THE LABOR LAW THAT WASN'T: HOW THE PENNSYLVANIA SUPREME COURT IN THE NINETEENTH CENTURY DENIED MECHANICS' LIENS TO WAGEWORKERS

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ABSTRACT

Mechanics' lien laws give those who supply labor or material to the construction of a building a lien against the building if they are left unpaid. Historians have often described these statutes, which had spread throughout the United States by the mid-nineteenth century, as an early form of labor legislation. This Article shows how, in Pennsylvania at least, that description is simply wrong. In the nineteenth century, the Pennsylvania Supreme Court construed the state's mechanics' lien laws as providing protection to unpaid contractors and suppliers, but it repeatedly refused to read the legislation as giving any remedy to the unpaid wageworker.

This Article also explores why the court refused to extend mechanics' liens to wageworkers. After considering various possible explanations, the Article concludes that class bias provides the most plausible explanation. Legal historians have noted various contexts in which class bias led nineteenth-century courts to deny recoveries to workers. The Pennsylvania Supreme Court's construction of the state's mechanics' lien legislation provides another example.

The early judicial construction of mechanics' liens is not just a matter of historical interest. Pennsylvania's high court has recently relied on its nineteenth-century precedents in construing mechanics' lien laws. These historical decisions thus continue to shape the law and deprive workers on building projects of a means of collecting compensation they have earned.

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INTRODUCTION

Mechanics' lien laws give those who supply labor or material to the construction of a building a lien against the building if they are left unpaid. By the mid-nineteenth century, mechanics' lien laws had spread throughout the United States.

Historians have portrayed mechanics' lien laws as an early form of labor legislation. Legal historian Lawrence Friedman referred to the mechanics' lien law as a "pro-labor statute" that

gave a claims preference to "productive laborers."[1] In his history of workers in early Pennsylvania, William Sullivan endorsed Henry Farnam's observation that "labor protection in the United States really begins with mechanics' liens."[2] Matthew Bewig echoed that view in his article on mechanics' lien laws in *The Encyclopedia of U.S. Labor and Working-Class History*, referring to them as "some of the first labor laws passed in the United States" and as legislation that "protects the wageworker."[3]

This Article seeks to set the record straight. Courts in the nineteenth century frequently construed mechanics' lien laws as providing *no* protection to the wageworker.[4] They extended the statutes' protections to contractors and subcontractors on building projects but often denied liens asserted by unpaid employees.[5] That was certainly true in Pennsylvania.

The question whether workers on building sites could assert a mechanics' lien was not a trivial one. Then, as now, the construction industry constituted a key sector of the United States economy.[6] In early nineteenth-century Philadelphia, for example, nearly a quarter of the male workforce depended on the construction industry for their livelihoods.[7]

Too often in that era, construction contractors or subcontractors went broke or simply cheated their employees, leaving many workers unpaid.[8] When these unpaid workers sought to assert a lien against the building on which they had

1. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 178 (3d ed. 2005).

2. WILLIAM A. SULLIVAN, THE INDUSTRIAL WORKER IN PENNSYLVANIA: 1800–1840, at 211 (1955) (quoting HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, at 152 (1938)).

3. Matthew S. R. Bewig, *Mechanics' Lien Law*, *in* 1 ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY 874 (Eric Arnesen ed., 2007).

4. *See infra* Section II.A.

5. *See infra* Section II.A.

6. Donald R. Adams, *Residential Construction Industry in the Early Nineteenth Century*, 35 J. ECON. HIST. 794, 794 (1975).

7. *See* DONNA J. RILLING, MAKING HOUSES, CRAFTING CAPITALISM: BUILDERS IN PHILADELPHIA 1790–1850 viii (2001).

8. *See infra* notes 29–31 and accompanying text.

labored, the building owner often opposed the lien claim in court. That left the judiciary with the dilemma of who should bear the loss, the unpaid worker or the building owner who benefitted from his labor but who did not directly employ him.

The judicial construction of mechanics' liens in the nineteenth century is not simply a matter of historical interest. The decisions made then shape Pennsylvania law today. As recently as 2014, the Pennsylvania Supreme Court held that union health and retirement funds had no right to assert a mechanics' lien against an employer that failed to pay contributions owed to the funds for work performed by union-represented employees.[9] In reaching its decision, the court relied on its own nineteenth-century precedents holding that the Pennsylvania mechanics' lien law provided no protection to employees on a construction project.[10] Those nineteenth-century precedents thus continue to deprive Pennsylvania wageworkers a mechanism to obtain compensation owed for their labor.

Some of the same issues that courts grappled with in the nineteenth century, such as whether a subcontractor's employees have a right to a mechanic's lien, still generate controversies today.[11] Indeed, if anything, the question of how the law should treat employees of contractors and subcontractors has only grown in importance as the contemporary American workplace has "fissured," with more and more corporations putting layers of intermediaries between themselves and their workforce.[12] Moreover, the study

9. Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co., 90 A.3d 682, 697 (Pa. 2014).

10. *See id.* at 691 n.10 (citing Harlan v. Rand, 27 Pa. 511, 515 (1865); Guthrie v. Horner, 12 Pa. 236, 237 (1849); Jobsen v. Boden, 8 Pa. 463, 463 (1848)); *see also id.* at 693.

11. *See* Anee P. Raulerson, Comment, *Employees as Subcontractors: Maryland's Interpretation of Its Mechanics' Lien Statute*, 33 U. BALT. L. REV. 97, 100–02, 107 (2003).

12. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 3, 7–8, 100 (2014) (noting, for example, that today 80% of hotel staff are employed by hotel franchises and supervised by management companies separate from the brand-name hotel property); Emily A. Spieler, *Employment Law and the Evolving Organization of Work—A Commentary*, 6 NE. U. L.J. 287, 295–96 (2014) (noting that "[f]ranchising, independent contractor designations, subcontracting and staffing through employment agencies have now expanded into sectors where they were previously uncommon.").

of how courts historically grappled with issues of unpaid wages has contemporary relevance because the non-payment of earned wages, often labeled "wage theft," constitutes a pervasive problem in modern America, causing substantial loss to millions of workers each year,[13] including in Pennsylvania.[14]

No modern study exists of the judicial interpretation of mechanics' lien laws in nineteenth-century America.[15] This Article seeks to remedy that by examining cases the Pennsylvania Supreme Court decided during that period. The Article focuses on Pennsylvania because the Keystone State was one of the first to adopt mechanics' lien legislation, and because that legislation generated heaps of litigation, reaching the commonwealth's supreme court in hundreds of cases.[16] In addition, Pennsylvania provides a study of contrasts: an industrial state with a labor movement that pushed hard for mechanics' lien laws, Pennsylvania also had a judiciary that refused to extend lien law protection to wageworkers employed on building projects.[17]

13. *See generally* David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/ (providing data that demonstrate illegal non-payment or underpayment of wages is "widespread and deep-rooted"). *See also* Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 97 (2018) ("Wage theft is, by many accounts, one of the most common crimes committed in the United States.").

14. *See* STEPHEN & SANDRA SELLER CTR. FOR SOC. JUST. TEMP. UNIV. BEASLEY SCH. OF L., SHORTCHANGED: HOW WAGE THEFT HARMS PENNSYLVANIA'S WORKERS AND ECONOMY 10–15 (2015), https://www2.law.temple.edu/csj/files/wagetheft-report.pdf (providing data on pervasiveness of non-payment or underpayment of wages in Pennsylvania). To combat wage theft, a handful of states have enacted legislation giving workers a lien against their employer's property for unpaid wages, but Pennsylvania and most other states have failed to enact such legislation. *See* Rebecca Lineberry, *Combatting Wage Theft: Establishing Employees as Secured Creditors Under the Maryland Unpaid Wage Lien Law*, 77 MD. L. REV. 1229, 1231 n.25 (2018) (listing Alaska, Idaho, Indiana, Kentucky, Maryland, Tennessee, Texas, and Wisconsin as states that permit unpaid wage liens); Hallett, *supra* note 13, at 116–17.

15. However, for a study of mechanics' lien laws in nineteenth-century Ontario, see Margaret McCallum, *Mechanics' Liens in the Mowat Era*, 19 HISTOIRE SOCIALE–SOC. HIST. 387 (1986).

16. A Westlaw search for nineteenth-century Pennsylvania Supreme Court cases containing the term "mechanics' lien" yields over 700 results.

17. *See infra* text accompanying notes 108–33, 144–55.

This Article concludes that Pennsylvania's high court could have read the state's mechanics' lien statutes to reach wageworkers, but that it chose not to do so. By depriving wageworkers of a mechanism they might have used to collect pay they had earned, the Pennsylvania judiciary made life for those workers that much more precarious.

Part I of the Article discusses mechanics' lien legislation in nineteenth-century America. Part II focuses on Pennsylvania and how its supreme court repeatedly construed mechanics' lien legislation in a way that thwarted efforts to give lien protection to wageworkers. Part III explores possible explanations for the court's position and identifies class bias as the most plausible explanation; the court likely deemed those low on the social hierarchy as undeserving of a special statutory remedy.

I. MECHANICS' LIEN LAWS IN NINETEENTH-CENTURY AMERICA

Mechanics' lien laws were statutory innovations of the early American republic, unknown at common law.[18] At common law, the only remedy an unpaid mechanic or supplier had was to bring a civil suit to try to collect the amount owed for the services or supplies provided.[19]

Maryland enacted the first mechanics' lien law in 1791, apparently to encourage builders to construct houses in the new federal capital city.[20] By the middle of the nineteenth century, all states had enacted mechanics' lien legislation.[21] In his 1874 treatise on mechanics' lien laws, Samuel Phillips wrote that the

18. *See* SAMUEL L. PHILLIPS, A TREATISE ON THE LAW OF MECHANICS' LIENS ON REAL AND PERSONAL PROPERTY § 1 (1874) [hereinafter PHILLIPS 1874]; LOUIS BOISOT, A TREATISE ON MECHANICS' LIENS § 4 (1897). Common law had for a long time provided a lien over chattels in the possession of the creditor, such as the lien an innkeeper would have against the baggage of a guest who failed to pay for her room. *See* PHILLIPS 1874, *supra*, § 1; BOISOT, *supra*, § 1; Waters v. Wolf, 29 A. 646, 650 (Pa. 1894).

19. *See* PHILLIPS 1874, *supra* note 18, §§ 1–2.

20. *See id.* § 7; *see also* Morris v. United States, 174 U.S. 196, 345 (1899) (referring to Maryland's "builder's lien").

21. *See* PHILLIPS 1874, *supra* note 18, § 7.

early statutes were "imperfect and meagre," limited only to particular cities, and to residential buildings.[22] As the century progressed, the statutes grew more complex, expanded their geographic scope, and applied to industrial and commercial construction as well.[23]

What purpose did this burgeoning body of law serve? Commentators differed on that question. Some saw mechanics' lien legislation as a means to stimulate economic growth, while others saw it primarily as protection for a vulnerable group at risk of nonpayment.

A. *Vehicles for Economic Growth?*

Many commentators, then and since, have seen nineteenth-century mechanics' lien laws as a mechanism to stimulate economic development by encouraging subcontractors, suppliers, and workers to contribute to building projects despite the risk of nonpayment. Builders in the young republic often lacked adequate funds.[24] The country's banking reserves were small, its financial system was fragmented, and there was simply not enough currency in circulation to meet demand.[25] Too little capital and too much debt, and a frequent lack of business savvy, caused "endemic" levels of failure among nineteenth-century enterprises.[26] Recurrent recessions and

22. *Id.*

23. *See id.*

24. *See* MARY N. WOODS, FROM CRAFT TO PROFESSION: THE PRACTICE OF ARCHITECTURE IN NINETEENTH-CENTURY AMERICA 21 (1999).

25. *See id.*; EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 27 (2001) ("The new republic was, in the terminology of modern economic theory, a developing economy, richer in potential than actual stores of wealth. American monetary reserves . . . were not sufficient to meet the demand for funds by the nation's producers, entrepreneurs, and consumers. In both town and countryside, circulating coin fell well short of commercial requirements.").

26. *See* BALLEISEN, *supra* note 25, at 2–3, 26. Balleisen writes that "at least one in three" antebellum proprietors succumbed to unsupportable debt loads. *Id.* at 3. Historian Tony Freyer estimates that "[f]rom 20 to 50 percent of independent proprietors entered default proceedings . . . between 1800 and 1860." Tony A. Freyer, *Legal Innovation and Market Capitalism, 1790–1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA, THE LONG NINETEENTH CENTURY (1789–1920) 449, 458 (Michael Grossberg & Christopher Tomlins eds., 2008).

financials panics exacerbated the rate of business failure.[27] So, too, did the fierce competition that resulted from the relative ease of entry into business.[28] Therefore, a subcontractor, supplier, or worker hired by a builder faced considerable risk that the builder would fail before paying what it owed.

Indeed, because builders lacked sufficient funds, they typically delayed payments owed to workers and suppliers.[29] This, plus the risk of the builder's insolvency, and the risk of the builder's dishonesty, created a serious concern among those hired for construction projects that they would not be paid for their labor and materials.[30] Indeed, substantial numbers of workers went unpaid.[31] By allowing a claim on the finished building, mechanics' lien laws arguably encouraged the supply of labor and materials to construction projects, despite the risk of nonpayment.

In his 1814 treatise on mechanics' lien laws in Pennsylvania, Philadelphia lawyer Peter Browne argued that the absence of such laws would have "provided a fatal check to improvement" of the city.[32] He wrote that when undercapitalized builders failed,

> they not only ruined themselves, but injured many honest and industrious mechanics, who were unfortunate enough to place confidence in

27. Freyer, *supra* note 26, at 458.

28. *See* BALLEISEN, *supra* note 25, at 41–43; RILLING, *supra* note 7, at 146 (explaining that competition caused builders to operate close to the brink).

29. *See* RILLING, *supra* note 7, at 143–44; LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860, at 192 (1948) ("[L]aborers were expected to acquiesce in the postponement of wage payments . . . .").

30. One 1829 letter that appeared in the *New York Courier and Enquirer* explained that some building contractors bid for jobs below "what any honest man could undertake," and then, after getting the job, paid the workers a fraction of the pay due them and pocketed the remainder. WALTER HUGINS, JACKSONIAN DEMOCRACY AND THE WORKING CLASS: A STUDY OF THE NEW YORK WORKINGMEN'S MOVEMENT, 1829–1837, at 144 (1960) (quoting the letter signed "A Builder Who Is a Friend to the Poor Working Man," published in COURIER & ENQUIRER, Dec. 9, 1829).

31. *See* SELIG PERLMAN, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 12 (1922).

32. PETER ARRELL BROWNE, A SUMMARY OF THE LAW OF PENNSYLVANIA, SECURING TO MECHANICS, AND OTHERS, PAYMENT FOR THEIR LABOUR, AND MATERIALS, IN ERECTING ANY HOUSE, OR OTHER BUILDING, WITHIN THE CITY AND COUNTY OF PHILADELPHIA, THE BOROUGH OF ERIE, THE BOROUGH OF LANCASTER, AND THE BOROUGH OF PITTSBURGH iii (1814).

> them. This would have provided a fatal check to improvement, had not legislative wisdom promptly furnished a remedy, by giving the workmen, and persons furnishing materials, a lien on the buildings they were concerned in erecting.[33]

Others argued that mechanics' lien laws stimulated development by keeping down the price of construction. As an 1829 article in the *New York Courier and Enquirer* explained, the security provided by the lien law encouraged mechanics to take the risk of working for small builders who operated on slim margins; competition from these small builders drove down construction costs, and these lower construction costs encouraged "capitalists" to invest in real estate development.[34]

Twentieth-century legal historian Lawrence Friedman endorsed the view that mechanics' lien laws fostered economic growth in the capital-scarce early republic:

> [T]he lien was intended to *help* the landowner, in an age when cash, hard money, liquid capital was short. The law promised a safe and immovable form of collateral to those who supplied materials and labor. The lien was a kind of bootstrap . . . almost a subsidy, almost a kind of government credit to encourage building and improvement of land.[35]

Other commentators, both then and now, have denied that mechanics' lien laws promoted economic growth. In his 1867 treatise on lien laws, Louis Houck asserted that rather than fostering growth, a statute allowing parties to slap liens on buildings simply "clogs the transfer of real estate."[36] Canadian scholar Margaret McCallum, in her study of mechanics' lien

33. *Id.*

34. HUGINS, *supra* note 30, at 144 (citing COURIER & ENQUIRER, Nov. 9, Dec. 12, 1829).

35. FRIEDMAN, *supra* note 1, at 178.

36. LOUIS HOUCK, A TREATISE ON THE MECHANICS' LIEN LAW IN THE UNITED STATES § 11 (1867).

legislation in nineteenth-century Ontario, disputed the notion that such laws promoted economic growth by encouraging artisans to supply their labor to construction jobs, arguing that most workers had to accept what jobs they could find, whether the law promised them a lien or not.[37]

B. *Protection for Those Employed on Construction Projects*

Whether they promoted economic growth or not, mechanics' lien laws also had another, more direct, purpose: to protect from nonpayment those who supplied labor or supplies to construction projects. Phillips's 1874 treatise described the laws as protecting that "large and meritorious portion of the community [ ] which was for the most part poorly able to sustain the losses incident to business, and peculiarly liable to the frauds of the dishonest."[38] In explaining the need for mechanics' lien laws, twentieth-century political scientist Louis Hartz explained that "[i]t was utopian to expect mechanics, many of them without formal education, to investigate the solvency of employers."[39]

To protect workers from falling victim to dishonest or insolvent contractors, organized labor pushed for mechanics' lien laws.[40] The nation's first unions, composed of skilled artisans, emerged in the decades immediately following the American Revolution, coalescing around what historian Sean Wilentz describes as "an intense pride in craft cooperation and productive labor, and an abiding suspicion of the dominant mercantile elite and its professional allies."[41] The original 1791

37. *See* McCallum, *supra* note 15, at 402.

38. PHILLIPS 1874, *supra* note 18, § 6.

39. HARTZ, *supra* note 29, at 192.

40. *See* Bewig, *supra* note 3, at 874; *see also* MICHAEL SHIRLEY, FROM CONGREGATION TOWN TO INDUSTRIAL CITY: CULTURE AND SOCIAL CHANGE IN A SOUTHERN COMMUNITY 96 (1994) (noting that in the nineteenth century, societies of skilled artisans advocated for the passage of mechanics lien laws).

41. Sean Wilentz, *The Rise of the American Working Class, 1776–1877: A Survey*, *in* PERSPECTIVES ON AMERICAN LABOR HISTORY: THE PROBLEMS OF SYNTHESIS 83, 88 (J. Carroll Moody & Alice Kessler-Harris eds., 1990).

Maryland mechanics' lien law may have had labor backing; historian Charles Steffen has demonstrated that skilled craftsmen in late eighteenth-century Baltimore were organized and politically active.[42]

For nearly a decade beginning in the late 1820s, the radical Workingmen's Party in New York challenged the Democrats there for the allegiance of the working class, calling for free public education and an end to debtors' prison and compulsory militia service.[43] Supported by the craft unions in the building trades, the New York Workingmen's Party put mechanics' liens high on its legislative agenda.[44] But, as labor historian Walter Hugins tells it, it was the Democratic Party machine that pushed a mechanics' lien law through the New York legislature in 1830, winning many workers back to the Democratic fold.[45] A similar dynamic played out in late nineteenth-century Ontario, where the Reform Party, seeking the votes of the newly enfranchised working class, supported the Canadian Labour Union's call for a mechanics' lien law.[46]

Although organized labor pushed for mechanics' lien laws, some state judiciaries excluded the wageworker from the statutes' protection. The Article now turns to the story of how that happened in Pennsylvania.

II. MECHANICS' LIEN LAWS IN PENNSYLVANIA

Pennsylvania common law did not provide liens for mechanics.[47] When the first lien legislation appeared in the state, it applied to ships, not buildings. A 1784 statute made vessels built or repaired in the state "liable and chargeable for all debts contracted by the masters or owners thereof, for or by

42. *See* CHARLES G. STEFFEN, THE MECHANICS OF BALTIMORE: WORKERS AND POLITICS IN THE AGE OF REVOLUTION 1763–1812, at 102, 276, 281, 283 (1984).

43. *See* HUGINS, *supra* note 30, at 132, 136, 143, 145.

44. *See id.* at 143, 145.

45. *See id.* at 145.

46. *See* McCallum, *supra* note 15, at 394.

47. *See* OVID F. JOHNSON, LAW OF MECHANICS' LIENS IN PENNSYLVANIA 33–34 (1884).

reason of any work done, or materials" supplied.[48] Pennsylvania's first lien law for buildings appeared in 1803, the second in the nation after Maryland's.[49] It provided that buildings:

> shall be subject to the payment of the debts contracted by the owner or owners thereof, for or by reason of any work done or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber merchant, or any other person or persons employed in furnishing materials for, or in the erecting and constructing such house or other building . . . .[50]

This first Pennsylvania mechanics' lien law appeared in a period when Jeffersonian social reforms flourished in the state, but the impetus for the statute remains unclear.[51] In his mid-nineteenth century treatise on Pennsylvania mechanics' liens, Henry Sergeant conceded ignorance of the "precise history" leading to enactment of the law.[52] Years after the statute's enactment, Pennsylvania Supreme Court Chief Justice John Gibson wrote that it was "the frequency of loss" suffered by mechanics that "first induced the legislature to give them a lien on the building,"[53] and that the legislature had acted with a "spirit of kindness" to such workers.[54] But it is unlikely that a

48. *Id.* at 34 (quoting the 1784 Pennsylvania statute).

49. *See* PHILLIPS 1874, *supra* note 18, § 7.

50. An Act Securing to Mechanics and Others Payment for Their Labour and Materials in Erecting Any House or Other Building Within the City and County of Philadelphia, 1806, 4 Sm. L. 300 (Pa.), *reprinted in* HENRY J. SERGEANT, A TREATISE ON THE LIEN OF MECHANICS AND MATERIAL MEN, IN PENNSYLVANIA, WITH THE ACTS OF ASSEMBLY RELATING THERETO, AND VARIOUS FORMS app. 318 (E. Spencer Miller ed., 2d ed. 1856).

51. *See* ANTHONY F. C. WALLACE, ROCKDALE: THE GROWTH OF AN AMERICAN VILLAGE IN THE EARLY INDUSTRIAL REVOLUTION 259–61 (1978) (noting that Jeffersonian beliefs flourished in Pennsylvania in the opening two decades of the nineteenth century).

52. SERGEANT, *supra* note 50, at 33.

53. Bolton v. Johns, 5 Pa. 145, 150 (1847).

54. O'Conner v. Warner, 4 Watts & Serg. 223, 226 (Pa. 1842).

"spirit of kindness" alone drove the Pennsylvania mechanics' lien law through the General Assembly. According to William Sullivan's study of the nineteenth-century Pennsylvania labor movement, workers in the state had sought lien laws "from the earliest day of the Republic," and it was they who "extracted from the State Legislature" the first mechanics' lien law.[55]

The 1803 statute applied to Philadelphia, which was then the fast-growing urban core of the state.[56] In the first half of the nineteenth century, Philadelphia experienced explosive growth, with its population increasing almost nine-fold from 1790 to 1850.[57] Population growth spurred construction and pushed up housing prices. Peter Browne's 1814 treatise spoke of "astonishing progress in the improvement, and consequent rise in the value of real estate, situate[d] in the city and liberties of Philadelphia."[58]

The booming construction industry employed a fifth of the city's artisans and a tenth of its entire male workforce.[59] Their work included carpentry, masonry, metal work, painting and glazing, plastering, roofing, and plumbing.[60] Some were master craftsmen who employed others, but most were hired journeymen who worked for wages.[61] Employed by contractors or subcontractors who might be financially fragile or dishonest, or both, these workers faced the constant risk of not being paid.[62]

55. SULLIVAN, *supra* note 2, at 211.

56. *See* An Act Securing to Mechanics and Others Payment for Their Labour and Materials in Erecting Any House or Other Building within the City of Philadelphia, the District of Southwark and the Township of the Northern Liberties, 1803, Pamph. L. 561 § 1, *reprinted in* SERGEANT, *supra* note 50, at app. 317–18.

57. *See* RILLING, *supra* note 7, at viii (noting that from 1790 to 1850, an estimated 52,000 houses were built in greater Philadelphia, as its population soared from about 44,000 to 389,000 residents).

58. BROWNE, *supra* note 32, at iii.

59. *See* RILLING, *supra* note 7, at viii.

60. *See* Adams, *supra* note 6, at 797.

61. *See* RILLING, *supra* note 7, at 7, 25.

62. *See supra* notes 29–31 and accompanying text.

The 1803 statute limited liens to those owed money by the building's owner—a restriction which the Pennsylvania Supreme Court later found "to bear hard" on those left unpaid not by the owner but by a building contractor or other party engaged to construct the house.[63] As the court noted, "in a decisive majority of cases," it was the builder, not the owner, who hired the workers and suppliers.[64] In 1806, three years after the law's enactment, Pennsylvania's General Assembly amended it to eliminate the restrictive phrase "by the owner or owners."[65] Thus, as of 1806, the legislation provided mechanics' liens "to all cases of work done or materials furnished for a building" in Philadelphia.[66]

Although it initially limited mechanics' lien legislation to Philadelphia and its environs, over the ensuing decades the General Assembly repeatedly expanded the law's geographic scope to cover more and more of the state.[67]

A. *Early Judicial Interpretations of Pennsylvania's Mechanics' Lien Laws*

When it first encountered mechanics' lien legislation, the Pennsylvania Supreme Court consisted of three justices, who were appointed by the governor.[68] William Tilghman served as the court's chief justice from 1806 to 1827,[69] a period during

63. Steinmetz's Executors v. Boudinot, 3 Serg. & Rawle 541, 542 (Pa. 1817).

64. Savoy & Salter v. Jones, 2 Rawle 343, 351 (Pa. 1830); *see* RILLING, *supra* note 7, at 148 (explaining that subcontracting construction work was a widespread practice).

65. SERGEANT, *supra* note 50 and accompanying text.

66. *Steinmetz's Executors*, 3 Serg. & Rawle at 542; *see also* Hinchman v. Graham, 2 Serg. & Rawle 170, 172 (Pa. 1815) (Yeates, J.) (interpreting the 1806 legislation as extending the liens to all contracts for building houses in the city of Philadelphia).

67. *See* SERGEANT, *supra* note 50, at app. 319–29 (setting forth texts of a dozen amendments between 1808 and 1832 that extended the legislation's geographic range).

68. *See* Kenneth Gormley, *Introduction: The History of a Time-Honored Court, in* THE SUPREME COURT OF PENNSYLVANIA: LIFE AND LAW IN THE COMMONWEALTH, 1684–2017, at 3–4 (J. Hare ed., 2018).

69. *See Tilghman, William*, FED. JUD. CTR., https://www.fjc.gov/node/1388811 (last visited Apr. 4, 2021).

which the court issued its initial interpretations of the mechanics' lien statutes.

In its early decisions, the court, under Tilghman, expressed fidelity to the language of the mechanics' lien law, but also skepticism about its utility and concern about its effect on those who owned or financed real estate.[70] Such concerns appear in the court's very first decision on mechanics' liens, *Lyle v. Ducomb*.[71] In 1811, Vincent Ducomb mortgaged a lot of land that he owned on Walnut Street in Philadelphia.[72] He then tore down the wood house on the lot and had a brick one built in its place.[73] Ducomb became insolvent, leaving those who built the brick house unpaid.[74] They asserted mechanics' liens against the new building, but the mortgage lender asserted a mortgage lien against it, too.[75] Thus, the question in *Lyle* was who had the right to be paid first: the mortgage lender or the mechanics?

The 1806 statute provided that a mechanic's lien was to be paid "before any other lien which originated subsequent to the commencement of the said building."[76] Tilghman considered the mechanics' argument that the mortgage lien against the brick house had to have arisen "subsequent to the commencement of the building" because "it is impossible to have a lien on a thing not in existence, and therefore a mortgage cannot be a lien on a building before it is erected."[77] However, the judge rejected that argument, writing that such a construction of the statute would do "manifest injustice" to the mortgage lender, denying him of a chunk of the mortgage

70. Tilghman's concerns about property rights also appear in the court's interpretations of Pennsylvania's slave emancipation statute. Tilghman, who owned slaves in Maryland, gave weight to masters' property rights in his interpretations of the statute. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 64–65 (1975).

71. *See* Lyle v. Ducomb, 5 Binn. 585, 588 (Pa. 1813).

72. *Id.* at 587.

73. *See id.*

74. *See id.* at 585–86.

75. *Id.* at 586–87.

76. *Id.* at 587. To view the text of the statute, see SERGEANT, *supra* note 50, at app. 318.

77. *Lyle*, 5 Binn. at 587.

loan's collateral.[78] Under such a reading of the statute, the lender, "who had the security of a good house and land," would have to "rest contended with the land alone."[79]

Lyle set an important early precedent, giving mortgage lenders, and the financial interests they represented, primacy over mechanics' lien claims. This was significant because most buildings were built with borrowed money; few builders had sufficient capital without it to undertake construction projects.[80] If construction began before the owner or builder took a mortgage loan, the mechanics' lien statute dictated that a mechanic's lien took precedence over the mortgage lien.[81] But having construction precede the mortgage loan was rare. Financers typically gave their mortgage loan prior to the beginning of construction, ensuring that their claims would trump a mechanic's lien.[82]

That was not the only way for lenders to ensure payment. Lenders took care not to extend more money than the construction project required, ensuring themselves sufficient collateral in the event of the builder's default.[83] And mortgage agreements often carried penalties for default that could double the sum owed.[84] As a result, in the event of the builder's default, proceeds from the sale of the building almost always went to

78. *Id.* at 588.

79. *Id.*

80. *See* RILLING, *supra* note 7, at 55. In his 1814 treatise, Browne explained how widespread lending was. He wrote that "enterprising and public-spirited gentlemen" purchased large lots, subdivided them, conveyed them to "mechanics," and then loaned the mechanics "money sufficient to enable them to erect handsome buildings thereon." BROWNE, *supra* note 32, at iii.

81. *See* Am. Fire Ins. Co. v. Pringle, 2 Serg. & Rawle 138, 138 (Pa. 1815) (Tilghman, C.J.) (holding mechanics' lien claims take preference over mortgage lien claims when construction of the house was already in process when the mortgage loan was given). Even though the statute expressly gave mechanics' lien claims priority over a mortgage loan that was provided after construction began, the conclusion that the mechanics' lien trumps in that circumstance did not command unanimity on the court. *See id.* at 140 (Yeates, J., dissenting) (finding the conclusion that the mechanics' lien trumps, while "grounded on the literal expressions of the law, . . . does not . . . accord with the true meaning and spirit of it.").

82. *See* RILLING, *supra* note 7, at 61 n.83, 62 n.84.

83. *See id.* at 61.

84. *See id.* at 61–62.

the financiers, leaving little, if anything, for mechanics' lien holders.[85]

In its early decisions on mechanics' liens, the Pennsylvania Supreme Court expressed concern not only about the interests of financiers and property owners, but also about the "great inconvenience and hazard" it believed mechanics' liens posed to real estate transactions.[86] As the court wrote in one 1825 case:

> although it is very desirable that mechanics should be secured in the payment of their well earned wages, yet it cannot be denied, that the liens are attended with great inconvenience and hazard to *bona fide* purchasers. And these hazards often stand in the way of a good sale of the house after it is finished, and thus operate to the injury of those very mechanics whom it was the object of the law to protect.[87]

Despite the court's skepticism about mechanics' lien legislation, its early decisions generally applied it fairly, with the court refusing to impose limits on liens greater than the statute provided. For example, in an 1819 decision, the court declined to hold that a mechanic's lien expired after five years, finding not "one word in the act of assembly to warrant" such a holding.[88] Similarly, in an 1815 decision, it rejected the argument that materials a merchant provided for the construction of a house could only give rise to a lien if the builder actually used the materials.[89] "I was once inclined to think, that the lien might be restrained to the materials actually used in the building," Tilghman wrote, "[b]ut on reflection, I

85. Rilling estimates that artisans typically received a fraction of the value of their mechanics' lien claims. *See id.* at 62.

86. Hern & Co. v. Hopkins, 13 Serg. & Rawle 269, 277 (Pa. 1825).

87. *Id.*; *see also* Gorgas v. Douglas, 6 Serg. & Rawle 512, 520 (Pa. 1821) (asserting that the mechanics' lien law "often creates great difficulties, and operates to the prejudice of the persons whom it was intended to protect, by throwing obstacles in the way of purchasers, by which the value of houses is diminished").

88. Knorr v. Elliott, 5 Serg. & Rawle 49, 50 (Pa. 1819).

89. Hinchman v. Graham, 2 Serg. & Rawle 170, 174 (Pa. 1815).

find that such a construction is not warranted by the words of the law . . . ." [90] In another case, in 1830, the court allowed a lien to stand despite the death of the person who contracted for the construction work, reasoning that the lien "arises from the credit having been given, not to the owner, but the building."[91] "The law may not, on the whole, be a beneficial one," the court wrote, but "still, it is entitled to a reasonable construction."[92]

B. *Labor Agitation in Pennsylvania for Mechanics' Lien Legislation*

While Pennsylvania's high court began to shape its mechanics' lien jurisprudence in the opening decades of the nineteenth century, the state's labor movement grew and continued to advocate in favor of the legislation.[93] Agitation by Philadelphia construction workers for a ten-hour workday served as the catalyst for the creation in 1827 of Pennsylvania's first labor federation, the Mechanics' Union of Trade Associations.[94] The following year saw the appearance in Pennsylvania of the Workingmen's Party, America's first labor-based political party.[95] As part of its reform agenda, the state's labor movement sought more effective lien legislation for wage earners.[96] The Workingmen's Party did not last, but other parties, vying for workers' votes, took up its agenda.[97] Among

90. *Id.* at 172 (emphasis omitted).

91. Savoy & Salter v. Jones, 2 Rawle 343, 350–51 (Pa. 1830).

92. *Id.* at 351.

93. *See* CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 153–54 (1993).

94. SULLIVAN, *supra* note 2, at 99. *See also* Ken Fones-Wolfe, *An Industrial Giant Takes Shape, 1800–1827*, *in* KEYSTONE OF DEMOCRACY: A HISTORY OF PENNSYLVANIA WORKERS 37, 50 (Howard Harris & Perry Blatz eds., 1999) (describing the founding of the Mechanics' Union of Trade Associations as a consequence of carpenters' failed attempts to secure a shorter workday).

95. *See* Fones-Wolfe, *supra* note 94, at 51.

96. *See* SULLIVAN, *supra* note 2, at 212; TOMLINS, *supra* note 93, at 153–54. The platform of the Workingmen's Party also called for universal public education, restrictions on banks and monopolies, repeal of obligatory militia laws, and abolition of imprisonment for debt. WALLACE, *supra* note 51, at 291–92.

97. *See* WALLACE, *supra* note 51, at 292.

the Jacksonian-era reforms in Pennsylvania, the legislature issued a more comprehensive mechanics' lien law in 1836.[98]

C. *The Court's Exclusion of Wageworkers from the Protections of Pennsylvania's Mechanics' Lien Legislation*

As the middle of the nineteenth century approached, it was an open question whether the Pennsylvania Supreme Court would deem wageworkers on construction projects to have a right to a mechanic's lien. Certain signs suggested it would. First, the legislature had enacted the 1836 statute in the wake of a period of labor agitation that included advocacy for mechanics' liens for workers.[99] Also, while the 1836 statute did not expressly include wageworkers, it had broad language making buildings "subject to a lien for the payment of *all* debts contracted *for work done* or materials furnished" for the building.[100] That language could certainly have been read to encompass debts for unpaid wages earned by employees on a construction site.

Moreover, just a few years prior to enactment of the 1836 statute, Chief Justice John Bannister Gibson, who succeeded Tilghman in 1827,[101] signaled that he read mechanics' lien legislation broadly. In 1830, in *Savoy v. Jones*, the court held that one who supplied bricks to a construction project need not be a brickmaker to have a lien.[102] Gibson explained that the statute applied to "every one without distinction" who provided supplies or labor:

> A lien is given in general and comprehensive terms, to every one without distinction,

98. *See* An Act Relating to the Lien of Mechanics and Others upon Buildings, Pamph. L. 695 (Pa. 1836), *reprinted in* SERGEANT, *supra* note 50, at app. 330–42; WALLACE, *supra* note 51, at 384 (discussing enactment of other reform legislation).

99. *See supra* notes 93–98 and accompanying text.

100. Pamph. L. 695 § 1 (emphasis added).

101. *See John Bannister Gibson (1780–1853)*, DICKINSON COLL. ARCHIVES & SPECIAL COLLECTIONS, http://archives.dickinson.edu/people/john-bannister-gibson-1780-1853 (last visited Apr. 4, 2021).

102. Savoy & Salter v. Jones, 2 Rawle 343, 350–51 (Pa. 1830).

> "employed in furnishing materials for, or in the erecting, or constructing," of any house or other building; and I cannot imagine why none but regular dealers in the article, or workmen bred to the particular craft should have the benefit of it. We have mechanics who can turn their hand to anything; and there is the same reason for hypothecating the product of a bricklayer's labour, for wages earned as a carpenter, as there would be for wages earned in his proper vocation . . . .[103]

The example Gibson chose to underscore his point—that a bricklayer could have a lien for "wages earned as a carpenter"—certainly suggested that "wages earned" would give rise to a lien.

Pennsylvania's legislature seemed to agree that the mechanics' lien law warranted broad application. In its 1843 decision in *Hoatz v. Patterson*, the court denied a lien to a building contractor who had a "special" contract to erect a building, on the ground that if the contractor wanted some security to ensure payment, he should have bargained for it.[104] The next year, in *Haley v. Prosser*, the court denied a mechanic's lien to a carpenter who had a contract with the owner, explaining that a party who enters a "special" contract with the owner "must provide for his own security."[105] The court explained that because his rights "are defined by a bargain," the carpenter was not "at liberty to claim anything beyond the terms of it."[106] The court in these two cases did not define what it meant by a "special" contract, but the idea that a contract, even without saying so, could negate a statutory lien right threatened to blow a gaping hole in the coverage of the mechanics' lien law. The General Assembly responded by

103. *Id.* at 351.

104. Hoatz v. Patterson, 5 Watts & Serg. 537, 538–39 (Pa. 1843).

105. Haley v. Prosser, 8 Watts & Serg. 133, 134 (Pa. 1844).

106. *Id.*

enacting an amendment in 1845 that declared that the 1836 mechanics' lien law was to be "construed" such that the right to a mechanic's lien would not "be in any manner affected" by the existence of a contract.[107] In no uncertain terms, the legislative branch signaled to the judicial branch that it wanted statutory security for those who provided labor or materials on a construction project.

Despite all this, three years later, the Pennsylvania Supreme Court held in *Jobsen v. Boden* that wageworkers on a construction project had no right to a mechanic's lien.[108] Jobsen, a contractor hired to build a mill, employed a journeyman named Boden to work on the project as a carpenter and millwright.[109] Boden later filed a mechanic's lien against the mill, and the lower court ruled in his favor.[110] The Pennsylvania Supreme Court reversed.[111] In his decision, Justice Bell conceded that the language of the 1806 statute "taken literally, would seem to include every grade and class of workmen, from the chief builder down to the least important day-labourer."[112] The court identified no language in the 1836 statute, or in any other enactment, that narrowed the broad reach of the mechanics' lien law. Yet, it still ruled against Boden, the wageworker.

"[T]hough perhaps comprehended by the letter" of the mechanics' lien statutes, Bell wrote, "it is very certain one

107. An Act Concerning Certain Sheriffs' and Coroners' Sales and for Other Purposes, Pamph. L. 538 § 5 (Pa. 1845), *reprinted in* SERGEANT, *supra* note 50, at app. 348 ("It is hereby declared that the provisions of the Act approved June 16, eighteen hundred and thirty-six . . . *shall be so construed*; and no claim which has been or may be filed against any house or other building, or on the lien thereof . . . shall be in any manner affected by reason of any contract having been entered into for the erection of such building . . . .") (emphasis added). The court recognized that the 1845 statute sought to "correct" *Hoatz*. *See* Jobsen v. Boden, 8 Pa. 463, 464 (Pa. 1848) ("[T]his declaratory act was not to extend the remedy of the lien to the wages of subordinate workmen, but to correct a supposed error of judicial decision, committed in . . . *Hartz v. Patterson* . . . .").

108. *Jobsen*, 8 Pa. at 464.

109. *Id.* at 463.

110. *Id.*

111. *Id.* at 465.

112. *Id.* at 463.

merely engaged as a journeyman was not within their spirit."[113] The opinion cited two earlier lower court cases that refused liens to journeymen under the 1806 statute, and then pointed out that the General Assembly never expressly overruled those decisions.[114] Of course, the Pennsylvania Supreme Court itself could have overruled those lower court decisions. But it chose what it described as a "restricted construction" of the mechanics' lien law, because it believed such a construction "absolutely necessary to the safety of the proprietors of newly-erected buildings."[115]

Justice Bell wrote that the 1845 amendment restored lien rights to contractors and to master-workmen employed as subcontractors.[116] But, he wrote, to also give liens to "every individual workman engaged by the principal, even for a day, or to the extent of preparing a bed of mortar," would "soon be felt as intolerable."[117] Giving ordinary wageworkers a lien right, the court continued, would not only increase the risks to "owners desirous of improving their estates," but would check economic growth and thus be bad for workers themselves:

> To increase these risks so materially as we are now asked to do, would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise, and thus eventually to injure the workman himself. For the introduction of such a rule, a distinct manifestation of legislative will is necessary. It is, in our apprehension, far better for all parties to leave the journeyman operative to the security he most

113. *Id.* at 464.

114. *Id.* at 463 (citing the 1819 decision by the District Court of Philadelphia in *Cobb v. Traquair* and the 1836 decision by the Common Pleas of Philadelphia County in *Barnes v. Wright*). *Cobb* and *Barnes* are not available on Westlaw or Lexis.

115. *Id.* at 465.

116. *Id.*

117. *Id.*

> commonly relies on, the personal responsibility of his employer.[118]

The following year, 1849, the Pennsylvania Supreme Court again asserted that "a journeyman is not entitled to a lien for his work," explaining that it was the worker's employer, not the building's owner, "who ought to pay him."[119]

The court expounded further on the wageworker exclusion in its 1856 decision in *Harlan v. Rand*.[120] In that case, the owner hired a builder to construct a building.[121] The builder hired a subcontractor to install a heating system and the subcontractor hired a man named Rand to make pipes and other parts of the heating system.[122] Work on the heating system ended after fire inspectors condemned the system as a hazard.[123] Left unpaid for his work, Rand sought a mechanic's lien.[124] The lower court ruled in his favor, but the supreme court reversed.[125] Justice Lowrie reasoned that if Rand were considered an artisan and "not a mere journeyman," then "simple justice" precluded giving him a lien for a defective heating system.[126] On the other hand, Lowrie explained, "[i]f he was a mere journeyman," he also lost the case, because then the law would consider him "as working on the credit of his employer, and not of the building."[127]

The court explained that Rand had no right to a lien for an additional reason: he was too remote from the owner. Justice Lowrie wrote that liens arose not just from "the mere fact that the work was done" but from a contract with the property

118. *Id.*
119. Guthrie v. Horner, 12 Pa. 236, 237–38 (1849).
120. 27 Pa. 511 (1856).
121. *Id.* at 511.
122. *Id.* at 511–12.
123. *Id.* at 512.
124. *Id.*
125. *Id.* at 512, 516.
126. *Id.* at 514.
127. *Id.*

owner.[128] Because lien rights arise from contract rights, only the owner, or a contractor who contracts directly with the owner, has authority "to bind the building."[129] Finding that the law required such a limit, the court stated:

> The carpenter may undertake with the builder for finishing all his kind of work, including all the nails, screws, locks, hinges, fastenings, &c. Can he transmit the right of lien to all the dealers and artisans in these kinds of business? If he can, then the lien rights against any house may be entirely indefinite. The bricklayer, the stone-mason, the plasterer, the painter, the paper-hanger, the plumber, and the cellar-digger may multiply them in the same way, until the costs of liens may exceed the value of the house. If such had been understood to be the law, the multiplication of liens would long ago have become so intolerable as to require a correction of it.[130]

That Rand worked for a subcontractor, rather than for the owner or contractor, thus provided another reason to deny him a lien right.[131]

In sum, despite the breadth of the statute and its backing by organized labor,[132] the Pennsylvania Supreme Court in *Jobsen* and *Harlan* deprived wageworkers employed on building projects of the right to a mechanic's lien. A "mere journeyman" had to look for payment to "his employer," and had no lien against the building.[133]

128. *Id.* at 514–15.
129. *Id.* at 516.
130. *Id.* at 515.
131. *See id.* at 514.
132. *See supra* Section II.B.
133. *Harlan*, 27 Pa. at 514.

D. *Application of Mechanics' Lien Laws in Other States*

Other states in the mid-nineteenth century took a less restrictive approach. Massachusetts, for example, had a mechanics' lien statute similar to Pennsylvania's, but in 1856—the same year the Pennsylvania court issued its *Harlan* decision—the Massachusetts high court extended lien rights to employees.[134] In *Parker v. Bell*, a builder contracted with the owners of a lot of land to construct a house and then subcontracted with a firm to do the plastering and stucco work.[135] The partners in the firm asserted a lien on the house for the work they performed.[136] The Massachusetts Supreme Judicial Court held that the partners had a right to a lien, but only for work "done with their own hands," and that to the extent the plastering and stucco work was done by journeymen or laborers the firm employed, those wageworkers had their own right to a lien.[137] The employee, the court explained,

> earns wages; he is entitled to payment for labor performed, and therefore he may have in his own behalf a lien upon the land upon which he has wrought. The same principle, which entitles the petitioners to insist upon a lien for their services and the labor which they have contributed, affords a like and equal advantage to the workmen whom they have employed to do any

134. The Massachusetts statute provided in relevant part that

> any person who shall actually perform labor in erecting, altering or repairing any building or structure upon real estate, or shall furnish materials actually used for the same, by virtue of any agreement with or consent of the owner thereof, or other person having authority or acting for such owner to procure labor or furnish materials in his behalf, shall have a lien upon such building or structure, and upon the interest of the owner of the building or structure in the lot of land upon which the same is situated, to secure the payment of the amount due him for such labor and materials.

Parker v. Bell, 73 Mass. (7 Gray) 429, 430–32 (Mass. 1856).

135. *Id.* at 431–32.

136. *Id.* at 432.

137. *Id.*

> part of the work essential to the fulfilment of the contract . . . .[138]

Unlike their brethren in Pennsylvania, the high court judges in Massachusetts expressed no concern that extending lien rights to wage earners would create intolerable risks for owners or extraordinary burdens on real estate transactions.

New York carved a middle path, providing that mechanics' lien rights might extend to wageworkers employed by a general contractor, but not to those employed by a subcontractor. New York's mechanics' lien statute expressly included work performed on a building by a "journeyman" or "laborer," but in its 1837 decision in *S.S.&W. Wood v. Donaldson*, the state's Supreme Court of Judicature held that the law gave no lien to an employee hired to do masonry work by a subcontractor who absconded without paying him.[139] The court conceded that the statute "includes every laborer upon the building, without any limitation in respect to the person who may have employed him," but nonetheless it construed the legislation as providing protection only to those in privity with the contractor.[140] Extending protection to employees of subcontractors, the court reasoned, would be "extremely oppressive" to contractors, since the employees' lien claims might deplete the fund the owner would use to pay the contractor.[141]

Moreover, while the New York courts allowed a mechanic's lien to employees of contractors, they limited an owner's exposure to mechanics' liens, by holding that an owner who fully satisfied his contract with a contractor could not be liable

138. *Id.* at 432–33. A few years later, the Massachusetts high court reaffirmed its position that laborers have a lien for the amount of their wages. *See* Whitford v. Newell, 84 Mass. (2 Allen) 424, 427 (Mass. 1861).

139. 17 Wend. 550, 551–53 (N.Y. Sup. Ct. 1837).

140. *Id.* at 553.

141. *Id.* at 552. Other states, such as Illinois and Alabama, followed New York's lead, also denying lien protection to employees of subcontractors. *See, e.g.*, Rothgerber v. Dupuy, 64 Ill. 452, 455 (1872); Turcott v. Hall, 8 Ala. 522, 526 (1845). In a later decision, New York's high court allowed recovery by employees hired by a subcontractor to construct a railroad, but that was under a special statute that was only applicable to railroads and that limited the employees' claims to thirty days' pay. *See* Kent v. New-York Cent. R.R. Co., 12 N.Y. 628, 630–31 (1855).

to anyone the contractor failed to pay.[142] Thus, in New York, if a contractor, paid in full by the owner, absconded or went broke, leaving his employees unpaid, the employees had no recourse against the owner.[143]

E. *The Pennsylvania Supreme Court Nullifies Legislation Intended to Extend Mechanics' Liens to Workers*

Back in Pennsylvania, at least some legislators were unhappy with the high court's refusal to give workers lien rights. In 1887, the Pennsylvania General Assembly overruled *Jobsen* and *Harlan* by providing a right to a mechanic's lien to all mechanics and laborers "by whomsoever employed" who had a claim of ten dollars or more.[144] This new statute, however, quickly fell under the judicial ax.

By the late nineteenth century, state courts nationwide were engaging in aggressive constitutional review of legislation, particularly as it related to labor issues.[145] That was certainly true in Pennsylvania, where, for example, the high court voided a state statute regulating wages for iron workers, deeming it a

142. *See, e.g.*, Lumbard v. Syracuse, Binghamton & New York R.R. Co., 55 N.Y. 491, 493–94 (1874); WILLIAM L. SNYDER, THE MECHANICS' LIEN LAW OF THE STATE OF NEW YORK 2–3 (3d ed. 1896) ("But in no case shall such owner be liable to pay . . . a greater sum than the price stipulated and agreed to be paid in such contract.").

143. Pennsylvania, by contrast, provided no such limitations on mechanics' liens. Subcontractors there could recover against the building despite what the owner had already paid the contractor. This distinction between New York and Pennsylvania mechanics' lien jurisprudence persists. *See* Raulerson, *supra* note 11, at 110–11 (explaining that New York "limits the amount of money that a laborer can collect from an owner to the amount the owner has not yet paid the contractor" while in Pennsylvania "the subcontractor is not limited to the amount of money he can collect from the owner, regardless of what the owner has already paid the general contractor.").

144. Titusville Iron-Works v. Keystone Oil Co., 15 A. 917, 918 (Pa. 1888) (citing An Act Relating to the Lien of Mechanics and Others upon Buildings, Pamph. L. 413 (Pa. 1887)). Ten dollars in 1887 is the equivalent of about $278 in 2021. *See* INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/1887?amount=10 (last visited Apr. 29, 2021).

145. *See* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1973, at 126–27 (1998); FRIEDMAN, *supra* note 1, at 266–67; WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 33, 38 (1991). The same approach in the federal courts would lead to the Supreme Court's infamous *Lochner* decision. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (striking down maximum work hours legislation as unconstitutional).

"degrading" form of "legislative tutelage."[146] The rising tide of constitutional review began to encroach on mechanics' lien legislation. While an 1867 treatise on mechanics' liens lacked any mention of courts attacking them as unconstitutional,[147] an 1883 treatise noted that such statutes could be "obnoxious to the prohibition of the constitution."[148] By 1897, a mechanics' lien law treatise devoted a full chapter to the subject of constitutional review, noting that while mechanics' liens in general passed constitutional muster, courts in certain states had struck them down in whole or part as constitutionally infirm.[149]

Joining the wave of constitutional review, the Pennsylvania Supreme Court, in its 1888 decision in *Titusville Iron-Works v. Keystone Oil Co.*, wasted no time striking down the 1887 mechanics' lien statute.[150] That 1887 statute, rather than simply declaring that the mechanics' lien law applied to workers, provided that the mechanics' liens acts of 1836 and 1845 were *to be construed* to apply to them.[151] There was nothing novel about the legislature stating how prior statutes should be construed. For example, the 1845 mechanics' lien law stated that the 1836 act "shall be construed" in such a way as to extend mechanics' liens to contractors.[152]

Nonetheless, in *Titusville*, the Pennsylvania Supreme Court held that the statute unconstitutionally encroached on the

146. Godcharles v. Wigeman, 6 A. 354, 356 (Pa. 1886).

147. *See* HOUCK, *supra* note 36, § 68.

148. SAMUEL L. PHILLIPS, A TREATISE ON THE LAW OF MECHANICS' LIENS ON REAL AND PERSONAL PROPERTY 44 (2d ed. 1883) [hereinafter PHILLIPS 1883].

149. *See generally* BOISOT, *supra* note 18, at ch. 3. The treatise noted, for example, that state courts in Michigan, Minnesota, and Alabama had found that mechanics' lien laws unconstitutionally deprived "persons of their property without due process of law . . . ." *Id.* § 24.

150. Titusville Iron-Works v. Keystone Oil Co., 15 A. 917 (Pa. 1888). One newspaper reported that the court was so eager to strike down the law that it did not even wait for the lawyers to finish their arguments. *An Important Decision: The Mechanic's Lien Act Declared Unconstitutional*, LANCASTER DAILY INTELLIGENCER, Oct. 31, 1888, https://chroniclingamerica.loc.gov/lccn/sn83032300/1888-10-31/ed-1/seq-3/.

151. *See Titusville*, 15 A. at 918.

152. *See* Jobsen v. Boden, 8 Pa. 463, 464 (1848).

powers of the judiciary, since, as Justice Williams wrote, it told the court how to construe prior legislation:

> The legislature can no more exercise judicial powers than the courts can arrogate to themselves legislative powers. The legislative and judicial departments of the government are independent and co-ordinate. The act of 1887 is in no respect a legislative declaration of the rights and privileges of the class of persons to whom it relates, but it is a judicial order or decree directed to the courts. It undertakes to give a new and final interpretation of the acts of 1836 and 1845, and directs the courts to adopt that interpretation in all cases that may be before them.[153]

What makes *Titusville* remarkable was the court's readiness, based on a technicality, to frustrate the obvious will of the General Assembly. The General Assembly in 1887 could have enacted a lien law saying that it applied to wageworkers. It chose instead to say that prior lien legislation was to be *construed* to apply to them, but the legislature's intent was clear: workers were to have the right to a lien.[154] Yet the court seized on how the legislature framed the command in order to declare the 1887 statute dead on arrival.[155]

Despite its aggressive assertion of judicial power, the *Titusville* decision received applause from some in the press. The Pennsylvania General Assembly had long suffered from a miserable reputation, perceived as a body of inexperienced

153. *Titusville*, 15 A. at 919.

154. *See id.* at 919–20.

155. For a critique of cases like *Titusville* that hold such declaratory legislation unconstitutional, see Note, *Declaratory Legislation*, 49 HARV. L. REV. 128, 138–39 (1935) ("[T]he doctrine that declaratory statutes invade the judicial function of construing enactments is untenable, for although the legislature is in form issuing a mandate to the court, in substance it is making new law which in turn must be construed by the court. . . .While the legislature may say 'black, as used in the prior act, shall be construed to mean white,' the effect of this form is essentially the same as to say 'black, in the past and in the future, has the same legal effect as white.'").

legislators tainted by corruption and susceptible to overreaching lobbyists.[156] Using the *Titusville* case as an opportunity to castigate the legislature, the *Lancaster Daily Intelligencer* faulted the General Assembly for framing the mechanics' lien statute incorrectly, calling the case

> one more illustration of the great misfortune Pennsylvania suffers in the poor quality of its legislature, which has neither knowledge of elementary principles of law nor possession of common sense. It should have a court tacked to it during the session to keep it straight. It meets now once in two years. It would be well if it met but once in five.[157]

The Forest Republican took a similar tone, writing that the 1887 act was "so clearly in disregard of a positive mandate of the Constitution the Supreme Court could do no less than declare the act null and void."[158]

The Carbon Advocate declined to join in the legislature-bashing, and simply noted that, as a practical matter, the *Titusville* decision, by stripping workers of the right to file liens, would "affect hundreds, if not thousands, of suits now pending in the various county courts."[159] The *Pittsburg Dispatch* went further. Under a headline "Only for the Bosses," the newspaper claimed that "the term 'mechanics' lien is not only a misnomer, but a misleader," because it did not apply to those who do the

156. *See* Douglas E. Bowers, *From Logrolling to Corruption: The Development of Lobbying in Pennsylvania, 1815–1861*, 3 J. EARLY REPUBLIC 443, 459 (1983). For an analysis of how lobbying and corruption shaped the negative public opinion of the General Assembly, see generally Robert Harrison, *The Hornets' Nest at Harrisburg: A Study of the Pennsylvania Legislature in the Late 1870s*, 103 PENN. MAG. HIST. & BIOGRAPHY 334 (1979) and PHILLIP S. KLEIN & ARI HOOGENBOOM, A HISTORY OF PENNSYLVANIA 356 (1973).

157. *An Important Decision: Mechanic's Lien Act Declared Unconstitutional*, *supra* note 150.

158. *The New Lien Law Set Aside*, FOREST REPUBLICAN, Nov. 14, 1888, https://chroniclingamerica.loc.gov/lccn/sn84026497/1888-11-14/ed-1/seq-2/.

159. *See* CARBON ADVOCATE, Nov. 24, 1888, https://chroniclingamerica.loc.gov/lccn/sn83032231/1888-11-24/ed-1/seq-2/.

work.[160] "The proper appellation," the newspaper asserted, "should be 'builders lien.'"[161] Workers, the article said, did not realize that the court had interpreted the law as excluding them: "thousands of intelligent mechanics suppose it is devised for their benefit and never know any better until they have fed a lawyer to tell them."[162]

F. *The Court Lets Owners Opt Out of Mechanics' Lien Liability*

Just two years after striking down legislation that extended mechanics' liens to wageworkers, the Pennsylvania Supreme Court issued a decision that allowed owners to opt out of the lien law entirely. In *Schroeder v. Galland*, the owner's contract with the builder stipulated that the building would be built "free of all liens."[163] The builder subcontracted some of the work and the subcontractor later filed a mechanic's lien.[164] The supreme court denied the subcontractor's lien claim, holding that the no-lien stipulations in the contract between the owner and the builder bound the subcontractor, too.[165] This was "no hardship" on the subcontractor, Justice Green wrote, because the subcontractor is "absolutely bound by all the plans and specifications expressed in the original contract."[166] For example, the subcontractor "certainly cannot furnish pine wood for interior wood-work when the owner's contract with the builder calls for walnut or cherry or ash."[167] That the subcontractor may have been unaware of the no-lien stipulations was not an argument the court would entertain: "He is bound to know them. It is a legal necessity arising from

160. *Only for the Bosses: The Supreme Court Judges Lay Cold the Mechanics' Lien Law*, PITT. DISPATCH, Nov. 17, 1891, at 8, https://chroniclingamerica.loc.gov/lccn/sn84024546/1891-11-17/ed-1/seq-8/.

161. *Id.*

162. *Id.*

163. 134 Pa. 277, 282 (1890).

164. *See id.* at 283.

165. *See id.* at 286.

166. *Id.* at 285–86.

167. *Id.* at 285.

the fact that he has undertaken to do the work which his principal [the builder] has engaged to do."[168]

Commentators quickly grasped that the *Schroeder* decision, as a practical matter, spelled the end of mechanics' liens in Pennsylvania. The *Cambria Freeman* explained that contracts between owners and builders had long had stipulations against the builder filing a lien "but heretofore it has not been supposed that these provisions affected sub-contractors . . . ."[169] With the no-lien stipulation extended to apply to others, the newspaper explained, "the mechanics' lien law of 1806 might just as well not have been passed."[170]

The Pennsylvania labor movement mobilized to re-establish the mechanics' lien law. In 1890, the *Pittsburg Dispatch* reported that the Executive Board of the Central Trades Council, a labor group, instructed its lawyer to prepare a bill for a new mechanics' lien statute.[171] The next year, the same newspaper reported that labor organizations intended "to bring a pressure to bear on the present Legislature" to restore to subcontractors and workers the right to file liens.[172] But, the newspaper warned, "[i]t may not be a one-sided fight," as "those who put their money into buildings" opposed the bill, denouncing it as "so troublesome as to materially interfere with business" and "a piece of demagogy passed to secure the support of labor organizations."[173] Another article in the same paper called the mechanics' lien law "worse than foolish," legislation that "creates a burden on the construction of houses" and that subjects owners to "the perils of bankruptcy or insanity . . . ."[174]

168. *Id.*

169. CAMBRIA FREEMAN, May 30, 1890, https://chroniclingamerica.loc.gov/lccn/sn83032041/1890-05-30/ed-1/seq-2/.

170. *Id.*

171. *Central Trades Council*, PITT. DISPATCH, Mar. 9, 1890, at 2, https://chroniclingamerica.loc.gov/lccn/sn84024546/1890-03-09/ed-1/seq-2/.

172. *Want the Old Law*, PITT. DISPATCH, Apr. 8, 1891, at 2, https://chroniclingamerica.loc.gov/lccn/sn84024546/1891-04-08/ed-1/seq-2/.

173. *Id.*

174. *Liens and Contracts*, PITT. DISPATCH, May 12, 1891, at 4, https://chroniclingamerica.loc.gov/lccn/sn84024546/1891-05-12/ed-1/seq-4/.

In 1891, the General Assembly passed a new mechanics' lien law providing that a no-lien stipulation in a contract between an owner and a builder would have no effect on anyone else, unless the subcontractor in writing waived his right to a mechanic's lien.[175] In other words, the new law abrogated *Schroeder*. Just three years later, however, the Pennsylvania Supreme Court, in a ruling that severely constrained legislative power, declared the new mechanics' lien law unconstitutional.[176]

In *Waters v. Wolf*, the court explained that the 1891 law infringed liberty of contract by making an owner subject to a subcontractor's lien despite having never contracted with the subcontractor.[177] The court reasoned that "[t]he lien of a mechanic being a remedy, by which the property of one man may be taken for the benefit of another, it necessarily follows that it can only arise by the free consent of him to whom it belongs."[178] Justice Dean found "monstrous" the idea that an owner could be "entrapped into the payment of a debt which he never contracted[,] and which was not contracted by anyone having any legal authority to bind him or his estate."[179] He conceded that the General Assembly passed the mechanics' lien legislation to secure payment "to a class deemed specially deserving"—such as the carpenter, bricklayer, and mason—but he insisted that "a debt without a contract cannot be created against the owner."[180] The sole exception, Justice Dean wrote, was the lien given to a volunteer who salvaged cargo from a shipwreck, because that situation permitted for no advance contract.[181]

The court's radical view that statutes must give way to private contractual relations prompted a dissent. Justice

175. *See* Waters v. Wolf, 29 A. 646, 646–47, 654 (Pa. 1894).

176. *Id.* at 651–53.

177. *Id.* at 651–52.

178. *Id.* at 652 (quoting PHILLIPS 1874, *supra* note 18, § 65).

179. *Id.* at 649 (quoting Brown v. Cowan, 1 A. 520, 522 (Pa. 1885)).

180. *Id.* at 650–51.

181. *Id.* at 650.

Mitchell asserted that the General Assembly had the right to give a subcontractor a mechanic's lien "as a matter of public policy without regard to the will of the owner."[182] It was entirely within the legislature's power, he wrote, to determine "what contracts shall be lawful, in what form they shall be made, and what shall be their effect."[183]

After *Waters*, the General Assembly finally threw in the towel. With the 1891 Act declared unconstitutional, the legislature passed a new statute in 1895 that effectively codified *Waters* by providing that there could be no mechanics' liens when the contract between the owner and builder contained a no-lien stipulation.[184] As one newspaper aptly stated, because it allowed owners to opt out, "[t]he practical effect of the law is to abolish mechanics liens."[185] Thus, the nineteenth century in Pennsylvania came to a close much as it had begun: with wageworkers on construction sites having no right to assert a lien against the building if their employer left them unpaid.

III. WHY THE PENNSYLVANIA SUPREME COURT EXCLUDED WAGEWORKERS FROM THE MECHANICS' LIEN LAWS

Having recounted how the Pennsylvania Supreme Court denied wageworkers mechanics' lien rights, this Article now explores *why* it did so. The simplest explanation is that the court was following the dictates of the legislature. But that explanation fails. The various mechanics' lien laws enacted by the Pennsylvania legislature did not expressly exclude wageworkers. Indeed, the legislation's expansive language could easily have been construed to encompass them.[186] In *Jobsen*, for example, the court acknowledged that the language of the 1806 statute "taken literally, would seem to include every

182. *Id.* at 654 (Mitchell, J., dissenting).

183. *Id.* at 653.

184. *As to Mechanics' Liens*, COLUMBIAN, Aug. 23, 1895, at 3, https://chroniclingamerica.loc.gov/lccn/sn83032011/1895-08-23/ed-1/seq-3/.

185. *Id.*

186. *See supra* text accompanying notes 50 and 100.

grade and class of workmen . . . down to the least important day-labourer."[187] Moreover, the court identified no language in the 1836 statute that narrowed the broad reach of the mechanics' lien law.

The court made a deliberate policy decision to construe the legislation narrowly, at least when it came to the rights of wageworkers. The court said as much in *Jobsen* when it wrote that journeymen were "perhaps comprehended by the letter" of the mechanics' lien laws but "not within their spirit."[188] That the court made a policy decision should not be surprising. Legal historians have argued that, in general, nineteenth-century state court judges saw themselves as policy makers.[189] Moreover, the Pennsylvania Supreme Court in other cases during that era construed statutes more narrowly than written, when it believed public policy required it.[190] But why did the judges make the policy decision that the statute should be narrowly construed to exclude wageworkers? The Article explores several possibilities below and concludes that the most plausible explanation is class bias—the notion that workers' subordinate social position did not warrant extending to them a special statutory remedy.

187. Jobsen v. Boden, 8 Pa. 463, 463 (1848).

188. *Id.* at 464.

189. *See* WIECEK, *supra* note 145, at 44 (arguing that nineteenth-century state court judges had an instrumentalist view of the law and saw their role as participating in the making of policy); *see e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 39 (1977) ("[C]ommon law judges could implement their own conception of desirable social policy.").

190. *See, e.g.*, Heebner v. Chave, 5 Pa. 115, 117 (1847) (interpreting statute that prohibited attachment of wages of "any labourers" to apply to manual laborers only; even though the term "labour" had a "very extensive" meaning, in the court's view, the statute "was not designed" to protect others); *Ex parte* Meason, 5 Binn. 167, 175 (Pa. 1812) (interpreting a statute that gave "servant's wages" preference among claims against deceased employer's estate to apply only to domestic servants, not workers in employer's iron works; even though the term "servants" is "very comprehensive," a court must "seek for some more limited and reasonable sense" of the statute).

A. *Mechanics' Liens as Radical Innovations?*

One could argue that mechanics' lien laws were radical innovations, and that conservative judges were simply trying to limit how deeply these new laws encroached on the legal *status quo*.[191] Bewig's article, for example, referred to the "radical implications of the mechanics' lien law," arguing that the law could be transformed from a "bourgeois legal innovation intended to encourage economic development into an engine of economic fairness and wealth redistribution," one that "challenged the usual assumption underlying wage labor that the worker retains no interest in the product of his/her labor."[192]

In fact, far from being an "engine . . . of wealth distribution," mechanics' lien laws simply provided an additional remedy to obtain payment for those who, under existing contract law, had already earned the payment. Pennsylvania Chief Justice Gibson said as much in upholding the 1845 mechanics' lien law as constitutional: the statute provided "[n]o alteration" of the parties' rights, he wrote, "further than to give a specific remedy against the property."[193] McCallum, the Canadian scholar, described Ontario's nineteenth-century mechanics' lien laws as modest "piecemeal reform," a description that could apply equally to their American cousins:

> Despite its interference with the law of contract, there was nothing radical about mechanics' lien legislation. It did not impose minimum standards for employment contracts or restrict the right to own and develop property. It did not question the worth or validity of the exchange relationship at

191. For example, in his study of industrial accident law in early nineteenth-century Massachusetts, Christopher Tomlins argues that court decisions denying workers' claims were simply seeking to protect the status quo. *See* Christopher Tomlins, *A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800–1850*, 6 L. & HIST. REV. 375, 378 (1988) [hereinafter Tomlins, *A Mysterious Power*]. For support for the proposition that nineteenth-century judges were conservative, see FRIEDMAN, *supra* note 1, at 288.

192. Bewig, *supra* note 3, at 874.

193. Bolton v. Johns, 5 Pa. 145, 149 (1847).

> the core of capitalist law and ideology. Rather, it provided a corrective mechanism for a situation in which the strict application of the law of contract produced a breakdown in the exchange relationship.[194]

Moreover, in practice, the additional remedy that mechanics' lien laws provided typically yielded little for the claimant. As explained above, in the event of a default, those asserting mechanics' liens typically stood in line behind mortgage lenders, who left them little or nothing to collect.[195] Also, as Rilling explained, by the mid-nineteenth century, owners' contracts with builders often required, as a condition of payment, that the builder provide the owner with releases from all mechanics and material men.[196] That practice effectively shielded owners from the risk of mechanics' liens.

Further, while mechanics' liens may have been alien to the common law, there was nothing new or radical about the idea of a lien. Other types of liens, such as liens on chattels, had long existed.[197] And, by the mid-nineteenth century, when the Pennsylvania Supreme Court was considering whether to extend them to wageworkers, mechanics' lien laws had lost their novelty, having become a commonplace feature of the American legal landscape.[198] It is thus unlikely that the Pennsylvania court refused to extend mechanics' liens to wageworkers because it saw mechanics' liens as radical innovations.

194. McCallum, *supra* note 15, at 403. A similar debate, about whether a legal innovation radically changed the status quo, appears in the area of workers' compensation. While some historians have seen workers' compensation legislation as a clear break from the common law of industrial accidents, others have seen it as merely adding a regulatory regime to the established legal structure. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 128–29 (2004).

195. *See supra* Section II.A.

196. *See* RILLING, *supra* note 7, at 184.

197. *See* PHILLIPS 1874, *supra* note 18, §§ 1–2.

198. *See id.* § 6.

B. *Mechanics' Liens as Hindrances on Growth?*

Even if mechanics' lien laws were not radical innovations, one could argue that the Pennsylvania Supreme Court saw granting lien rights to workers as a hindrance to economic development. Justice Bell in *Jobsen* wrote that to give wageworkers mechanics' lien rights "would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise."[199]

Despite Bell's assertion, one can question the extent to which concern over economic growth really drove the court's decision-making. James Willard Hurst, the dean of mid-twentieth century American legal history, championed the idea that the need to promote economic growth shaped nineteenth-century American law.[200] But others since have largely debunked Hurst's functionalist approach of explaining law as a response to society's needs.[201] Robert Gordon argued that functionalist interpretations like Hurst's lack explanatory power, since for any supposed societal need, there will be a wide variety of possible legal solutions.[202] That is certainly the case here. For example, there is no reason to believe that Massachusetts had any less interest in economic growth than Pennsylvania, yet it chose not to follow Pennsylvania's approach to mechanics' liens.[203] Moreover, while Justice Bell asserted in *Jobsen* that mechanics' lien laws hindered economic growth, others at the time believed they promoted it.[204] Any causal connection between a perceived need for economic

199. Jobsen v. Boden, 8 Pa. 463, 465 (Pa. 1848). That view was consistent with the belief, espoused by some, that mechanics lien laws "create[d] a burden on the construction of houses." *Liens and Contracts*, PITT. DISPATCH, May 12, 1891, at 4, https://chroniclingamerica.loc.gov/lccn/sn84024546/1891-05-12/ed-1/seq-4/.

200. *See, e.g.*, JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7, 10, 24 (1956).

201. *See, e.g.*, ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 86 (2001); Tomlins, *A Mysterious Power*, *supra* note 191, at 378; Robert W. Gordon, Symposium, *Critical Legal Histories*, 36 STAN. L. REV. 57, 58 (1984).

202. *See* Gordon, *supra* note 201, at 87–96.

203. *See supra* notes 134–38 and accompanying text.

204. *See supra* Sections II.B–C.

growth and a restrictive judicial construction of mechanics' lien laws is tenuous at best.

C. *Contract Ideology?*

Contract ideology provides another possible explanation for the Pennsylvania court's denying mechanics' liens to wageworkers. Contract ideology, which flourished in nineteenth-century America, held that voluntary agreements among individuals constitute the true foundation for legal obligations.[205] Justice Dean captured the essence of this idea when he wrote in the 1894 *Waters* case that a lien on property "can only arise by the free consent of him to whom it belongs."[206] Arguably, the lack of a contract between the building's owner and the employee who worked on the building explains why the Pennsylvania Supreme Court believed employees should have no lien. That is certainly the explanation emphasized by the court in *Harlan*. In that 1856 decision, Justice Lowrie wrote that the law "requires the lien to be founded on contract."[207]

But contract ideology, too, provides a less-than-adequate explanation for the Pennsylvania Supreme Court's position. The court's 1848 *Jobsen* decision denied mechanics' liens to wageworkers without any contract-based justification.[208] Nor did the court rely on contract analysis in its 1888 *Titusville* decision striking down a mechanics' lien statute that would

205. *See, e.g.*, John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement*, 114 HARV. L. REV. 690, 699 (2000) (explaining that in the nineteenth century, "[p]rivate contractual relations became the paradigmatic concept through which common law lawyers and judges approached legal problems"); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION x (1998) ("[T]he nineteenth century has long been deemed the age of contract . . . .").

206. Waters v. Wolf, 29 A. 646, 652 (Pa. 1894).

207. Harlan v. Rand, 27 Pa. 511, 516 (1856).

208. *See generally* Jobsen v. Boden, 8 Pa. 463 (1848).

have been applicable to wageworkers; there, the court based its ruling on constitutional separation-of-powers analysis.[209]

Moreover, *Harlan*, one of the cases denying liens to wageworkers, acknowledged that contractual privity need not always exist between the building's owner and the mechanics' lien claimant. In that case, the court wrote that a contractor could "bind the building to others," such as those who supplied materials to the project or "in some cases for work specially done by others."[210] Why should the lack of contractual privity with the owner *not* preclude a lien for a contractor's material supplier or specialty craftsman but preclude a lien for the contractor's laborer? This inconsistency suggests that something other than a lack of contractual privity drove the court to deny liens to wageworkers.

D. *Class Bias*

Among the possible explanations for the Pennsylvania court's decision to deny mechanics' lien rights to wageworkers, one stands out as most plausible: class bias. As used here, class bias means seeing workers through a prism of social hierarchy and, as a result, treating them differently from others. Legal historian Christopher Tomlins has argued that while nineteenth-century employment law emphasized the ideals of free labor and contract-based relations, social hierarchy continued to pervade the workplace, and that courts participated in its reproduction.[211] William Forbath makes the

209. *See supra* notes 150–53 and accompanying text. Indeed, the court's 1890 *Schroeder* decision seems to run directly contrary to contract ideology. There, the court held subcontractors bound to no-lien stipulations in agreements between owners and contractors, stipulations that they did not necessarily consent to and that they may not have even known existed. *See supra* text accompanying notes 163–70.

210. *Harlan*, 27 Pa. at 515.

211. *See* TOMLINS, *supra* note 93, at 229–31 (describing the transformation of the relationships between employer and employee in America from the colonial era to the nineteenth century); William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 643, 674 (Michael Grossberg & Christopher Tomlins eds., 2008) (arguing that employment law in the newly-industrial United States maintained "hierarchy and subordination").

same point, arguing that the nineteenth-century common law of employment, based on concepts of master and servant, constituted a legal regime "of hierarchy and subordination."[212]

Class bias does not necessarily mean animus toward workers or a conscious intent to do them wrong.[213] Rather, it can manifest as an indifference to workers' welfare and a disregard of their contributions to society.[214] Rilling notes such class bias in her history of the construction industry in nineteen-century Pennsylvania, writing that "[l]abor—even craft labor—fought against political, social, and ideological currents that discredited its contribution to the republic."[215]

Legal historian Morton Horwitz found that what he termed "class bias" permeated nineteenth-century jurisprudence.[216] For example, he wrote that early nineteenth-century courts often allowed building contractors a *quantum meruit* recovery for a partially completed job, but typically denied workers any wages if they failed to complete their full term of employment.[217] Lawrence Friedman wrote that early nineteenth-century jurisprudence yielded "many distinctions of this sort, between the middle class and those below the middle class," noting, for example, that in railroad accident cases, courts were much more likely to grant recoveries to

212. Forbath, *supra* note 211, at 674.

213. Joseph Slater, *The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America*, 15 BERK. J. EMP. & LAB. L. 141, 163 (1994) (arguing that "self-conscious, explicit assertions of animosity" constitutes too narrow a concept of class bias).

214. *See id.* (noting class bias resulted in judges favoring employers over unions).

215. RILLING, *supra* note 7, at 62.

216. HORWITZ, *supra* note 189, at 188.

217. *See id*. at 186–87; *see also* Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677, 683 (1986) (demonstrating how a line of cases allowing partial recovery for contractors but not workers "constitutes and exemplifies class bias"). *But see* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 186 (1997) (finding that courts treated contractors no better or worse than workers). For discussions of cases denying workers any recovery unless they completed their entire employment contract, see STEINFELD, *supra* note 201, at 291–92 and TOMLINS, *supra* note 93, at 273–79.

passengers than to workers.[218] Class bias continued beyond the early nineteenth century. Political scientist Karen Orren, for example, has noted that during the period from 1870 to 1920, American courts took a much less forgiving approach in labor cases than business cases.[219] According to Barry Friedman, scholars have traditionally seen the Supreme Court's early twentieth-century *Lochner*-era decisions as a product of class bias.[220]

The class bias that legal historians have identified in nineteenth-century American jurisprudence suggests that it may also have animated the Pennsylvania Supreme Court's refusal to extend mechanics' lien rights to wageworkers. So, too, does the lack of other persuasive explanations for the court's refusal.[221]

The court did not express any overt animus against workers. But by denying them a means to try to recover wages they had earned, the Pennsylvania Supreme Court displayed a lack of concern for their welfare and undervalued their role. Hints of this attitude leaked into the court's decisions. *Jobsen* posited a workplace hierarchy extending from the "chief builder down to the *least important* day-labourer."[222] *Harlan* referred to the "*mere* journeyman" who did not warrant a mechanics' lien.[223] The notion of the wageworker as unimportant appeared again in

218. Lawrence Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 L. & SOC. INQUIRY 253, 265–68 (1999). On the denial of recoveries to injured workers, see generally Tomlins, *A Mysterious Power*, *supra* note 191, which provides a historical analysis of employer liability jurisprudence that limited employees' ability to bring suit against their employers.

219. *See* Karen Orren, *The Laws of Industrial Organization, 1870–1920*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 531, 544 (Michael Grossberg & Christopher Tomlins eds., 2008) (highlighting how judicial "rigidity in reviewing labor statutes" was "so different from its flexibility in its commerce decisions").

220. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1420 (2001).

221. *See supra* Sections III.A–C.

222. Jobsen v. Borden, 8 Pa. 463, 463 (1848) (emphasis added) (citing the 1819 decision by the District Court of Philadelphia in *Cobb v. Traquair*).

223. Harlan v. Rand, 27 Pa. 511, 514 (1856) (emphasis added).

Jobsen's reference to one "*merely* engaged as a journeyman."[224] Such language suggests that the court's rulings may have been a product of their perception of wageworkers' position in the workplace and in society.

CONCLUSION

This Article makes two basic points. First, because the Pennsylvania Supreme Court interpreted the state's nineteenth-century mechanics' lien legislation as providing *no* protection to wageworkers, it would be inaccurate, at least in the Pennsylvania context, to consider such legislation an early form of labor law.

Second, the Article suggests class bias as the most likely explanation for the court's refusal to extend mechanics' liens to wageworkers. The court could have read the state's nineteenth-century mechanics' lien legislation as reaching workers, but it chose not to, displaying a willingness to tolerate loss for those it perceived as low on the workplace and social hierarchy.

224. *Jobsen*, 8 Pa. at 463 (emphasis added).