out the young, relatively unknown German as his intellectual successor seems, in retrospect, quite unusual, considering the number of brilliant economists, British and otherwise, whom he might have nominated for that role. Or did his choice reflect the alleged insularity in his thinking to which some have called attention? Perhaps Keynes, even at that early period in Schumacher's career, detected that element of intellectual creativity which became manifest in his later life and thought. In a book of his essays, published posthumously, Schumacher modestly wrote: ". . . I can't myself raise the winds that might blow us, or this ship into a better world. But I can at least put up the sail so that when the wind comes, I can catch it." [Schumacher, 1979, p. 65] In the years since his death in 1977 and even before, it has become increasingly evident that some of his ideas such as worker participation, appropriate technology, and recognition of the energy problem are catching the wind of informed public opinion throughout the world. Though he was overshadowed in his life by other economists such as Keynes himself, Schumacher may come to be regarded as a pathbreaker and a major shaper of mankind's future on spaceship earth.

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THE EMPLOYMENT CONTRACT AND LIBERAL THOUGHT*

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INTRODUCTION

My purpose is to analyze the institution of capitalist production and particularly its contractual basis, the employment contract, within the liberal contractarian tradition of political/economic theory. How does the employment contract fit into contractarian social thought? What are the implications of democratic theory for the employment contract?

To set the stage for the analysis, I first consider the question, "Capitalism — compared to what?" I then briefly argue that it is the employer-employee contract and not the private ownership of the means of production which is characteristic of capitalist production. Liberal thought formulates the basic social issues in terms of stark contrast of voluntarism: coercion or contract. This seems to establish an association between democracy and capitalism. It puts democracy and capitalism on the same side of the issue over against coercive systems of autocracy and slavery. But, as we shall see, there are liberal contractarian theories which accept certain types of autocracy, feudal relations, and even slavery. Thus voluntarism does not decide these basic social issues.

The real issue is between voluntary contractual systems which permit basic human rights to be alienated and voluntary contractual systems based on inalienable human rights. I present an analysis of the employment contract which shows that capitalism and democracy fall on opposite sides of that issue. If capitalism is not associated with democracy, then what is the intellectual ancestry of the employment contract? I pursue that question by outlining the neglected intellectual history of the contract of political subjection, the *pactum subjectionis*, and the contract to sell oneself, the self-sale contract. There is a substantial liberal tradition which allowed the legal alienation of basic human rights and which condoned contractual forms of autocracy and slavery in addition to the employment contract. In conclusion, I sketch a form of an inalienable human rights theory which provides a basis for political and economic democracy.

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NEITHER CAPITALISM NOR SOCIALISM, BUT SELF-MANAGEMENT

For most of this century, political economic debate has been locked into a bipolar contrast of two alternatives: capitalism or socialism. There are variations and offshoots, but the core of the social question has not ceased to revolve around these two foci. Once the field of choice is so narrowed, the proponents for each system have an easy task; they only need to attack the other system. It is easier to show the ineqalitarian class structure of capitalist society than it is to show how a one party dictatorship will lead to an eqalitarian, classless society. It is easier to show the undemocratic nature of socialism than it is to show how the employer-employee relationship is "democratic."

We must break out of this logjam to scrutinize our present system of production, capitalist production, with new eyes. The similarities between capitalism and socialism are as striking as the contrasts; the real economic alternatives lie elsewhere.

Since the envisioned alternative is important for social analysis, I must be explicit about one type of economic system which stands in contrast to both capitalism and socialism. The third way has no standard label, but it is variously called *self-management*, *economic democracy*, *industrial democracy*, *workers' management*, or *workplace democracy*. The firms in such a market economy are called *self-managed firms*, *worker cooperatives*, or *labor-managed firms*. [See, for example, Vanek, 1970, 1975.] The legal structure of worker cooperatives or self-managed firms has been developed in theoretical and practical terms elsewhere. [Industrial Cooperative Assn., 1983; Ellerman, 1984a and 1983; Ellerman and Pitegoff, 1983] The best concrete example of workers' self-management can be seen in the Mondragon complex of worker cooperatives in the Basque region of northern Spain. [See Oakeshott, 1978; Thomas and Logan, 1982; and Ellerman, 1984b.]

It should be noted that I am using the word "socialism" in the dictionary sense of "governmental ownership and administration of the means of production." Some would argue that this refers only to "state socialism" or "governmental socialism," and that workers' self-management is the meaning of "true" socialism. But this is not the middle of the nineteenth century when the concept of socialism was ill-defined and open to competing interpretations. The history of the twentieth century has stamped an indelible meaning upon the word "socialism." That meaning is government ownership (at least as a "necessary condition"). Phrases such as "state socialism" or "governmental socialism" are simply redundant.

Self-management is not socialism, and, indeed, it is diametrically opposed to the governmental ownership and control of industry. For example, the government owns no part of the Mondragon cooperatives. The whole Mondragon cooperative movement grew up in the last quarter century in opposition to the Franco government. Given the normal difficulties in political and economic communication, one can ill-afford sentimental attachments to private definitions. If one doesn't mean governmental ownership, then one shouldn't say "socialism." Those who seek a new world should first find a new word.

CAPITALIST PRODUCTION: BASED ON PROPERTY OR CONTRACT?

The received wisdom on both the Left and Right is that capitalist production is legally based on the private ownership of the means of production. To abolish capitalist production, it is allegedly necessary to abolish private ownership of physical and financial capital. But this conventional view of private property rights is false; capitalist production is legally based not on private property but on the employment contract. An economic, accounting, and legal analysis of the actual structure of private property rights involved in production has been developed in booklength elsewhere. [Ellerman, 1982] An outline of the relevant part of the analysis is given in this section.

In the Middle Ages, one source of governmental authority was the ownership of land. The legal right to govern the people living in a certain geographical area was viewed as part of the right of ownership of that land.

> By way of investigating the origin of Political Society, men at first contented themselves with a general discussion of the manner in which *dominium* had made its appearance in the world and the legitimacy of its origin; and in their concept of *dominium*, Rulership and Ownership were blent. [Gierke, 1958, p. 88]

The landlord was the lord of the land. The transition from feudalism to capitalism was accompanied by democratic revolutions in the political sphere. In the economic sphere, however, the conventional view is still that "Rulership and Ownership" are blended; the legal right to manage the workers using capital assets is widely viewed as part of the right of ownership of those means of production. Capital replaces land as the asset which blends "Rulership and Ownership."

> It is not because he is a leader of industry that a man is a capitalist; on the contrary, he is a leader of industry because he is a capitalist. The leadership of industry is an attribute of capital, just as in feudal times the functions of general and judge were attributes of landed property. [Marx, 1977, pp. 450-451]

In modern terms, the capitalist does not just own capital inputs; the capitalist "owns the firm." Thus "Rulership" over production is part of the "ownership of the firm."

Logical analysis of the system of property and contracts reveals a surprising conclusion. There is in fact no such legal right of "ownership of the firm" with the above-described legal attributes. Upon sustained analysis, the alleged "ownership of the firm" dissolves into the ownership of capital inputs plus a certain *contractual role;* the role of hiring the workers and the other productive factors.

To change the identity of the firm, it is sufficient to change, e.g., reverse, the contractual role between capital and labor — without changing the ownership of capital. If the hiring contract between capital and labor is reversed, so that labor hires capital and becomes the firm, then the identity of the firm has changed without any transfer in the "ownership of the means of production." "Rulership" over production has changed hands without changing the ownership of capital. Therefore "Rulership" over production legally derives not from the ownership of capital but from the contractual role of being the hiring party. Thus in capitalist production, the capitalist's authority ("Rulership") over the workers is legally based *not* on the "ownership of the means of production" but on the *employment contract.*

There are many ways to misinterpret this deceptively simple argument that there is no legal right of "ownership of the firm." "What, there is no ownership of a corporation?" The corporation is indeed owned by its shareholders, but there is no legal necessity for a corporation to be the "firm," i.e., to be the legal party undertaking production using the corporation's assets. If the corporation's assets are hired out instead of labor being hired in, then the identity of the "firm" changes hands — but with no corporate shares being bought or sold. Hence the "Rulership" or direct control rights over the human activity of production using the corporate assets was *not* a part of the property rights attached to corporate shares. In that sense, the ownership of the corporation does not include any so-called "ownership of the firm."

The ownership of corporate shares is only an *indirect form* of the ownership of financial and physical capital assets. As always, it is the direction of the hiring contracts — whether labor is hired in or capital is hired out — which determines who is the firm. Thus "being the firm" — "firmhood" — is a *contractual role,* not a property right. In a capitalist firm, capital hires labor; in a self-managed firm, labor hires capital (and the capital assets are not government-owned). The actual legal foundation of the capitalist firm is the contract wherein the capitalist and/or the entrepreneur hires labor, the employment contract, not the "private ownership of the means of production."

"What, capital and labor have symmetric social power under capitalism?" says the indignant Marxist. The question of the symmetry or asymmetry of capital and labor requires careful attention to the distinction between right and might. Capital and labor are symmetrical at the level of formal legal rights. In a capitalist economy, things and people are legally symmetrical in that both may be hired or rented. Indeed, one of the proud "scientific" achievements of capitalist economic theory is an analytical formalism where the capital and labor "inputs" in a production function do not need to be labeled since they are symmetrical. [See, for example, Samuelson, 1972.]

Capital and labor are hardly symmetrical in terms of might — market power or social authority. In conventional economics, when thousands of workers join together in a labor union, that is seen as a monopolistic lump in a potentially competitive soup. But when tens of thousands of capital owners join together in a capital union called a joint-stock corporation, it is seen as a single market participant who can negotiate "one on one" with the worker. And the market power of organized capital is buttressed by the social power of the unexamined ideology that it is right and proper for labor to be hired by capital rather than vice-versa.

The power of capital stands in sharp contract to the formal, legal symmetry between capital and labor in the marketplace. The temptation is apparently irresistible on both the Right and Left to interpret this might as right. Hence the conventional wisdom is that the legal authority to direct the human activity of production is part of the ownership of capital. But the capital owner *qua* capital owner has the legal right only to tell the worker what not to do, e.g., to make the worker a trespasser. There is no automatic right to tell the worker what to do, i.e., to make the worker an employee. That requires capital to hire labor, i.e., the employment contract. The asymmetrical social power of capital assures that the labor employment contract is made in the marketplace, not the

legally-symmetrical capital rental contract.

CAPITALISM IN LIBERAL THOUGHT

I will first consider how the basic issues of capitalism are now formulated in liberal thought. It is a remarkable fact about our current intellectual milieu that capitalism is considered to be positively associated with democracy. One reason is the either/or mentality of the capitalism/socialism debate. Since capitalism is *the* alternative to socialism, and since socialism has been so undemocratic, capitalism must represent democracy.

A deeper reason for the alleged association between capitalism and democracy lies in a basic tenet of classical, liberal, social philosophy: that a person's rights and duties in society should be based on voluntary arrangements, not on inherited status. Liberty is the cardinal virtue. Individuals should have the liberty to determine their role in society by means of voluntary contracts. Liberty entails the absence of coercion by other individuals, by organizations, by the state, or by a status role imposed from the past. I will use "liberal" in this classical sense, which should be juxtaposed to "illiberal" rather than "conservative." Many political conservatives (e.g., Hayek or Friedman) are quite liberal in the classical sense. [See Friedman, 1962, p. 5 for a discussion of classical liberalism.]

A classical statement of this basic, liberal theme is Henry Maine's assertion that the movement of the progressive societies has hitherto been a movement *from Status to Contract.* [1861, reprinted 1972, p. 100]

Liberalism, as a social philosophy, has, above all else, emphasized the importance of voluntariness (informed consent free of individual or government coercion). In ancient and medieval societies, the cake of custom had crystallized into hereditary roles, master and slave, lord and serf. Liberal capitalist democracy depicts itself as the outcome of a progressive historical trend to loosen the chains of the past so that each person's role in the political and economic system is based on explicit or implicit voluntary contractual arrangements.

This is the liberal vision in simple and stark terms. Democracy, or at least the liberal conception of democracy, and capitalism both fit into the vision. The liberal conception of democracy is *government based on the consent of the governed,* as expressed, for example, in an explicitly or implicitly agreed-upon political constitution. The democratic form of government is thus typically juxtaposed to the hereditary monarchies

of the past or the imposed authoritarian regimes of the present.

A similar, stark juxtaposition is made in the economic sphere.

> Fundamentally, there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of coercion — the technique of the army and of the modern totalitarian state. The other is voluntary co-operation of individuals — the technique of the market place. [Friedman, 1962, p. 13]

Coercion or contract — that is the basic choice according to liberal social thought. Capitalist production is pictured as the economic correlate of democratic government because it is also based on consent, on the web of market contracts between the capitalist firm and its suppliers and workers. The principal contract at the foundation of capitalist production is the *employment contract,* which establishes the legal relationship of employer and employee.

The basic connection between democracy and capitalism in liberal social philosophy is that both are founded on voluntary social arrangements — the democratic constitution and the employer-employee contract. Much of the progressive and radical criticism of capitalism has accepted the liberal definition of the issues but has disagreed on the empirical question of the voluntariness of the employment contract.

The contracts available to an individual will depend, in large part, on the property and resources of that individual. While status in a strict sense is not inherited in liberal society, property is inherited. Moreover, a class-based system of education has made even the subtler intellectual abilities and 'human capital' into resources which are 'inheritable' or transmittable along class lines. Hence, it is argued, when one is born with little or no inherited capital (financial or otherwise) and with only one's labor to sell, then the 'choice' to be a wage-worker is no choice at all. It is for all practical purposes an inherited status.

These predetermined or socially involuntary aspects of the employment contract are nowhere more evident than in the "company town" — where there is essentially only one employer, who may well be able to enlist the police power. Yet the alternative of socialism is widely perceived as reorganizing society into one big company town. Thus the involuntariness critique of the employment contract has, for all but the most doctrinaire, led not to more government ownership but to more labor legislation, anti-trust laws, industrial regulation, social welfare legislation, taxation of inherited property, and improved public educa-

tion. Such is the well-worn path of modern liberal thought in the capitalist democracies.

THE BASIC ISSUE: ALIENABLE OR INALIENABLE HUMAN RIGHTS

My purpose is not to take sides on this question of the voluntariness of the employment contract. My purpose is to argue that the question is ill-posed — that the issue is misrepresented by liberal capitalist thought. Voluntariness is not the basic issue. Of course, voluntariness is a necessary condition for any acceptable political or economic system. But this has been accepted by both sides in sophisticated political debates from at least the late Middle Ages and Renaissance onwards. Both the proponents of democratic government and the contractarian defenders of traditional, non-democratic forms of government agreed on the criterion of voluntariness — on the foundation of government on the consent of the governed. As we shall see, the anti-democratic liberal tradition has been somewhat neglected by liberal intellectual history.

What is the basic issue? The real issue is not consent, but whether or not consent can alienate and transfer the right of self-government to some sovereign person or body such as a constitutional monarch, a body of oligarchs, or, in the parlance of modern libertarianism, a "dominant protective association." [Nozick, 1974, p. 113] If the rights to self-government may be alienated, then a non-democratic government may be based on the consent of the governed. If, however, the rights to self-government are "unalienable," then "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Such is a democratic government where those who govern are the representatives or agents of the governed. Some political philosophers, such as Hobbes, based autocracy on a *pactum subjectionis*, a contract of subjection, while others saw the social contract as only delegating the right to govern to governors acting as the agents of the governed.

The issue was not coercion or contract. Contract was the common coin of the classical liberal tradition. The basic issue was and is the voluntary alienability versus the inalienability of the natural right to self-government and self-determination.

> This dispute also reaches far back into the Middle Ages. It first took a strictly juristic form in the dispute . . . as to the legal nature of the ancient "translatio imperii" from the Roman people to the Princeps. One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise. . . . On the one hand from the people's abdication the most absolute sovereignty of the prince might be deduced, ... On the other hand the assumption of a mere "concessio imperii" led to the doctrine of popular sovereignty. [Gierke, 1966, pp. 93-94]

Translatio or *concessio?* A social contract of submission or a democratic social contract?

The same fundamental issue arises for individual rather than collective contracts: whether or not an individual may voluntarily alienate the natural right of self-determination as in a voluntary self-enslavement. Robert Nozick is a modern representative of the liberal, indeed, libertarian tradition which permits the contract to sell oneself into slavery. A group of people might sell the right to self-government to a "dominant protective association" and an individual might do likewise.

> The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would. [Nozick, 1974, p. 331]

The arguments of this liberal tradition have been traced and developed in some detail by J. Philmore, who also emphasizes the importance of the basic issue.

> The problem of voluntary slavery and its political analogue is the fundamental paradigmatic problem of modern social philosophy. [Philmore, 1982, p. 55]

There are two distinct natural rights traditions which have diametrically opposite implications for political and economic issues. One tradition sees natural rights essentially as property rights; i.e., as rights which may be alienated and transferred with the consent of the bearers. The other tradition sees natural or human rights as personal rights which may not be alienated even with the free consent of the bearers. This is because the contract to alienate the rights would be null and void on natural law grounds — even though such contracts might be recognized as "valid" by some systems of positive law.

The first conception of natural rights might be called *alienist* and the other conception *inalienist*. The alienist concept of natural rights is the basis for the tradition of non-democratic liberal thought (described below) from antiquity up through Grotius and Hobbes to Nozick. The concept of inalienable natural or human rights is the basis for the tradition of democratic liberal thought. To consider capitalism in the

tradition of liberal thought, I must first analyze the employment contract as the contractual foundation of capitalist production.

THE EMPLOYMENT CONTRACT: AN ANALYSIS

Is the capitalist firm a democratic institution? There is astonishingly little attention to the basic question in the liberal capitalist literature. Instead of being the first question, it is usually not asked at all. [For example, Friedman, 1962, or in the recent neo-institutionalist literature such as Williamson 1975.] If the capitalist corporation is considered from the viewpoint of social contract theory, what is the relevant social contract: the articles and by-laws as a "social contract" between the shareholders, or the employment contract?

For purposes of analysis, I will take the joint stock corporation which hires in labor as the typical capitalist firm. The legal structure of the capitalist firm might be construed in a rough analogy with representative government.

> The analogy between state and corporation has been congenial to American lawmakers, legislative and judicial. The shareholders were the electorate, the directors the legislature, enacting general policies and committing them to the officers for execution. [Chayes, 1966, p. 39]

In the large corporations with publicly traded shares, there is a well-known separation of ownership and control. [See, for example, Berle and Means, 1932.] The far-flung shareholders, as the citizens in a large public corporation, do not wield effective power over the managers, who typically own only a small portion of the shares. But let us, for the sake of the argument, waive these difficulties. Let us assume either a closely-held corporation or a public corporation where the shareholders vigorously exercise their voting rights. Wouldn't that be a democratic structure, a shareholders' democracy? No, because it lacks the most basic attribute of democracy, self-government. The shareholders are not "the governed" in a corporation.

> Shareholder democracy, so-called, is misconceived because the shareholders are not the governed of the corporation whose consent must be sought. [Chayes, 1966, p. 40]

Who, then, is governed or managed in a corporation? There are a number of groups whose interests (e.g., property or persons) are affected by corporate activities:

1. employees (all who work in the corporation),
2. consumers,
3. shareholders,

4. suppliers, and
5. local residents

But there are two quite different ways in which a person might be affected by corporate decisions:

(1) The will of the person is under the authority of corporate decision-makers, or
(2) The person or property of the individual is affected by the corporate decisions, but the person is not under the authority of the corporate management.

In the first case, the person is not only affected but is *governed* by corporate decisions, and, in the second case, the person is only *affected*.

There are also two types of control which a person or group of people might exert over corporate decisions:

(1) *direct or positive control* which is the authority to make decisions and
(2) *indirect or negative control* which is the power to veto or otherwise constrain the decisions.

In terms of choice theory in economics, indirect control is the right to determine certain constraints on the set of possible choices, and direct control is the right to make the choice out of the set of feasible choices allowed by the constraints.

There is a natural pairing between the two ways in which people may be affected and the two types of control. The pairing between being (only) affected and indirect control would allow affected interests to be protected. This can be expressed simply as the

> AFFECTED INTERESTS PRINCIPLE: Everyone whose legitimate interests are affected by a decision should have a right of indirect control (e.g., a collective or perhaps individual veto) to constrain that decision.

The operation of this principle requires a voluntary interface between the corporation and the affected parties. That voluntary interface is usually the market. An effect outside that interface is an external effect or externality.

The pairing of being governed and direct control would realize the idea of self-government. This could be expressed as the

> DEMOCRATIC PRINCIPLE: Everyone who is governed by a decision should have a direct control right (e.g., a vote) to participate in making that decision.

Returning to the list of interest groups or stakeholders affected by corporate decisions, it may be partitioned into two groups: those governed and those only affected. The consumers, shareholders, suppliers,

and local residents are not under the authority of corporate management. They do not take commands from the managers. They are not "the governed." Only the employees, always in the inclusive sense of all who work in the firm, are the governed. Indeed, the command structure of the employment relation is its characteristic feature. To describe the essentials of the "legal relationship normally called that of 'master and servant' or 'employer and employee,' " [Coase, 1937, p. 403] the Chicago economist, Ronald Coase, quotes from a legal reference book:

> The master must have the right to control the servant's work, either personally or by another servant or agent. It is this right of control or interference, of being entitled to tell the servant when to work (within the hours of service) or when not to work, and what work to do and how to do it (within the terms of such service), which is the dominant characteristic in this relation. . . . [Batt, 1967, p. 8; also in Coase, 1937, p. 403]

A capitalist corporation is not a democratic organization. The employees are the governed, but the shareholders have the franchise. A socialist firm is also undemocratic. Even assuming a political democracy, as in democratic socialism, the employees in a government-run firm are an insignificant portion of the general electorate. The vast majority of the citizens are not governed by the corporate managers, even though the citizens are viewed as indirectly selecting the management in the political democratic process. Hence, politically democratic socialism is economically undemocratic (like so-called "democratic capitalism"). The democratic firm, where the people managed are the people having the vote to select management, is the worker cooperative or self-managed firm. [See Ellerman, 1984a; or Ellerman and Pitegoff, 1983.]

What of the articles of incorporation and by-laws of a corporation? Do they form a "social contract" for the corporation? There is a portion of social contract thought [for example, Gierke, 1957 on the law of associations] which explicitly considers the corporation as a contractually based association in analogy with a constitutional government.

> To pursue the theory of a contract of society to its logical conclusions was necessarily also to arrive . . . at the idea that associations had a natural right to exist independently of state-creation. As a *societas*, each corporate body was the result of contract; and all such bodies derived their existence, exactly in the same way as the state, from the original rights of individuals which formed the basis of contract. [Gierke, 1957, p. 169]

The contract considered as the basis for a corporation is the contract

between the shareholders that is embodied in the articles of incorporation and the by-laws of the corporation. Yet we have seen that the shareholders are not "the governed" of a corporation. Hence, the articles-and-by-laws contract is *not* the contract between those who govern and the governed — which has been the traditional subject matter of social contract theory. The contract between the governed and their governors is the employment contract.

The capitalist firm is a peculiar institution. There is no clear analogue to this pair of contracts in political theory. It is as if the people in one country (the shareholders) joined together in a contractual association (the corporation) to elect a government (corporate management) to govern the people in another country (the corporate employees). The people in the second country (the employees) agree to another contract; a contract of subjection (the employment contract) to their governors. That would be the political analogue of a capitalist firm.

In a self-managed firm or worker cooperative, these two contracts are replaced by the one democratic constitution for the workplace. There are no absentee "owners" and no "employees." The worker-members of a democratic corporation agree in the articles and by-laws to the democratic procedures through which they will select management and thus self-manage their work.

Social contract thought focuses on the contract between those who govern and the governed. In the capitalist firm, that is the employment contract. As noted above, there are two fundamentally different types of contracts of government: the contract of subjection of the alienable natural rights tradition, and the democratic constitution of the inalienable natural rights tradition.

In the contract of subjection, the right to govern is alienated and transferred from the governed to their governors. It is not a delegation or "concessio"; it is an alienation or "translatio." The governors are not the representatives of the governed; they rule in their own name.

A democratic constitution is just the opposite. It is erected to secure the right of self-government, not to alienate it. Any legitimate authority exercised by those who govern is delegated to them from the governed. The governors are the representatives of the governed and they rule in the name of the governed.

The employment contract is a limited contract of subjection in the workplace, a *pactum subjectionis* that is limited in duration (the term of the contract) and in scope (the scope of the employment). It is a legal alienation of the direct control rights over the employees (always within

the scope of the employment), not a delegation. It is a "translatio," not a "concessio." The employer is not the representative or agent of the employees. The employer manages the employees in his own name, not in the name of the employees.

There is an entire intellectual tradition behind the employment contract; a tradition that is liberal (contractual voluntarism) and non-democratic (alienable right to self-determination). Liberal capitalist thought has understandably de-emphasized the liberal non-democratic tradition in an attempt to portray capitalist production as being correlated with political democracy on the simplistic grounds that both are voluntary. Both are juxtaposed to the illiberal traditions which advocate non-democratic forms of government on various grounds such as religion, race, or "historical necessity."

INVOLUNTARY ILLIBERAL INSTITUTIONS:	VOLUNTARY LIBERAL INSTITUTIONS:
Chattel slavery.	Political democracy.
Feudalism.	Capitalist production.
Imposed autocracies of the Left or Right.	

Political democracy and capitalist production are, however, on diametrically opposite sides of the liberal voluntaristic spectrum. The democratic liberal tradition considers the right to self-government as inalienable, while the non-democratic liberal tradition permits the alienation on that right in undemocratic institutions such as a constitutional autocracy or a capitalist firm. The right-hand side of the above scheme can be expanded to show how capitalism and democracy are on opposite sides of the liberal spectrum.

VOLUNTARY LIBERAL INSTITUTIONS:

ALIENIST AND UNDEMOCRATIC	INALIENIST AND DEMOCRATIC
Constitutional autocracy.	Political democracy.
Capitalist production.	Industrial democracy.

Capitalist production and political democracy are not associated at all. The economic correlate of political democracy is the industrial democracy of self-managed firms, and the political analogue of a capitalist firm is a constitutional autocracy based on a *pactum subjectionis*.

THE PACTUM SUBJECTIONIS IN LIBERAL THOUGHT

The purpose of this section and the next is to outline the neglected, non-democratic, contractarian tradition of liberal thought which stands behind the employment contract. Citations from primary and secondary sources give a brief "travelogue" through the intellectual history of the political contract of subjection and the self-sale contract.

The idea of a contract of rulership between a king and the people goes back to antiquity. The sovereignty of the Roman emperor was usually seen as being founded on a contract of rulership enacted by the Roman people. The Roman jurist Ulpian (170?-228) gave the classic and oft-quoted statement of this view in the *Institutes* of Justinian (Lib. I, Tit. II, 6):

> Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerned his *imperium*, have yielded up to him all their power and authority. [quoted in Corwin, 1955, p. 4; and in Sabine, 1958, p. 171]

The American constitutional scholar, Edward S. Corwin, noted the questions which would arise in the Middle Ages about the nature of this pact.

> During the Middle Ages the question was much debated whether the *lex regia* effected an absolute alienation *(translatio)* of the legislative power to the Emperor, or was a revocable delegation *(cessio)*. The champions of popular sovereignty . . . took the latter view. [Corwin, 1955, p. 4]

As the idea of grounding rulership on ownership receded in the Middle Ages, the idea of a contract of rulership became widespread.

> Then, when the question about Ownership had been severed from that about Rulership, we may see coming to the front always more plainly the supposition of the State's origin in a Contract of Subjection made between People and ruler. [Gierke, 1958, p. 88]

The intent of this contractarian thought was at first not to attack undemocratic power but to found it on consent:

> In contrast to theories which would insist more or less emphatically on the usurpatory and illegitimate origin of Temporal Lordship, there was developed a doctrine which taught that the

> State had a rightful beginning in a Contract of Subjection to which the People was party. [Gierke, 1958, pp. 38-39]

In terms of the liberal "coercion or contract" dichotomy, this alienist, natural rights tradition was grounded foursquare on contract.

> Indeed that the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled could therefore be propounded as a philosophic axiom. [Gierke, 1958, pp. 39-40]

A state of government which had been settled for many years was *ex post factor* legitimated by the tacit consent of the people. In about 1310, according to Gierke,

> Englebert of Volkersdorf is the first to declare in a general way that all *regna et principatus* originated in a *pactum subjectionis* which satisfied a natural want and instinct. [Gierke, 1958, p. 146]

William of Ockham (1290-1349) is sometimes cited as the first to expound the idea of consent-based legitimacy in *The Dialogue* (1343).

> Ockham cites as one provision of natural law . . . the requirement that rulers should be elected by consent — probably the first time in the history of political thought that governmental legitimacy was defined as derived from consent based on natural law. . . . Ockham adds that subjects can relinquish or transfer to others their right of election (he cites the case of the Holy Roman Empire). . . . [Sigmund, 1971, pp. 56-57]

Tuck [1979] has traced another root of alienist natural rights thought to a seemingly obscure medieval controversy about the meaning of apostolic poverty. Is a monk's right *(ius)* to use food, clothing, and shelter a property right (a *dominium)* even though a monk may not sell these commodities? The thinkers who foreshadowed the liberal nondemocratic tradition argued that one's right or liberty to use commodities and, broadly, to act in the world, was indeed a property right (a *dominium).*

In 1402, the Parisian legal theorist, Jean Gerson, treated man's right to act in the world and, indeed, man's right to liberty as property. This led to the conclusion that liberty could also be traded away.

> We can see from the history of this movement how the attack on apostolic poverty had led to a radical natural rights theory. If one had property in anything which one used, in any way, even if only for personal consumption and with no possibility of trade, then any intervention by an agent in the outside world was the exercise of a property right. Even one's own liberty, which was undoubtedly used to do things in the material world, counted as property — with the implication that it could, if the legal circumstances were right, be traded like any other property. [Tuck, 1979, p. 29]

A limited form of this alienist view is not only dominant today, but it is the legal basis for our present system of capitalist production. One's "own liberty . . . to do things in the material world" is now called "labor," "Labor Service is a Commodity" [Alchian and Allen, 1969, p. 469], the commodity is bought and sold on the labor market, and the contract for this legal alienation and transfer is the employment contract.

A Dominican theologian, Silvestro Mazzolini da Prierio, argued in 1515 that a free man could sell himself into unconditional slavery. [See Tuck, 1979, p. 49.] A Portuguese churchman, Luis de Molina, asserted in 1592 that:

> Man is *dominus* not only of his external goods, but also of his own honour and fame; he is also *dominus* of his own liberty, and in the context of the natural law can alienate it and enslave himself. . . . It follows . . . that if a man who is not subject to that law [i.e., Roman law] sells himself unconditionally in some place where the relevant laws allow him, then that sale is valid. [Molina quoted in Tuck, 1979, p. 54]

The influential Spanish scholastic philosopher and jurist, Francisco Suarez, reiterated the basic theme in the alienist concept of natural rights:

> nature, although it has granted liberty and *dominium* over that liberty, has nevertheless not absolutely forbidden that it should be taken away. For . . . the very reason that man is *dominus* of his own liberty, it is possible for him to sell or alienate the same. [Suarez, 1612, quoted in Tuck, 1979, p. 56]

Suarez developed the connection between voluntary slavery and the political *pactum subjectionis* which is a recurrent theme in the alienist natural rights tradition.

> If voluntary slavery was possible for an individual, so it was for an entire people. . . . A natural rights theory defense of slavery became in Suarez's hand a similar defense of absolutism: if natural men possess property rights over their liberty and the material world, then they may trade away that property for any return they themselves might think fit. . . . [Tuck, 1979, pp. 56-57]

Hugo Grotius (1583-1645) was a pivotal figure in the development of natural rights political philosophy, but he also, in the alienist tradition, viewed man's natural right to liberty as a right which could be transferred with consent.

> A man may by his own act make himself the slave of any one: as appears by the Hebrew and the Roman law. Why then may not a people do the same, so as to transfer the whole Right of governing it to one or more persons? [Grotius, 1625, reprinted in Morris, 1959, p. 89]

Grotius was followed on the Continent by Samuel Pufendorf (1632-94), who, as Rousseau pointed out, continued the alienist tradition of treating liberty as a property right.

> Puffendorf says that we may divest ourselves of our liberty in favour of other men, just as we transfer our property from one to another by contracts and agreements. [Rousseau, 1755, second part]

Thomas Hobbes (1588-1679) made the best-known attempt to found an absolute monarchy or oligarchy on the consent of the governed. Without an overarching power to hold people in awe, life would be a constant war of all against all. To prevent this state of chaos and strife, men should join together and voluntarily transfer the right of self-government to a person or body of persons as an absolute sovereign. This *pactum subjectionis* would be a

> covenant of every man with every man, in such manner as if every man should say to every man, *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner.* [Hobbes, 1651, reprinted 1958, p. 142]

With the success of the political democratic revolutions, this long and venerable non-democratic tradition of liberal thought did not die; it retreated to the private economic sector. There it has thrived ever since as the liberal capitalist thought which condones the limited *pactum subjectionis* of the workplace, the employment contract.

The liberal tradition of allowing non-democratic forms of government based on the consent of the governed is represented today in the alienist, natural law libertarianism of Robert Nozick. The contract of subjection re-emerges from its economic habitat to enter the political sphere of Nozick's work since his ultra-capitalist approach to political theory is the marketplace writ large. Unlike Hobbes, Nozick does not espouse alienating the right of self-government to an absolute sovereign — but only that it should be permitted. Nozick's point is that the basic "framework should be fixed as voluntary." [Nozick, 1974, p. 331] An individual should be free to sell himself into slavery or to forswear such contracts. People should be free to contract away the right of self-government to an authoritarian, dominant protective association or to enter into democratic protective associations.

THE SELF-SALE CONTRACT IN LIBERAL THOUGHT

The employment contract may be considered as a collective (e.g., collectively bargained) contract or as an individual contract. We have seen that as a collective contract it is a limited economic form of the political *pactum subjectionis*. As an individual contract, the employment contract is related to the self-sale or self-enslavement contract. As was evident in the last section, the writers in the non-democratic tradition were well aware that the *pactum subjectionis* was essentially a collective version of the self-sale contract.

To investigate the relation between the self-sale and employment contracts, we must consider the distinction between selling and renting. A durable entity, such as a machine or a house, can be considered as the bundle of future services which could be derived from it. When the entity is *sold*, all the future services are sold. When the entity is *rented* for a certain time period, then only services derived from it during that period are sold. When a machine is rented for two hours, the machine services, two machine-hours, are sold. It is the same when the entity is a person. When a man is rented for two hours, the labor services, two man-hours, are sold. It may sound unusual to say that people are rented, but that is only because it is customary to use the word hired when the rented entity is a person. One customarily says that a car or house is rented, but that a person is hired.

The legal contract for the renting of persons is the employment contract; it is the self-rental contract. Hence the relation between the self-sale and employment contracts is essentially the relationship between selling and renting; i.e., between selling all or only a limited portion of one's labor services.

This relation between owning and renting people has been understood at least since antiquity. In the third century, the Stoic philosopher, Chrysippus, held that

> no man is a slave 'by nature' and that a slave should be treated as a 'laborer hired for life.'. . . [Sabine, 1958, p. 150]

In more recent times, James Mill expounded on the distinction between buying and renting people from the employer's viewpoint.

> The only difference is, in the mode of purchasing. The owner of the slave purchases, at once, the whole of the labour, which the man can ever perform: he, who pays wages, purchases only so much of a man's labour as he can perform in a day, or any other

stipulated time. [James Mill, 1826, Chapter 1, section II]

The self-sale contract is now legally recognized as being invalid; our present labor system is based on the renting of people.

> Since slavery was abolished, human earning power is forbidden by law to be capitalized. A man is not even free to sell himself: he must *rent* himself at a wage. [Samuelson, 1976, p. 52]

But the self-sale contract, the all-at-once labor contract, has had a long history. That history is largely neglected in contemporary liberal capitalist thought so I will outline the intellectual tradition of the lifetime labor contract. Following Nozick's ultra-capitalist advocacy of revalidating self-sale contracts, [1974, p. 331] J. Philmore [1982] has summarized much of the past and present thinking about voluntary contractual slavery — so I will be drawing on that treatment.

Ancient Rome developed detailed laws for dealing with slavery. Roman law, as codified in the *Digest* and *Institutes* of Justinian, provided for three legal means of becoming a slave:

> Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him. [*Institutes* Lib. I, Tit. III, 4]

In addition to outright contractual slavery, the other two means were seen as having aspects of contract. A person born of a slave mother and raised using the master's food, clothing, and shelter was considered as having agreed to a tacit contract to trade a lifetime of labor for these and future provisions. And Hobbes, for example, clearly saw a "covenant" in the ancient practice of enslaving prisoners of war.

> And this dominion is then acquired to the victor when the vanquished, to avoid the present stroke of death, covenants either in express words or by other sufficient signs of the will that, so long as his life and the liberty of his body is allowed him, the victor shall have the use thereof at his pleasure. . . . It is not, therefore, the victory that gives the right of dominion over the vanquished but his own covenant. [*Leviathan*, II, chapter 20]

The point is not the factual absurdity of interpreting this as consent; the point is the attempt to ground slavery on the liberal basis of consent. An alienist liberal would disagree with Hobbes only on the factual question of what constitutes "consent."

As previously noted, numerous medieval writers, such as Mazzolini, Molina, and Suarez, all condoned voluntary contractual slavery, and envisioned the *pactum subjectionis* as the collective version of that contract. It might also be observed that the feudal relations between lords and vassals or serfs were sometimes seen as contractual. The vassals held a higher station than the serfs.

> Actually only gentlemen could be vassals to a Lord. The relation was marked by elaborate ceremonies at its beginning *(homage)* and was always regarded as a mutual relation of give and take, indeed, as a contractual relation. [Brinton, 1959, pp. 211-212]

But scholars disagree about the contractual aspects of medieval serfdom.

> While slavery is widely accepted as being an involuntarily achieved status (although there were cases of voluntary entry . . . in ancient and medieval Europe), other forms of what are sometimes called 'forced labor' are the result of voluntary agreement. Recently economic historians have reopened the discussion of whether European serfdom represented a voluntary exchange — protection for labor services — or whether it was a form of forced labor imposed from above. [Engerman, 1983, p. 44; quoted in Philmore, 1982, p. 47]

Grotius, Hobbes, and Pufendorf all belonged to the alienable natural rights tradition which accepted the self-sale contract and constructed the *pactum subjectionis* on that model. Hobbes saw compact in the enslaved prisoner of war who was obedient without being physically bound.

> This model of slave-making resembled in many respects Hobbes's concept of the social compact. Hobbes stated quite explicitly that the only difference between the free subject and the 'servant' was that one served the city and the other served a fellow subject. . . . Though Pufendorf did not follow Hobbes to the extreme of maintaining that a master could not do injury to his slave, he agreed that the institution was founded on compact and was in accord with natural law. [Davis, 1966, pp. 117-18]

With the rise of democratic ideology in the political sphere and the rise of capitalist ideology in the economic sphere, the alienist natural rights tradition had less use for contractual theories of autocracy, slavery, or feudalism. Lacking any significant notion of inalienable rights, the alienable tradition recast the basic issue as coercion versus contract. Political autocracy, slavery, and feudalism were construed as being *intrinsically* involuntary. As a matter of historical fact, these systems were, by most any modern standard, coercive.

This, however, leaves a logical gap in alienist liberal theory. What about a genuinely voluntary contract of subjection or a voluntary lifetime labor contract (as in Nozick's "free system")? Liberal capitalist thought has had essentially two options:

(1) ignore the issue, and treat the older alternatives to capitalism and democracy as inherently coercive, or

(2) erect a theory of inalienable rights which would rule out the *pactum subjectionis* and the self-sale contract, but would permit the short-term limited contract of workplace subjection wherein people rent themselves out for a wage.

The first option of ignoring the issue seems to be the preferred strategy. The non-democratic liberal tradition of the *pactum subjectionis* and the self-sale contract has been much neglected — at least prior to Nozick's attempted revival. Modern books on political, economic, and ethical theory generally ignore the self-sale contract and its political analogue. Contemporary liberal philosophers consider the contract for the renting of human beings, i.e., the employment contract, as being so obviously valid that it requires no defense, although one might sometimes question the "fairness" of its terms. [See, for example, Rawls, 1971.]

Some writers in the alienist tradition of liberal capitalist thought have taken the second option and have tried to criticize the self-sale contract without jeopardizing the self-rental contract. But J. Philmore [1982] has analyzed these arguments, and has shown that the lifetime labor contract and the short-term labor contract stand together — or fall together.

Without recapitulating all of Philmore's arguments, let us consider the crucial example of John Locke. Locke, as one of the founding fathers of liberal capitalist thought, made the fairly typical move of trying to differentiate the self-sale and self-rental contracts using the absolute/limited dichotomy.

> For a Man, not having the Power of his own Life, *cannot*, by Compact, or his own consent, *enslave himself* to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. [*Second Treatise*, section 23]

But this is not a serious theory of inalienability. Locke's argument is only that if one doesn't have the right to take one's own life in the first place, then one could not alienate it to someone else. Moreover, the argument is directed against a strawman. Any legal system "civilized" enough to bother having a contract for self-enslavement would have some limitations on the power of the master. Indeed, such civilized lifetime labor contracts were quite acceptable to Locke, but he would not call that "slavery."

> For, if once *Compact* enter between them, and make an agreement for a limited Power on the one side, and Obedience on the other, the State of War and *Slavery* ceases, as long as the Compact endures. . . . I confess, we find among the *Jews*, as well as other Nations, that Men did sell themselves; but 'tis plain, this was only to *Drudgery, not to slavery*. For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power. *[Second Treatise*, section 24]

Aside from the delicate semantics, Locke's treatment of the self-sale contract was squarely in the alienist tradition.

Other writers in the alienist tradition have followed suit. The self-sale contract is either ignored or refuted in some unrealistically extreme form. As Philmore has demonstrated, there are no serious arguments in liberal capitalist thought against a civilized non-hereditary lifetime labor contract. There is only a quantitative difference between the long-term and short-term labor contracts; they stand or fall together.

Another interesting case study in liberal intellectual history is the treatment of the American pro-slavery writers. The pro-slavery position is presented as being based on illiberal racist or feudal paternalistic arguments. Considerable attention is focused on illiberal writers such as George Fitzhugh, [see Genovese, 1969; Wish 1960; Woodward, 1960] while liberal defenders of slavery are passed over in silence. For example, Rev. Samuel Seabury [1861] gave a sophisticated liberal defense of ante-bellum slavery in the Grotius-Hobbes-Pufendorf-Locke tradition of alienist natural rights theory.

> From all which it appears that, wherever slavery exists as a settled condition or institution of society, the bond which unites master and servant is of a *moral* nature; founded in *right*, not in *might*. . . . Let the origin of the relation have been what it may, yet when once it can plead such prescription of time as to have received a fixed and determinate character, it must be assumed to be founded in the consent of the parties, and to be, to all intents and purposes, a compact or covenant, of the same kind with that which lies at the foundation of all human society. [p. 144]

Seabury easily anticipated the retort to his classical tacit-contract argument.

> 'Contract!' methinks I hear them exclaim; 'look at the poor

> fugitive from his master's service! He bound by contract! A good joke, truly.' But ask these same men what binds *them* to society? Are they slaves to their rulers? O no! They are bound together by the COMPACT on which society is founded. Very good; but did you ever sign this compact? Did your fathers ever sign it? 'No; it is a tacit and implied contract.' [Seabury, 1861, p. 153]

This puts an alienist liberal in the sensitive position of disagreeing with Seabury only on factual grounds. Without a theory of inalienability, an alienist is reduced to arguing on *empirical* grounds that the implied social contract has "genuine tacit consent," but that the implied slavery contract does not. It is no surprise that most liberal thinkers have preferred to simply ignore these liberal contractual slavery arguments, and to present the issues in simplistic coercion-or-contract terms, involuntary slave labor or free hired labor.

In modern times, versions of the self-sale or lifetime labor contract have re-emerged in philosophy [see Nozick, 1974, p. 331, as already noted above] and in economic models of perfectly competitive capitalism. In these economic models, a consumer/worker

> is to choose (and carry out) a consumption plan made now for the whole future, i.e., a specification of the quantities of all his inputs and all his outputs. [Debreu, 1959, p. 50]

In such Arrow-Debreu models, [Arrow and Debreu, 1954] there are complete future markets in all commodities. Since a capitalist economy is being modeled, labor is legally treated as a commodity. Hence a consumer/worker is viewed as making a lifetime of labor contracts all at that initial time (not necessarily all with the same employer). Restrictions on the sale of future-dated labor services would be market imperfections precluding the allocative efficiency of competitive equilibrium.

> Now it is time to state the conditions under which private property and free contract will lead to an optimal allocation of resources. . . . The institution of private property and free contract as we know it is modified to permit individuals to sell or mortgage their persons in return for present and/or future benefits. [Christ, 1975, p. 334; quoted in Philmore, 1982, p. 52]

The efficiency norm of conventional liberal economics requires treating the human right to one's person as an alienable or marketable right. Orthodox textbooks usually do not emphasize this point.

FINAL REMARKS

Our subject matter has been intellectual history, not history. Our topic is not the factual question of the extent to which historical systems

of autocracy, slavery, and capitalism may be construed as voluntary or involuntary. It is easy to ridicule claims that past systems of political autocracy and economic slavery were contractually based. And there is always the risk that future historians will ridicule the pretense that our present labor system based on rented workers is a free voluntary contractual system. At least we might be comforted that our present labor system is less involuntary and more voluntary than past systems. Be all that as it may, it is not our present topic.

Our topic is the intellectual history of the liberal contractarian arguments for voluntary non-democratic government, voluntary self-sale contracts, and voluntary self-rental contracts. I have endeavored to show that the real issues are too broadly stated by the standard liberal coercion-or-contract dichotomy. The basic issue is not voluntarism; a wide range of social regimes, including autocracy and slavery, could be constructed on a voluntary contractual basis. The real debate is between those voluntary contractual arrangements which would alienate basic rights and those which would treat basic rights as inalienable.

Capitalism and democracy, far from being associated or correlated, fall on the opposing sides of this issue. Capitalist production, i.e., the employment contract, is based on the legal alienation and transfer of the right of self-determination and self-direction within the terms and scope of the employment. The employer does not act in the name of the employees. As their name indicates, the "employees" are the means, the instruments, "employed" by the "employer" to further his own ends.

I have tired to outline the hidden intellectual ancestry of the employment contract. The hired labor contract is the child of the *pactum subjectionis* and the self-sale contract. With the democratic revolutions and the abolition of slavery, that old liberal tradition of contractual subjection has descended to the present as *liberal capitalist thought*. With political autocracy ruled out, liberal capitalist thought praises the voluntarism of the economic *pactum subjectionis* of the workplace. With slavery abolished, liberal capitalist thought praises the freedom either to rent oneself out or to rent other human beings. Such is the intellectual and moral heritage of the old liberal tradition which permits the legal alienation of basic rights by means of voluntary contracts.

A theory of inalienability is well beyond the scope of this paper. [but see Ellerman, 1985] The logical structure of such a theory may, however, be sketched. Suppose there are certain rights, called "human rights" or "natural rights," which one has solely on the basis of being human, i.e., by being a natural person. And suppose that one genuinely

consents, for whatever reason, to a voluntary contract to alienate and transfer such a right. This contract would, in part, put the person in the legal role of a non-person (an entity without certain human rights), e.g., the role of an instrument "employed" by another person. But being a human or natural person is a factual status unchanged by any contract, so a contract to have the role of a non-person cannot in a strict sense be fulfilled. The contract is thus invalid on natural law grounds, and the person still qualifies for the right on the same grounds of being human — regardless of the contract. Since the contract to alienate a human right is naturally invalid, the right is inalienable.

A system of positive law could still recognize the contract as being legally valid, could treat certain human rights as alienable property rights, and could enforce the consequences of that legalistic alienation and transfer. Inalienable rights theory would view a system based on such a contract as a legalized fraud on an institutional scale. But the alienist liberal tradition would see it, if voluntary, as a normal legal contract, e.g., the employment contract, the contract to rent human beings. In the alienist tradition, the issue is voluntarism. But the inalienable rights tradition views any voluntary contract which in part puts a person in the legal role of a non-person as being naturally invalid — regardless of whether the contract is in the political or economic sphere, and regardless of whether the contract is for a lifetime or for eight hours a day.

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