative theory that justifies the balance between stability and change, in every individual context, on consideration of human values.”

<sup>56</sup> Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039–42 (1996).

persons in their shoes.<sup>57</sup> In turn, advocates must articulate a basis for their claims and reconcile them with competing claims.

This process of articulation and reconciliation requires thinking critically and recognizing that *most* property claims can be undermined in some way. Such a recognition may encourage some to disengage from debate on the view that all normative claims are self-serving.<sup>58</sup> But according to Singer, Underkuffler, and like-minded scholars, we cannot fall into that trap of disengagement. Choices are unavoidable. While we have to be cautious in judging the claims of others, we simultaneously have to reject claims when their proponents cannot offer a persuasive justification for why their acts that are harming others are legitimate.<sup>59</sup> It admittedly is paradoxical—we need to evaluate assertions with a humility that appreciates the possibility that changing times and conditions may push us to reverse course.<sup>60</sup> That is, we need to be cautious but also have a strong belief in justice. We are, indeed, “the player and the cards.”<sup>61</sup>

Today, the standing opposition to new compulsory terms is of such vitality that the counterposition—the normatively charged counter-bite—has been suppressed in public discourse in considerable respects.<sup>62</sup> As noted in the Introduction, it is no longer a select collection of conservative libertarian lawmakers who oppose the imposition of new compulsory terms wholesale; progressive lawmakers, too, are sounding the alarm against such compulsory terms.<sup>63</sup> In this light, the next Part aims to rehighlight for the public consciousness a number of key characteristics of circumstances in which compulsory terms may well be justified on deontological or consequentialist

<sup>57</sup> Mulvaney, *supra* note 49, at 30; see also Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986) (describing a culture of justification as “a communicative practice of open and intelligible reason-giving”).

<sup>58</sup> See Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2326–28 (1992).

<sup>59</sup> See Singer, *supra* note 54, at 41 (noting that we must see each other as human, which constrains our own preferences and requires us to consider moral questions from the perspective of the party or parties who end up on the losing side in the resolution of a dispute between competing claimants).

<sup>60</sup> See Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743, 785 (1986) (“[T]he ‘problem’ can never be ‘solved.’ . . . [T]hose of us who believe that no question as basic as the relationship between individual liberty and collective action can ever be ‘settled’ must continue to confront the opposing arguments.”).

<sup>61</sup> See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8–9 (1984) (asserting that “the absence of determinacy, objectivity, and neutrality does not condemn us to indifference or arbitrariness” but, instead, “liberates us” to embrace “passionate moral and political commitments”).

<sup>62</sup> See, e.g., Peller, *supra* note 17, at 920 (asserting that we continue to allow “ideological positions about a range of issues to appear as rational extensions from commitments to freedom and self-determination when they necessarily involve politics, the contingent exercise of social power”).

<sup>63</sup> See Cervenka, *supra* note 6.

grounds. The nature of a symposium volume unsurprisingly precludes anything approaching a comprehensive account of the categories of counterjustification that are at our disposal; however, the hope is that the broad outlines sketched here will serve as fodder for future work aimed at recasting conversations centered on whether compulsory terms in property are justified in any generic sense as conversations centered on whether specific compulsory terms might be prudent in given identifiable contexts.

### III. JUSTIFYING COMPULSORY TERMS IN PROPERTY RELATIONS

The premises underlying the conventional opposition to compulsory terms—particular conceptions of freedom, antipaternalism, and markets—cut across different argumentative dimensions. Endorsing a particular conception of freedom is in sizable respects a matter of moral concern—it is about the kind of society in which we want to live. Meanwhile, claims of antipaternalism have both moral and utilitarian dimensions, in the sense that they both touch on crafting the going conception of freedom and broach the actual exercise of one’s freedom to engage in exchanges with others. Finally, those critiques centered on markets as the settings for such exchanges are predominantly utilitarian in nature. Appraising these premises across their respective argumentative dimensions in accord with the argument-counterargument structure outlined above, this Part identifies some of the key characteristics of those situations in which, contra the conventional account, compulsory terms may well be justified.

#### A. *Respecting Competing Freedoms*

Invoking freedom is not always sufficient to guide the resolution of competing claims to resources, for it is not in all cases possible to support all people’s freedom to do with their property what they like all of the time.<sup>64</sup> Enhancing one person’s freedom often requires constraining that of another.<sup>65</sup> Consider, for instance, “forced entry” laws, which mandate that landowners and employers allow employees to carry firearms onto

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<sup>64</sup> One of the leading legacies of the legal realist movement, of course, is its deconstruction of the classical conception of freedom. *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Hale, *supra* note 37; Cohen, *supra* note 44; Holmes, *Privilege*, *supra* note 41; Hohfeld, *Judicial Reasoning I*, *supra* note 8; Hohfeld, *Judicial Reasoning II*, *supra* note 8; Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1917).

<sup>65</sup> *See* Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1252 (2007) (asserting that property is reciprocal in the sense that, for each recognition of a property interest, there are interests that are spurned); Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 453 (2014) (“[I]n a world of limited resources, in which owners are surrounded by other owners, there is no possible way to secure for all owners the capacity to freely do as they wish with their property.”).



workplace grounds.<sup>66</sup> In addition to authorizing the transportation and storage of firearms, these laws regularly provide that said firearms may be removed from the employees' vehicles for purposes of self-defense, the defense of another, or the defense of property without the consent of the landowner/employer.<sup>67</sup>

As multiple federal appellate court decisions have made plain, the Second Amendment does not *compel* all private property owners to allow firearms onto their property.<sup>68</sup> It follows, therefore, that forced entry laws reflect a regulatory choice to define and allocate property interests in a certain way in the face of competing claims. To some employers, compelling such a term in employment arrangements restricts their freedom to use their land in a manner that lies outside the shadow of fear cast by employees who bring loaded firearms to the workplace. From their perspective, employees bearing firearms hold arbitrary power over their fellow employees and their employer through intimidation; the holders of such weapons impose their will on everyone else. On this view, allowing employers to restrict firearm possession on their land is therefore not only appropriate but necessary to ensure freedom. Some employees, though, understand forced entry laws to *buttress* freedom. In their view, requiring employers to allow employees to bring firearms onto the work site prevents harm on the theory that responsible persons with access to their firearms will be able to defeat the threat of dangerous persons—including those who themselves bear firearms—harboring ill will.<sup>69</sup>

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<sup>66</sup> See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 5 (2012). Twenty-four states have adopted some version of a forced entry law. Jonathan Hancock & Joann Coston-Holloway, *State Guns-at-Work Laws Chart: Overview*, WESTLAW: PRAC. L., <https://us.practicallaw.thomsonreuters.com/9-521-5091> [<https://perma.cc/RN2X-47W7>]. Kentucky's iteration is typical in declaring that "[n]o person, including but not limited to an employer, who is the owner, lessee, or occupant of real property shall prohibit any person who is legally entitled to possess a firearm from possessing a firearm, part of a firearm, ammunition, or ammunition component in a vehicle on the property." KY. REV. STAT. ANN. § 237.106(1).

<sup>67</sup> KY. REV. STAT. ANN. § 237.106(3).

<sup>68</sup> See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) ("An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land."); see also *Bastible v. Weyerhaeuser Co.*, 437 F.3d 999, 1008 (10th Cir. 2006) (concluding that a company "did not unlawfully infringe upon any right of [its employees] in enforcing its no-firearms policy" when the company terminated employees who transported firearms onto the company's property in their vehicles).

<sup>69</sup> See Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, SCI. AM. (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/> [<https://perma.cc/CHF3-75HJ>] ("[G]un advocates argue . . . that murders, crimes and mass shootings happen because there aren't enough guns in enough places. Arming more people will make our country safer and more peaceful, they say, because criminals won't cause trouble if they know they are surrounded by gun-toting good guys.").

Ensuring employers' freedom to live unburdened by a fear of firearms violence is a course that necessarily limits the employees' freedom to protect themselves from harm; likewise, allowing employees the ability to bring firearms onto workplace grounds is a course that necessarily limits the employers' freedom to live unburdened by a fear of firearms violence. It is not as if one set of these parties' competing interests is internal to property and the other set is external. They are *both internal* to property, and to what property "protection"—for firearms on one hand and land on the other—should entail.<sup>70</sup>

The parties' competing interests, on this account, are distinct from mere preferences. Unlike preferences, their interests rest on conflicting interpretations of a foundational value—freedom—that they share and that is not easily amenable to aggregation and comparison. It is hard to imagine that there is a point at which we all will have reflected long enough about the meaning of freedom that the contours of these parties' property rights will be determined definitively in perpetuity; it seems unlikely that we ever would be able to deduce a resolution of the parties' competing claims by turning to some agreed-upon meaning of "freedom." Resolving this dispute requires evaluating *competing* freedoms. It requires deciding whether to protect the employees' interest in the freedom of action or the employers' interest in the freedom to be secure from illegitimate harm. These parties cannot act—indeed, they cannot *exist*—free and apart from one another. They are partners in an interconnective and interdependent social and economic relationship.

In the face of these types of conflicting property claims and the competing freedoms that attend them, there must be some mechanism to define the contours of property interests so as to determine what freedom entails in various contexts.<sup>71</sup> We can gain an appreciation for the mechanism that we currently employ in the United States by looking back on the mechanism underlying the system of European feudalism, the vestiges of which we rejected in the course of the American Revolution. Under the feudal system, "owners" were defined by their laddered status. Lords and long-dead ancestors had the power to make what were at times shameful demands, forcibly linking those of an inferior status together via a complex

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<sup>70</sup> See UNDERKUFFLER, *supra* note 55, at 157 (explaining that the resolution of property disputes necessarily requires value-laden engagement on the question of "what the right to property protection—as a fundamental matter—should be").

<sup>71</sup> Professor Jennifer Nedelsky terms the product of this definitional exercise "responsible freedom." Jennifer Nedelsky, A Relational Approach to Property 10 (unpublished manuscript) (on file with *Northwestern University Law Review*).

matrix of fealties (i.e., allegiances, dues, and loyalties).<sup>72</sup> These linkages had the derivative effect of tying most all individuals to their place; these individuals could not liberally use, sell, borrow, or trade interests in land, for they were subject to the demands made by those of a superior status, who, in turn, were ruled by those of a superior status, all the way on up to a king.<sup>73</sup>

Upon pronouncing unalienable the rights to “Life, Liberty, and the pursuit of Happiness,” the drafters of the Declaration of Independence explained that governments must be “instituted” to “secure these rights.”<sup>74</sup> Such rights could not be secured without compulsorily precluding property arrangements characterized by the sorts of unreasonable demands commonplace in a feudal system that necessarily placed these rights out of reach for many. Over time, then, we have instituted governments—by democratically electing representatives—for the purpose of, among other tasks, making definitional and allocative choices surrounding property that determine which demands are and are not beyond the pale.<sup>75</sup>

These representatives cannot simply support “strong” ownership powers. To ensure that all people have the prospect of becoming owners and to allow all owners to exercise their ownership powers, all owners necessarily must be told what their ownership powers entail—how much waste they can produce before it amounts to harmful pollution, how much market dominance they can acquire before it is deemed monopolistically damaging to competitors, whom they can and cannot prevent from entering into market exchanges and for what reasons, etc. In reflecting these choices, it is property law that determines the meaning of freedom in the face of competing freedoms—for example, the freedom of use versus the freedom from harm—across circumstances.

The individuals whom voters democratically elect to resolve the competing freedoms presented by the question of whether employers should

<sup>72</sup> See, e.g., DAVID CARPENTER, *THE STRUGGLE FOR MASTERY: BRITAIN 1066–1284*, at 403–07 (2003).

<sup>73</sup> See, e.g., Edward Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 578–80. This is not to suggest that those parties of inferior status had no rights that those of superior status respected. Indeed, on many feudal manors, important land use decisions often were made collectively by tenants.

<sup>74</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>75</sup> Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 925 (“Respected liberties are not a pre-established and immutable touchstone of defining and allocating property interests; rather, they are an *outcome* of [the] democratic process of making policy choices among the varying potential answers to difficult questions through the formulation of property laws in the face of new circumstances and information.”); Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy*, in *TRANSFORMATIVE PROPERTY LAW 1*, 20 (G. Muller, R. Brits, B.V. Slade & J. van Wyk eds., 2018) (“Democracies do not serve property rights; property rights serve democratic values.”).

be mandated to allow employees to carry firearms onto workplace grounds have many options for defining the meaning of ownership in a manner that resolves such a case. Perhaps, for instance, the employees' ownership of their firearms should be defined as subject to an obligation to abate the harm to their employers if the employees can do so at the lowest cost; alternatively, perhaps the employers' ownership of land should be defined as subject to an obligation to tolerate low-grade impacts of their employees' use of their personal property on that employer's land. However, because defining ownership with respect to one of the parties necessarily has the effect of limiting the ownership claims of the other, the state cannot, out of respect for freedom, choose *not* to define ownership.<sup>76</sup> This is so because what may be thought of as inactions—i.e., choices to repeal or not enforce existing regulations or to refrain from adopting new ones—naturally have their own defining effects in the face of conflicting interests.<sup>77</sup> The question, then, is not *whether* the state should *interfere* with property interests but, instead, *how* the state should *define* property interests in a given context.<sup>78</sup>

Conceiving of property laws as interfering with freedom prevents us from understanding the state's unavoidable responsibility of structuring the social and economic environment within which we can exercise our freedom. No bargains that are reached between individuals are, in actuality, wholly detached from public decisions on how to define and allocate property interests. These definitional and allocative choices determine the extent to

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<sup>76</sup> Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 370 (2010) ("No societally recognized and enforced property right, which is 'normatively neutral,' actually exists."); Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENV'TL. REV. 75, 84 (2010) ("There is, in truth, no morally neutral place for [property] law to hide."). Other rights, such as free speech, are not "rivalrous" in this sense. For example, recognizing an individual's speech right is unlikely to deprive others of their ability to speak; that is, with speech, scarcity is absent. Underkuffler-Freund, *supra* note 56, at 1039; *see also* Cohen, *supra* note 44, at 13 ("[D]ominion over things is also *imperium* over our fellow human beings."). Indeed, property's rivalrous nature helps explain why John Locke so wrestled with the task of justifying individual appropriations of nature's commons: such appropriations would deprive all others of their preexisting rights to the commons. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 25 (C.B. Macpherson ed., Hackett 1980) (1690).

<sup>77</sup> *See* Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 172–73 (2018); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 544 (1985); *see also* Kennedy, *supra* note 12, at 649 (asserting that a decision-maker "should be damned if he doesn't as well as damned if he does"). For example, a refusal to compel a habitability warranty in residential leases reflects a choice to enforce a lease under which a tenant can be evicted for nonpayment of rent even if there are rats in the rafters, the doors will not lock, and the toilet will not flush.

<sup>78</sup> *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 963 (2d Cir. 1942) (Frank, J., dissenting) ("Laissez-faire does not mean that the State has given up most of its 'interferences,' but that the State is used to 'interfere' in new ways at the demand of individuals.").

which we are free to make our own choices because they determine the power we have to demand things of others.<sup>79</sup>

It follows that any firm delineation between a public realm and a private realm sheds little light on our property system. Markets do not arise out of thin air; they are *established* by the collective choices to define and allocate property interests in certain ways and not others. Unequal distributions of resources, therefore, are not merely the result of private exchanges but lie on the backs of myriad state choices to define property rights in ways that create entitlements and correlative exposures.<sup>80</sup> There is no conflict between subverting and protecting individual choices; rather, the focus is on debating the contours of the society in which we want to live. Property rights cannot be explained as the mere result of bargains between freely engaging private parties. If property laws were different from the status quo, the bargains reached by private parties would be different because those laws distribute entitlements and, thus, bargaining power in different ways.<sup>81</sup>

### B. Confronting Antipaternalism

The foregoing discussion on conceptions of freedom is naturally moral in nature. A claim of antipaternalism, though, has both moral and utilitarian dimensions. While there are, of course, interplays between these two dimensions, this Section endeavors to address them separately and in turn. Across each dimension, it suggests that describing the imposition of compulsory terms writ large as “paternalism”—much like conceptualizing compulsory terms as interfering with freedom—conceals the role that the state necessarily plays in creating a platform for the development of social and economic relationships that are compatible with democratic norms.

#### 1. Paternalism and Morality

The standing opposition to compulsory terms in property relations is premised on the idea that all people have a sufficient amount of resources that others need, such that they can use those resources in markets to make fair deals to acquire what they need for themselves. If no such deals are out there, the implicit assumption—on the standing view—is that everyone has

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<sup>79</sup> Cohen, *supra* note 44, at 12–13 (describing property as consisting of delegations of public power to private parties).

<sup>80</sup> See generally Hohfeld, *Judicial Reasoning I*, *supra* note 8, at 47 (explaining that a liberty is a right created by law with a correlative duty to not interfere with that right as enforced by public officers); Hohfeld, *Judicial Reasoning II*, *supra* note 8, at 717, 725–32 (recognizing that rights, outside of natural rights, are given meaning and effect by law); Kennedy & Michelman, *supra* note 43, at 760 (explaining society establishes legal entitlements and that, upon doing so, it necessarily creates correlative legal exposures).

<sup>81</sup> Hale, *supra* note 37, at 478; HALE, *supra* note 44, at 385–99.

what they need. The problem lies in the reality that everyone does not have what they need. Some people must accept deals as they are offered to them, even if those deals perpetually prevent them from amassing enough resources to deal with others on any moderately fair terms. Freedom is empty if one does not have sufficient resources to exercise it.<sup>82</sup> A lack of alternatives constrains the choices people make, to the extent that, in certain cases, the only options available to some people come with burdens that no person in a morally just civil society should have to bear.

Consider, for example, how the argument that the landlord will raise the rent upon the imposition of a compulsory habitability warranty rests on the view that both landlords and tenants have the ability to pay for what they want. In actuality, the distribution of property at the outset of contract negotiations dictates the power relationship between the parties.<sup>83</sup> In the event that distribution is unjust, an arrangement reached on the open market may not be best characterized as one that maximizes the parties' legitimate interests but instead as one party—the landlord—unjustly exploiting the other's—the tenant's—marginality.<sup>84</sup> For an even more dramatic example, consider the types of sharecropping arrangements that proliferated in the South after emancipation. The formerly enslaved ostensibly agreed to pay “rent” to their old “masters”; however, the rent was often higher than the value of the seed, food, and wages they received, keeping them in perpetual debt and tied to the land like feudal peasants.<sup>85</sup> They simply did not have enough resources with which to bargain and thus were forced to accept this horrid arrangement.<sup>86</sup>

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<sup>82</sup> HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 42 (2021) (discussing the imperative that all people share an “entitle[ment] to own *some* autonomy-enhancing property”); GREGORY S. ALEXANDER, *PROPERTY AND HUMAN FLOURISHING* 9 (2018) (contending that every person is entitled to the resources necessary to allow them to chart their own course, for “every person is equally entitled to flourish”); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295, 302 (1991) (noting that “anything a person does has to be done somewhere”).

<sup>83</sup> Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 *U. COLO. L. REV.* 139, 170 n.125 (2005) (“The association between property and compensatory power is so simple and direct that in the past it has been considered comprehensive.” (quoting JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* 47 (1983))).

<sup>84</sup> On marginality, see AJ VAN DER WALT, *PROPERTY IN THE MARGINS* (2009).

<sup>85</sup> EDWARD ROYCE, *THE ORIGINS OF SOUTHERN SHARECROPPING* 175 (1993) (explaining that, “[w]ithin a decade of the abolition of slavery,” sharecropping had evolved “into an oppressive debt-peonage system”).

<sup>86</sup> *Id.* at 11 (“Even if the final transactions leading to sharecropping agreements consisted of voluntary choices made in a free-market setting . . . [i]t would still be necessary to assess the extent to which the terms under which planters and freedpeople bargained with one another at this final point (e.g., relative market power, access to resources, availability of alternatives) were themselves set by market forces.”).

Where the bargaining power of the parties is lopsided in light of an unjust original distribution, there is no surety that compulsory terms make the parties collectively worse off. Some relationships, such as slumlord–tenant and “master”–sharecropper, endorse a way of life that is inconsistent with membership in a political system in which every human life matters. It makes no difference that those who enter into such relationships meet whatever test of voluntariness is applicable to other types of relationships, for no person with the power to reject such relationships would agree to accept the vulnerabilities they present. Compulsory terms can do the prework of legitimizing the power relationship between the parties, only after which just market exchanges can occur. From this perspective, compulsory terms do not give parties rewards they cannot reap in the marketplace; they put parties in a position to reap *just* rewards in the marketplace.

The stakes are especially high in determining which relationships are off the table, for no amount of empirical evidence is apt to convince parties who want to enter into these subprime relationships that they are fundamentally morally wrong. But perhaps it is *because* the stakes are so high that the state, in a society riddled by political divisions, is best positioned to represent our collective, pluralist commitments in this regard. In other words, perhaps it is the political realm that is the more rational space for determinations of this sort, in that decisions made therein are based on moral reflections about the types of social relationships that befit humanity.<sup>87</sup> The market realm is the more irrational on this score, for it rests on the objectionable assumption that we should take the extant distribution of property interests—and, thus, economic power—as a given and determine how important select resources and interests are to people by looking exclusively at how much money people are willing to fork over for them.<sup>88</sup>

Should enslaved persons have to pay for their emancipation? Should tenants have to pay for the assurance that the ceiling will not collapse on their babies’ cribs? It may be that the answers to these questions respecting relationships of these natures are today so self-evident to so many that the questions themselves do not occur to us. But it bears reflecting on the broader reality that the legitimate social relationships that we often take for granted as constitutive of the market realm are not naturally occurring but, instead, are the *product* of the political realm. Regulations enacted in the political realm do not rest atop the market model; the market rests atop the foundation

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<sup>87</sup> There are, of course, powers of emphasis in both realms—economic powers in one, political powers in the other.

<sup>88</sup> Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L.J. 475, 492 (1993) (“Imagine, for example, that workers had no protection against being beaten on the job; they might very well agree to work without job security in order to obtain the right not to be beaten.”).

that the regulations in the political realm establish.<sup>89</sup> Markets depend on rules that the market itself often is incapable of establishing.<sup>90</sup> We express our needs and desires in the market realm, but those expressions are layered on top of the expressions of our needs and desires that we make in the political realm. It is in the political realm that we have the ability to take some relational possibilities off the table because they are inconsistent with living in dignity in a civilized democracy.<sup>91</sup>

That the legitimacy of social relationships is determined in the political realm becomes clearer upon reconsideration of the recent assertion set out in the Heritage Foundation report noted in the Introduction above that many workers “are not yet capable of contributing” more value to their employers than the annual wages that an employer must pay a full-time employee working at a \$15 minimum wage.<sup>92</sup> This assertion makes the compulsory term—the minimum wage—out to be a constraint on an employer’s freedom to pay the lowest wage that capable workers will accept on the market. It therefore assumes that, if workers really wanted higher wages, they would seek to bargain for those wages and, where due, succeed in securing them.

This position fails to recognize the possibility that prevailing wages exist not because they reflect bargains that both employers and employees consider just, but instead because the power structure concretized by prevailing property rules does not ensure the realization of a just bargain. If individuals are working hard but not earning enough to live on, it may be that their employers are making money off of their labor but not providing them with the resources they need to be able to provide that labor.<sup>93</sup> Because in these cases the employees’ labor is necessary to make the profits their employer takes, these employers take too much if they make money via practices that do not ensure that those whose services are necessary to their success are able to earn enough to continue to provide those services while meeting their own dignified lives’ basic necessities. To reverse a common trope, the employees are *making* what the employers are *taking* through the

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<sup>89</sup> Joseph William Singer, *Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL’Y REV. 139, 150 (2008).

<sup>90</sup> Robert Kuttner, *The Miracle of Bidenomics*, AM. PROSPECT (Apr. 13, 2021), <https://prospect.org/economy/miracle-of-bidenomics/> [<https://perma.cc/3LR9-P9EA>] (“All markets depend on rules—rules defining property rights, liability risks, unfair market practices.”).

<sup>91</sup> Singer, *supra* note 88, at 494 (“Legal rules structure the contours of the relationships within which bargaining occurs . . . . Legal rules shape the contours of the social relationships that comprise the form of social life to which we are committed.”).

<sup>92</sup> See Rachel Greszler, *Biden’s Covid Stimulus Plan to Double Minimum Wage Will Hurt the People He Wants to Help*, NBC NEWS (Feb. 3, 2021, 12:04 PM), <https://www.nbcnews.com/think/opinion/biden-s-covid-stimulus-plan-double-minimum-wage-will-hurt-ncna1256547> [<https://perma.cc/4X5L-LLLL>].

<sup>93</sup> See Mulvaney & Singer, *supra* note 32, at 30.



law's enforcement of low-wage contracts that workers, despite deserving otherwise, have no choice but to take.<sup>94</sup>

From this perspective, a legitimate minimum wage need not necessarily be interpreted to paternalistically limit the freedom of employers; instead, such a minimum standard could be interpreted as rejecting employers' coercive powers and recognizing the freedom of workers to secure a wage worthy of their contributions to the lives of their employers.<sup>95</sup> It is conceivable that a minimum wage might thwart the creation of an arrangement between an employer and a worker freely willing to accept a substandard wage. But a minimum wage can provide workers with a threshold that, despite whatever they are willing to accept, is commensurate with what they are *entitled* to collect. These minimum standards are a declaration—an evaluative assertion—about the types of social relations that are out-of-bounds in our democracy; they determine the issues about which employers and employees can and cannot legitimately negotiate and compete.<sup>96</sup> They are restrictions on the freedom to exploit and oppress in an effort to secure the freedom to participate in a just employment market in which a human being can garner wages sufficient on which to build a dignified life.

## 2. Paternalism and Utility

As the preceding Section asserted, describing the imposition of compulsory terms writ large as “paternalistic” conceals the reality that the state must determine the relationships that are morally consistent with a free and democratic society before individuals are in a position to state their social and market preferences. It also, though, turns a blind eye to the reality that, in a number of circumstances, compulsory terms can both satisfy people's social and market preferences as they are and satisfy *what would be* people's preferences if they had the benefit of hindsight.

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<sup>94</sup> Ben Crow & Zachary D. Carter, *Paul Ryan: 60 Percent of Americans Are 'Takers,' Not 'Makers,'* HUFFPOST (Oct. 5, 2012, 3:42 PM), [https://www.huffpost.com/entry/paul-ryan-60-percent-of-a\\_n\\_1943073](https://www.huffpost.com/entry/paul-ryan-60-percent-of-a_n_1943073) [<https://perma.cc/8YW2-8XAM>]. Employers who pay substandard wages also take from third parties—family, charity, government, etc.—who have to sustain these underpaid employees to enable them to work for these employers. See Mulvaney & Singer, *supra* note 32, at 32. For more on external effects, see *infra* Section III.C.4.

<sup>95</sup> See Christopher J. Flinn, *Minimum Wage Effects on Labor Market Outcomes Under Search, Matching, and Endogenous Contract Rates*, 74 *ECONOMETRICA* 1013, 1014 (2006).

<sup>96</sup> Joseph William Singer, *Democratic Property: Things We Should Not Have to Bargain For*, in *RESEARCH HANDBOOK ON PRIVATE LAW THEORY* 221 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (“Not every property arrangement can be justified by reasons that are compatible with democratic norms and values . . . . Within those democratic constraints, people are free to create new types of property rights and to use contractual relationships to share and limit those rights in ways that serve human interests and needs.”); *id.* at 222 (“Our property rights . . . set the stage for our exercise of freedom.”).

*a. Satisfying preferences*

As this Section explains, compulsory terms can satisfy people's social and market preferences as they are in circumstances in which (1) expense, time, and lack of expertise make it unlikely that parties will be able to conceive of or desire to negotiate for what are today routine, socially expected conditions, or (2) collective action problems predominate.

With respect to the former, it is expensive, time-consuming, and downright difficult to think of everything we would have to negotiate for in the absence of compulsory terms. Consider, for instance, the prospect of reaching an agreement with a builder to construct a modern home if there were no building codes devised by people with expertise in architectural stability, water, electric, gas, HVAC, and the like.<sup>97</sup> Many people may well want the compulsory terms of building codes so that they do not have to worry about the possibility of a new home or that of a neighbor going up in flames because the electrician cut corners. They may well want to be able to take for granted that, when a person walks into that new home, the sockets in the bathroom are grounded, rather than bear the responsibility to bargain for such peace of mind upon entry. It also may be true that a select few would prefer that the issue of whether a bathroom socket is grounded be on the bargaining table rather than set in stone at the outset. That preference, though, dashes the expectations of everyone else who buys or enters any home. One of these groups—either those who expect safe wiring or those who would prefer to negotiate for it—will be imposing its will on the other. An increase in freedom for some is always a decrease in freedom for others.<sup>98</sup> Compulsory terms can assume that conditions will reflect what most people want to take for granted.<sup>99</sup>

As for the latter, compulsory terms need not be construed as constraining free choices; compulsory terms can be understood as *restoring* free choices that the prior regulatory regime had thwarted by allowing certain power relationships to develop and persist. We might assume, for instance, that if employees wanted to work in an environment in which their co-

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<sup>97</sup> The exemplar of building codes highlights what in some cases is a special haziness of the line between laws that compel terms in property-related contracts and laws that more generally regulate business or other activities. Building-code requirements, after all, apply not only in instances in which homeowners and building contractors enter into contracts but also in instances in which landowners decide to engage in repairs or new construction with their own hands. The existence of this haziness does not detract from the arguments outlined in the text, but instead merely suggests that they may have application beyond the confines of what this Essay construes as compulsory terms in property.

<sup>98</sup> Paul Spicker, *Why Freedom Implies Equality*, 2 J. APPLIED PHIL. 205, 205 (1985) (“Freedom is a redistributive idea, implying that the freedom of some must be restricted to increase the freedom of others.”).

<sup>99</sup> Cf. Singer, *supra* note 89.

workers were required to wear masks to prevent the spread of COVID-19, they would have bargained for it, and that, since they did not bargain for such a safety precaution, they must not value it. Yet consider things from the other side: if it is the case that compulsory terms interfere with the intentions of contracting parties, it must mean that minimum safety requirements prevent workers from realizing their wish of securing jobs that may pay a bit more but at which they are especially vulnerable to disease. If we assume that most workers want relatively safe jobs, perhaps we should reconsider the baseline and assume that employers should have to bargain for the right to expose their workers to unmasked colleagues. The point, here, is that if employers would not be inclined to bargain for that right to expose their workers to a highly contagious deadly disease were they not afforded it at the outset (i.e., in economic parlance, the workers' asking price significantly exceeded the employers' offer price), perhaps we should not actually afford it to them at the outset.<sup>100</sup>

Many employers did not provide these relatively safe jobs in the peak stages of the COVID-19 pandemic because they had the power not to. One potential reason they have the power not to provide these jobs is the collective action problem. For instance, consider Starbucks's decision to lift its self-imposed mask mandate in the spring of 2021.<sup>101</sup> Starbucks employees might each have individually preferred in the moment that their colleagues and customers continue to wear masks in the face of emerging variants of the virus, but would not negotiate for that mandate for fear of being undercut by those willing to work without it. In this instance, the high transaction costs of getting all of the workers in a room to share their preferences blocks the expression of those preferences. In this sense, a law that sets a compulsory masking requirement may not be paternalistic at all. In these circumstances, such a term would not override most persons' individual choices; instead, it would merely reflect the actual costs of hiring workers by producing the

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<sup>100</sup> In some sense, this position parallels the claim that those with insufficient market power may not be able to register their legitimate preferences in the marketplace: money is of decreasing marginal utility, such that granting an entitlement to a poorer person may offer greater utility gains than granting it to a relatively wealthier person, even though the latter would be willing and able to pay more in absolute dollars for the entitlement were it sold at auction.

<sup>101</sup> Mary Meisenzahl, *Some Starbucks Employees Are Angry over Mask Mandates Lifting, While Others Are Eager to End Customer Confrontations*, BUS. INSIDER (May 17, 2021, 12:24 PM), <https://www.businessinsider.com/starbucks-lifts-mask-mandates-and-workers-are-divided-2021-5> [<https://perma.cc/Z6A9-MAPY>].

outcome to which the parties would have agreed absent the transaction costs.<sup>102</sup>

*b. Satisfying would-be preferences*

There certainly are times when compulsory terms do indeed preclude people from getting what they, at least in the moment, say they want, even when alternatives are available. But in some of these cases, the government really *does* know better.<sup>103</sup> Mill's fantastical take that we are in all circumstances the best judges of our own welfare is belied by the reality that we are quite often mistaken in our judgments as to what is in our best interests.<sup>104</sup> We regularly do not think to include contractual provisions (that our landlords include a grace period for rental payments), underestimate the risk of our own failures (that we can sell shares in a condominium Ponzi scheme), think in the instant rather than longer term (that we can comport with the obligations of a mortgage when the rates will spike markedly after the lapsing of an initial low-rate term), and trust sellers to act reasonably rather than stand on a legal right to commit unfair treatment (that we will be able to assign the remaining term on our lease when a job transfer requires us to move across the country).<sup>105</sup> That we make mistakes in judgment does not imply that we are unintelligent; rather, it simply reveals that rational thought is inherently imperfect.<sup>106</sup> In some cases, choice architectural tools

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<sup>102</sup> Kennedy, *supra* note 12, at 575. Kennedy cautions that efficiency arguments of this nature that surmise what parties would have accomplished absent transaction costs suffer from a manipulability in the sense that they require factual assumptions for which empirical evidence is inherently unavailable. *Id.* at 597–99 (asserting that interventions to compel job security terms are more colorably justified on distributivist or paternalist grounds, rather than efficiency grounds).

<sup>103</sup> *Id.* at 634 (“[T]he decisionmaker has to take the beneficiary under his wing and tell him what he can and cannot do.”).

<sup>104</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 21–22, 430–31 (2011) (explaining the various ways in which individuals predictably make judgments that diverge from their own best interests); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 19 (2008); Robert Charles Clark, *The Soundness of Financial Intermediaries*, 86 YALE L.J. 1, 18–20 (1976) (“Human finitude and normative error are the major sorts of personal imperfections: human beings have limited capacities to understand, to reason, and to predict, and they do not always know or choose the risks that under some moral theory they ought to prefer . . . . [But] since fallibilistic theories strike many persons as an insult to human dignity, inevitably there is pressure to disguise these theories when they do underpin regulation.”).

<sup>105</sup> Kennedy, *supra* note 12, at 626–28.

<sup>106</sup> Peter de Marneffe, *Avoiding Paternalism*, 34 PHIL. & PUB. AFFS. 68, 80 (2006). There are, of course, reasons for not acting to correct these mistakes. For instance, perhaps it is best for the parties to suffer the consequences of a mistake. Alternatively, perhaps we are mistaken about whether a mistake was actually at hand at all—maybe it was not a mistake but rather part of a strategy that we failed to understand. Or, even if the compulsory term did fend off a mistake, the saved party may be so aggrieved by the intersubjective judgment that generated that term that such an intervention is socially unforgivable. Kennedy, *supra* note 12, at 640–41.

may be an appropriate antidote to these imperfections.<sup>107</sup> In other situations, though, in which evidence over time suggests that these mistaken judgments are both especially likely and especially detrimental, the state's imposing compulsory terms may well be in our best interests.<sup>108</sup>

### C. Promoting Just Markets

The standing opposition to compulsory terms rests on the assumption that such terms necessarily end up hurting the people they were designed to benefit by impeding bargains. Yet it is not possible to predict with confidence what consequences will result from the imposition of a compulsory term in any general sense. The consequences depend on the state and structure of the market for that resource, as well as the state and structure of the market for the myriad resources that are interrelated thereto. In some instances—be it, as the following examples attest, as a result of cost neutralizing effects, the elasticity of supply and demand, the interactions of complementary policies, or impacts on third parties—compulsory terms may well be justifiable measures to achieve consequentialist aims.

#### I. Neutralized Costs

There are circumstances under which the costs of a compulsory term may be neutralized by derivative behavioral changes. For instance, raising the minimum wage may well have no discernible impact on net employment and production (particularly where it is coupled with indexing the minimum

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<sup>107</sup> See generally Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161–62 (2003) (asserting that rules should be chosen to improve the welfare of people by steering them in the direction of making better choices for themselves); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175, 178 (2003) (“Would many object to putting the fruit before the desserts at an elementary school cafeteria if the outcome were to increase the consumption ratio of apples to Twinkies?”). Thaler and Sunstein’s work has spawned a venerable cottage industry of legal and economic scholarship on the virtues, vices, impressions, and misimpressions of choice architecture. The many prominent critiques include Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003); Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905 (2009); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012); and On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098 (2008).

<sup>108</sup> For example, there is empirical evidence that a sizable percentage of people who earn enough income or have enough wealth-creating opportunities to save for retirement on their own nonetheless do not do so. See, e.g., Annamaria Lusardi, *Explaining Why So Many People Do Not Save* 12 n.13 (Ctr. for Ret. Rsch. AT Bos. Coll., Working Paper 2001-05, 2001), [https://crr.bc.edu/wp-content/uploads/2001/09/wp\\_2001-05.pdf](https://crr.bc.edu/wp-content/uploads/2001/09/wp_2001-05.pdf) [<https://perma.cc/GWH7-CLQQ>]. This evidence lends some support to the view that the state’s imposition of a Social Security system may well be in the best interests of the public.

wage to median wages moving forward<sup>109</sup>) where it makes higher paid employees—buttressed by a now-higher morale and self-worth—less likely to seek greener pastures.<sup>110</sup> In turn, employers’ expenditures on increased wages are offset as worker productivity increases when workers remain in their positions for longer periods and expenditures on training and administrative onboarding for new workers are reduced.<sup>111</sup>

## 2. *The Elasticity of the Supply and Demand Curves*

When the costs of compulsory terms are not neutralized, the extent to which the cascading distributive effects will inure to the benefit or detriment of a given party will be dependent on the shape of the supply and demand curves in the relevant market.<sup>112</sup> If, for example, the demand for housing in a given community will remain despite even a dramatic price increase while the slightest decrease in price will generate a marked decline in supply, landlords will pass on the bulk of the costs of a compelled habitability warranty to their tenants.<sup>113</sup> If, however, the demand for housing in a given community will drop sharply at the slightest price increase while even a large

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<sup>109</sup> Ben Zipperer, *Gradually Raising the Minimum Wage to \$15 Would Be Good for Workers, Good for Businesses, and Good for the Economy*, ECON. POL’Y INST. (Feb. 7, 2019), <https://www.epi.org/publication/minimum-wage-testimony-feb-2019/> [<https://perma.cc/ANY5-L7HR>].

<sup>110</sup> Under certain conditions, a minimum wage hike *could* negatively impact the number of people employed. *See, e.g.*, Kevin Freking, Alan Fram, & Josh Boak, *CBO Finds \$15 Minimum Wage Would Reduce Poverty, Increase Federal Debt*, PBS NEWS HOUR (Feb. 8, 2021), <https://www.pbs.org/newshour/politics/cbo-finds-15-minimum-wage-would-reduce-poverty-increase-federal-debt> [<https://perma.cc/K8YF-NUCU>] (describing a recent report of the Congressional Budget Office predicting that more than doubling the federal minimum wage of \$7.25/hour to \$15/hour would contribute to some modest increase in unemployment). The contention here is only that an increase in the unemployment rate does not inevitably result from the passage of a minimum wage increase.

<sup>111</sup> Paul Krugman, *Liberals and Wages*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/17/opinion/paul-krugman-liberals-and-wages.html> [<https://perma.cc/9TXS-37YC>]; Juliana Kaplan, *A \$15 Minimum Wage Would Barely Hurt Business and Be Life-Changing for Many Workers*, BUS. INSIDER (Feb. 8, 2021, 3:17 PM), <https://www.businessinsider.com/what-a-15-minimum-wage-would-mean-businesses-workers-employment-2021-1> [<https://perma.cc/7SUB-ZJJD>] (quoting Ben Zipperer, an economist at the Economic Policy Institute, as asserting that “yes, it is true that when you raise the minimum wage employers hire fewer low wage workers, [but] on the other hand, the factor that’s really offsetting that is that, even though employers are hiring fewer workers, fewer workers are leaving their jobs”).

<sup>112</sup> Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 361 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1483 (1989) (suggesting that it is hard to use a compulsory term to redistribute when the distributive effect depends on “the characteristics of the buying and selling classes”). Professor Martha McCluskey has noted the folly of referring to the provision of economic security as “redistribution” in the sense that “those rights become implicitly . . . suspect and subordinate.” Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 787 (2003). She advocates for “moving egalitarian economic protections from the margins to the center of citizenship.” *Id.* at 875–76.

<sup>113</sup> Kennedy, *supra* note 12, at 605–06.

price decrease will generate only a very minor reduction in supply, landlords will bear the bulk of the cost of the warranty.<sup>114</sup> The shapes of these curves will be dependent in important respects on how compulsory terms are defined and the extent to which they alter the distribution of power and wealth between landlords and tenants on the front end.<sup>115</sup>

### 3. *A System of Regulation*

In circumstances in which the costs of compulsory terms are passed on to those parties for whom the terms were designed to benefit, those costs may be offset not only by the benefits of the compulsory terms themselves but also by the benefits of other policy changes. For example, a term that compels landlords to allow tenants to have visitors in their units may, like a habitability warranty, lead landlords to raise rents under certain conditions, in light of the costs such a term can pose with respect to privacy, liability, wear and tear, and the like on the landlords.<sup>116</sup> However, this possibility is not necessarily a reason to shy away from compelling the term. Costliness, alone, cannot serve as a justification to reject a given regulation; if it did, most all regulations would be on the chopping block, for regulations—allocations of property interests amidst competing claims—almost inevitably impose costs. The costs of a given regulation must be balanced against the benefits of that regulation—including the benefits of that regulation *as that regulation operates within the larger system of regulation* that allows for and governs market exchanges.

Indeed, the extent to which compulsory terms can be effective is almost always contingent on the extent to which they are considered in concert with other policies. For example, even if in isolation the costs to landlords of allowing tenants to host visitors somehow outweigh the benefits of doing so, it is still not evident that the best way to help the poor is to allow landlords to make rental housing visitor-free.<sup>117</sup> We can, instead, decide that a property

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<sup>114</sup> *Id.* at 605; Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1101–10 (1971). The distributivist must be cautious, for while the seller will in this hypothetical instance bear the bulk of the cost of the warranty, there will be a small class of prospective tenants who would bear the remainder (and whose loss is necessary to benefit tenants writ large). Should this group of tenants be the slice about whom—because of their extreme impoverishment—the distributivist is most concerned, even a compulsory term that substantially redistributes from landlords to tenants generally may not serve the specific objective sought. *Id.* at 613.

<sup>115</sup> See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 722 (1988) (explaining that allowing employees to purchase a plant upon its closing is less likely to inure to the employees' benefit than giving them continuing access to the company's financial figures so they can exercise their purchase option upon an informed assessment of whether the plant is being managed in a reasonably competitive way).

<sup>116</sup> *State v. Shack*, 277 A.2d 369 (N.J. 1971).

<sup>117</sup> See JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION 76 (2015).

owner who chooses to enter the residential rental market must comply with a minimum standard relating to visitors and, if housing prices become out of reach for certain prospective tenants as a result of that minimum standard, consider counteracting that result with other policies that help the poor attain housing, such as subsidizing rent or childcare or increasing wages and access to jobs that provide suitable wages.<sup>118</sup>

#### 4. *External Effects*

Even in cases in which two parties would prefer to enter into a transaction that waives a compulsory term, there are instances in which the term may be needed to prevent harms to those who are not party to that transaction. Consider, for example, the mortgage requirements enacted in the wake of the housing crisis of 2008–2009 that seek to prevent a repeat of an economic recession that put many—including many who were not direct parties to subprime mortgagor–mortgagee relationships—out of their homes and work. The argument that borrowers and investors should be able to take risks if they truly want to do so—for example, agreeing to risk-intensive mortgage terms with which both parties know the borrowers are unlikely to be able to comply—is not especially convincing when we consider both the third parties that those perilous wagers harm and the third parties—family, charity, government, etc.—that step in to mitigate those harms.<sup>119</sup>

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<sup>118</sup> Likewise, if raising the minimum wage will lead to reduced employment under certain market conditions—a phenomenon that the most prominent recent economic research rejects, at least on the scale of minimum wage increases that are the subject of current political discourse in the United States—that is not necessarily a reason to reject such a raise. Regulations do not operate within individual bubbles. They are part of a system. Raising the minimum wage, even if doing so reduces employment in a given context, can be combined with other steps to offset those reductions. A substantial body of writing takes on the underlying assumption that increases in the minimum wage necessarily lead to reduced employment. See, e.g., Paul Wolfson & Dale Belman, *15 Years of Research on U.S. Employment and the Minimum Wage* 15, 49 (Tuck Sch. of Bus., Working Paper No. 2705499, 2016) (reviewing thirty-seven studies on the U.S. minimum wage in the past fifteen years and reporting employment elasticities with respect to the minimum wage as having a mean estimate of -.06 and a median estimate of -.03; i.e., a negligible impact on employment resulting from minimum wage increases); Sylvia Allegretto, Arindrajit Dube, Michael Reich & Ben Zipperer, *Credible Research Designs for Minimum Wage Studies: A Response to Neumark, Salas, and Wascher*, 70 ILR REV. 559, 590 (2017) (concluding that minimum wage studies that employ quality modeling find no or a very limited negative impact on employment resulting from minimum wage increases); Ben Casselman, *Cutoff of Jobless Benefits Is Found to Get Few Back to Work*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/2021/08/20/business/economy/unemployment-benefits-economy-states.html> [<https://perma.cc/5QK6-P3M4>] (finding that, as of the fall of 2021, states that had cut some or all of their COVID-19-pandemic-related benefits experienced slightly lower job growth than states that had maintained their benefits).

<sup>119</sup> For another example, consider the many grocery store owners who desired for their patrons to have the choice of whether to wear a mask and the many patrons who desired to go without one despite the high risks of COVID-19 transmission in various phases of the pandemic. Though both these owners and patrons were comfortable with the no-mask choice, a compulsory term requiring that patrons wear



Of course, the more broadly we define externalities, the more compulsory terms will be justifiable on efficiency grounds.<sup>120</sup> Indeed, as Kathleen Sullivan has explained, if moral offense to third parties is considered an external cost, then a great number of compulsory terms conceivably may pass utilitarian muster.<sup>121</sup> The point here, though, is simply that we would need to ignore *all* externalities to justify the rejection of compulsory terms across the board.

#### CONCLUSION

The state's imposition of compulsory terms in property relations may well promote unfairness, result in inefficiencies, or alter individual choices that are better left unaltered. This Essay has called into question, though, the resonant stance that such an imposition *inherently* is accompanied by one or more of these untoward effects. In outlining some of the key characteristics of those circumstances in which compulsory terms may well be justified on deontological or consequentialist grounds, the Essay seeks to generate momentum toward a renewed discourse that eschews knee-jerk opposition to compulsory terms in property in favor of one that engages with the rationales for and against such terms in a context-sensitive fashion.

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masks may nonetheless have been appropriate in this situation because of the external costs generated by the owners' and patrons' preferred arrangement. Perhaps most significantly, these external costs included putting the immunocompromised at risk of a deadly virus. If the impulses of these owners and their patrons who do not want to wear masks are widespread in a community, the ability to acquire a necessary item of personal property—food—would be determined by the extent to which people are or are not immunocompromised.

<sup>120</sup> See, e.g., Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 685–86 (1992) (“[T]hose subject to negative externalities from the purchased goods may . . . become better off, as from safety measures. The effects, both positive and negative, of the mandatory warranty ripple out to dependents (e.g., spouses and children) and supporters (e.g., parents and friends), to workers in directly impacted industries (and their dependents and supporters), [and] those involved with markets that feel the result of reallocating resources . . .”).

<sup>121</sup> Sullivan, *supra* note 112, at 1482; see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972) (discussing such an argument in the context of third parties taking moral offense to A's sale of a kidney to B).

