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About the Journal

The *Undergraduate History Journal at Illinois* is a peer-reviewed, double blind, history research publication run by students at the University of Illinois Urbana-Champaign, that strives to provide undergraduate students with the opportunity to share their research and gain exposure for their writing. The journal is committed to high standards of writing, a broad sampling of areas of research, and the integrity of academic research.

The journal is double-blind peer reviewed by a group of student editors. Once submissions are chosen, they are reviewed multiple times by our teams of editors, before being published in one of our biannual issues.

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Automation for All?: A Historical Analysis of the Automation of the Food Service Industry

Lucy Arias - University of Illinois Chicago

Entering the McDonalds, a consumer sees the usual one or two cashiers taking people's orders. There are large screens displaying the menu, and an array of cooking machines behind them in an open kitchen. Standing between the long line of customers and the impatient buyer, are one or two tall, white screens. These are self-service kiosks. They entice the newly entered client to take a closer look by displaying a picture of a big mac and fries, with large white letters in the middle of its shiny screen that read, "ORDER HERE". Another shopper has opted to order and pay at the drive-thru, in order to quickly grab their food and head to their destination. Arriving at the large menu screens, the buyer lowers their window to wait for the McDonalds employee to greet them. Instead, an automated, robotic sounding voice asks them what they would like to order. The patron hesitantly goes through their order, with the AI drive-thru voice repeating it back to them and asking if the order is correct. The consumer corrects the machine, telling it that they ordered 6 chicken nuggets, not 60. The machine asks the client to hold for a moment. A human voice sounds through the speakers, asking the buyer what they would like to change. Stepping away from the expected quick pace of the fast-food industry, it makes sense that local restaurants or food establishments would also change their norms and service to keep up. Now, even before arriving to most restaurants, one can make a reservation online, browse the menu, and even order for pick-up or delivery, cutting the need to even step foot in the establishment to order.

The food service industry has evolved a lot over time, leading to the constant present-day reports of a great labor shortage, and complaints about the lack of worker efficiency, accuracy, motivation, and overall productivity, issues which food service employers have sought out new

ways to offset. McDonald's, for example, has been facing a decreasing supply of its traditional teenage labor force throughout the years, forcing them to broaden their hiring scope and include people from distant communities, disabled adults, older employees, and foreign-born workers.¹ Even after initiatives like these, many food service companies and establishments still grumble about the lack of people willing to work, or the issues that plague the cooking and serving process. Employers have increasingly turned to technology in order to automate some of the “menial” and “burdensome” tasks that human employees have had to complete, cutting costs that would have gone towards human worker wages. Facing such technological developments in various industries, protests and concerns have arisen from the general public that robots, AI, machines, and other such technologies are stealing jobs from human workers. Companies automating the workplace defend mechanization by explaining that automation enhances human work quality and efficiency, allowing workers to focus better on customer service or other tasks. They justify that with new machines will come new jobs that will be focused on the maintenance of those machines, hence public concerns will be offset.

Though automation of the food service industry provides a variety of benefits to the company, and even some to consumers and employees, it is important to keep in mind the populations of workers that historically comprise this “inadequately supplied” labor force. Many food service jobs are already classified as “low-skilled”, which companies and clients alike use to justify the low wages granted to those who do toil in the industry, calling into question the assertions that automation concerns will be resolved. The demographics of the industry include a large majority of historically financially troubled communities, such as people of color, and foreign-born workers or immigrants. This, in turn, earns these communities a close association with the term “unskilled worker”. Many of these “low-skilled” workers are also identified as

¹ George Ritzer, *The McDonaldization of Society* (Los Angeles: Pine Forge Press, 2008), 192.

such due to their lack of higher education and “specialized skills”. So how likely is it that these workers, who are identified as “uneducated” and “low-skilled”, will go back to school or be qualified enough to actually complete maintenance on these machines? These populations of “low-skilled” and “minimum-wage workers” already, historically, have a hard time finding jobs that will allow them to live a decently comfortable life, or even simply survive, with many of them even taking on multiple jobs at once. Regardless of the many benefits that come with automation, mostly for the benefit of the employer, much of its past and current effects seem to project a negative future for these “low-skilled” food service employees. The automation and introduction of new technologies into the food service industry has brought various benefits and consequences for both companies, consumers, and employees, both substituting and enhancing human labor, but it has ultimately been negatively affecting various vulnerable populations of human workers, particularly immigrant and racialized communities.

What is “Automation”?

Automation can be used to describe “any single or multiple functional machine or group of machines that performs a predetermined or reprogrammable sequence of tasks.”² However, when talking about automation, particularly in the food service industry, it is important to remember that this usually refers to the automation of a single (maybe even a few) tasks or duties (such as “inputting data in a reservation system, cleaning the floor, etc.”³) rather than the automation or computerization of entire professions or jobs.⁴ A deep fryer may have a timer and even deep fry

² David A. Collier, “The Service Sector Revolution: The Automation of Services,” *Long Range Planning* 16, no. 6, (1983): 11.

³ Stanislav Ivanov and Craig Webster, *Robots, Artificial Intelligence and Service Automation in Travel, Tourism and Hospitality*, (Bingley: Emerald Publishing, 2019), 48.

⁴ Ibid.

the French fries on its own, but it cannot package and hand them to the patron, nor can it make hamburgers.

Service automation technologies (such as self-service kiosks, robot waiters, etc.) not only replace human labor but they can also be thought of as transferring “the responsibility of the service-delivery process from the company employees to the customers and transform them [the buyers] into prosumers of the service process.”⁵ “Prosumer” refers to the concept of mixing the roles of “consumer” and “producer” into a single role, whereby the purchaser takes on additional roles that would have previously been provided by a human employee.⁶ Buyers become a sort of “partial employee”, taking charge of some aspects of their food service experience, without being paid to do so by the company from which they are shopping at.⁷ For clients, this can include tasks like checking themselves in to a restaurant via a smartphone or self-check in machine, taking sushi plates off a conveyor belt, etc. A host would have checked a patron in, and a waiter would have served the dishes, but this is now done (partly or almost entirely) by the buyer themselves.

Most of these newly implemented technologies affecting both the employee and customer experience include Robots, Artificial Intelligence, and Service Automation or “RAISA”.⁸ A “Robot” can be defined as a mechanism that is programmed or programmable in two or more axes with a certain level of autonomy, which allows it to sense, manipulate, and move within its environment, and complete certain tasks.⁹ This is different from Artificial Intelligence (AI), which can be defined as a computer system’s ability to accurately interpret and learn from external data using mathematical algorithms, and use machine learning tools and techniques in

⁵ Ivanov and Webster, *Robots*, 10.

⁶ *Ibid*, 8.

⁷ *Ibid* 60.

⁸ *Ibid*, 7.

⁹ *Ibid*, 19.

order to accomplish a specific goal, function, or task.¹⁰ Though AI do not themselves *have* human intelligence, they do *exhibit* intelligent behavior, as part of their learning and study of human objectives or actions.¹¹ Current AI development, especially in the realm of food service labor, is at an Artificial Narrow Intelligence, or weak AI, stage where AI can really only work in fields where they outperform humans due to their algorithms.¹² So for now, most technology being implemented is made to complete a single, or handful of tasks, but it is not wide-ranging.

As RAISA tech becomes further implemented into the labor sector as a whole, it is important to define two very important processes that affect human employees: “De-skilling” and “Up-skilling”. By delegating some, or many, tasks of a certain job to RAISA technologies, the number of responsibilities or skills required by humans to complete said tasks decreases, allowing for less trained, skilled, or specially educated workers to complete the job, a process known as “de-skilling”.¹³ In contrast to “de-skilled” jobs, where now “less-skilled” workers can get the job done, “up-skilled” jobs require more skills, training, and education from their human workers in order to complete tasks efficiently using new RAISA tech. Companies often assert that de-skilling will allow productivity to increase because more workers will be able to complete their work, whilst requiring little to no skill at all.¹⁴ But by decreasing job qualifications or skills needed, employers are ultimately “homogenizing” labor, creating highly specialized jobs, such as vegetable slicer, which makes their human employees highly replaceable.¹⁵ These processes noticeably affect the human workforce, raising various concerns over human labor substitution with RAISA tech.

¹⁰ Ibid, 15.

¹¹ Ibid, 16.

¹² Ibid, 16.

¹³ Ibid, 48.

¹⁴ Ritzer, *McDonaldization*, 45.

¹⁵ Ibid.

“Low-skilled” labor is often used to refer (as it will also be used in this paper) to the perception of labor, work, professions, or forms of employment that are thought of as not requiring a high number of specialized skills, nor special education, training, or experience. Though “low-skilled” labor is often commonly perceived as consisting of tasks that are repetitive, and require little thought, such as that of cashiers, hosts, busboys, waiters, etc., this should not insinuate anything about the humans who carry out these roles, or the importance of such jobs. The term carries various negative associations and connotations, which may hold a certain degree of offensiveness towards the workers it is used to describe. “Low-skilled” is also often used to justify the low wages proportioned to these employees, without care of the current or historical social and economic contexts from which this “low-skilled” labor force arises. For the purposes of this paper, the term “low-skilled” does not mean to imply nor perpetuate any of these negative societal connotations, much less does it mean to justify the low wages and value placed on their work and labor. In contrast, “high-skilled” labor will refer to work that requires a high number of specialized skills, and/or special training, education, or experience, such as lawyers or software engineers. Their work and intelligence to finish their education or gain their professional skills has earned them their large pay and respect, but I must note that no one’s skill set makes them more or less superior or inherently intelligent. Nor does it affect someone’s worthiness of a livable wage, employment, life fulfillment, and basic human respect, or anyone’s personal value as a human.

The Evolution of the Food Service Industry and its Labor Force

Though automation within the food service industry can look differently according to the time period, the food preparation process and service industry has clearly evolved due to technological developments. Between 1958 – 1976 the productivity of eating and drinking locations, though varying widely, rose by an annual average rate of 1%, whilst its output increased by 3.1% and its hours rose by 2.1%.¹⁶ This productivity rise could be attributed to the spread of (at the time) modern management techniques, work organization, new technologies, and a rapidly increasing demand and supply of fast-food services.¹⁷ In 1976, the per capita spending on meals eaten away from home had risen 24% since the mid-1960's, landing at \$159 per capita.¹⁸ This “overall increase in spending for meals and snacks eaten away from home was accompanied by a shift from full-service restaurants to fast-food establishments”, leading to a rise in the frequency people were eating out, and the consumption and demand for quick, convenient, and lower priced meals.¹⁹

Alongside this change in where we eat food, comes a shift in the way we prepare food. Menus became simplified and standardized (what you can order at a Wendy's in the state of Wyoming does not differ from what you can order in Illinois), and many of the menu items or foods were being increasingly prepared or packaged away from the cooking or eating establishment.²⁰ Innovations like the microwave, pressure container, deep fat fryer, etc., not only led to cooking time reductions but deeply altered the way we cook, what we eat, and our perspectives on food convenience or quality. Technological developments in food preparation

¹⁶ Richard Carnes and Horst Brand, “Productivity and New Technology in Eating and Drinking Places.” *Monthly Labor Review* 100, no. 9, (September 1977): 9.

¹⁷ *Ibid.*, 9.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

and service meant to alleviate human work and time consumption, seemed to not only create an insatiable hunger for quick and economically convenient meals, but it also kickstarted a new cycle. Food service companies, in conjunction with other societal institutions, would accustom their patrons to new eating and cooking practices, leading to increasing demand for food and further development, a development that often meant constructing new technology to fit new needs. Places that could not keep up with calls for shorter wait times and more convenience for patrons, were unable to compete and shut down. This was a particular threat to smaller businesses and a big win for restaurant chains and corporations, as during 1958 – 1976, the number of food and drinking establishments dropped 4%, with drinking places accounting for most of this drop.²¹ The number of multi-unit establishments (those run by higher corporations, or under a brand-name that exists in multiple locations) almost doubled during this period, making them 10% of all eating places.²² Alongside shopper requests for a faster and more convenient food experience, came a heavy demand by producers for new food production techniques and a labor force able to keep up.

New methods began to be implemented and experimented with in the food service industry, things which, by 2022, we have grown accustomed to. “According to a 1974 survey, 70 percent of all [food service] respondents used fresh frozen meats and 56 percent used meats prepared to some extent off premises (for example, pre-cut to meet portion standards),”²³ all of which was done to reduce labor costs, control portions, and improve kitchen efficiency.²⁴ New equipment also arrived at food establishment kitchens, with innovations like convection ovens (which reportedly reduced cooking time by 50%), fat fryers, and thawing equipment being

²¹ Ibid, 11.

²² Ibid.

²³ Ibid, 12.

²⁴ Ibid, 12.

increasingly used to improve cooking speed and quality control.²⁵ Such developments and changes in the food production process, though revolutionary for their time, are now expected when we enter these establishments.

Likewise, new technology developments at the beginning of the 21st century, like websites, social media, specialized software's, and mobile apps, have become an integral part of our current society, including the food service sector. RAISA tech has become increasingly implemented into restaurants, bars, and the food service industry, affecting our diets, work force, and consumer culture. AI's and robots have increasingly entered into the restaurant industry, joining the kitchen as robot chefs, serving guests, making reservations, and even making drinks.²⁶ Some restaurants, such as Spyce, Jingdong X Future, Moley, and Café Dawn have even shown off their robot chefs or waiters, and others feature bartending robots like at Yoronotaki restaurant.²⁷

So far, there appears to be 2 types of restaurant robots: “Back of the House” robots, and “Front of the House.”²⁸ Back of the house robots are mostly used as kitchen assistants, with their main point of interaction being restaurant staff. An example is Cali Burger’s “Flippy” robot, a mechanical arm that helps flip burger meat and then helps assemble the burger.²⁹ These robots can aid in: food preparation; service or cooking time reduction; productivity increase; and ensure food quality or preparation consistency.³⁰ However, these robots can also cause major issues if, as main food preparers, they have a glitch or technological malfunction, which means they will need some human employees nearby to work alongside these robots if they are to be

²⁵ Ibid, 13

²⁶ Nozawa, et al., “Consumer Responses to the Use of Artificial Intelligence in Luxury and Non-Luxury Restaurants” *Food Quality and Preference* 96, (March 2022): 1.

²⁷ Ibid, 1.

²⁸ Ivanov and Webster, *Robots*, 196.

²⁹ Ibid, 196-197.

³⁰ Ibid 197.

implemented.³¹ Front of the house robots are usually those service robots that interact directly, and mostly, with customers. They can greet and seat patrons (with some robots saying pre-programmed phrases that can even be customized for different languages.³²), suggest menu items, take orders, deliver food, or even serve as entertainment.³³ For example, there has been implementation or proposals of interactive tables or tablet additions in various restaurants and chains, such as Olive Garden, Dominos and Pizza Hut, which would allow users to place their orders and play games on them. There are also sushi places which depend on conveyor belts to transport food and help entice patrons to try new or more dishes, as diners watch other plates travel along the belt next to their table. Amongst front of the house robots, “The most commonly used... are robotic food runners. The main task of these robots is delivering food to the table and bringing dirty plates back to the kitchen.”³⁴ Mobile or waitressing robots are increasingly being able to detect obstacles, with some programmed to memorize restaurant floor plans, and others only navigating on elevated platforms.³⁵ Based on the research and experience so far of the “Bear Robotics” company and operating restaurants, 3 main tasks seem to be up for automation in the food service industry: dishwashing, carrying food and drinks, and single tasks related to the cooking process (such as patty flipping).³⁶ Still, these robot runners or waiters will rely on human employees for support, such as to load completed orders onto the robot, interact with guests, and clean up tables.³⁷

Another AI technology implemented into the industry has been chatbots. Chatbots are online programs that are programmed to carry out conversations and interact in a human-like

³¹ Ibid, 197.

³² Ibid, 199.

³³ Ibid, 198.

³⁴ Ibid, 198.

³⁵ Ibid, 199.

³⁶ Ibid, 203.

³⁷ Ibid, 198.

manner, relying on machine learning, natural language processing, and constant customer interaction to improve their abilities.³⁸ In the food service industry, chatbots are quite capable of providing a variety of services. Before a patron's arrival to the establishment, chatbots can aid in the setting up of reservations, answering frequently asked questions, and placing to-go or delivery orders. At the food establishment, chatbots or AI can also serve as entertainment, process payments, assign loyalty points, and/or provide food establishments with data that can help them better service their clients.³⁹ Such technologies, though helpful to buyers and employees, queries how many more tasks employers plan to "alleviate" their human workers of, particularly those who historically and systematically do not find accessible employment elsewhere.

Additionally, rather than lessen burdens on workers, some restaurants have actually started using biometric technology (such as facial and fingerprint identification) to help with personnel authorization and time management.⁴⁰ Fingerprint tech has been tested and used to prevent employees from clocking in for each other, help companies "fight fraud", aid HR record-keeping, and to keep track of employees within the building.⁴¹ Thus, current technology and RAISA have been sneaking into the food service sector not just to entertain guests or aid human tasks, but also to watch and manage said workers, something not originally considered when discussing the topic. Though automation and technological developments within the food production and service process has altered the way we eat and what we consume, it has also impacted the way we perceive the employees within the industry. We have not only come to label these workers as "unskilled," "uneducated," and "shameful" but we have used such labels to

³⁸ Ibid, 187.

³⁹ Ibid, 187.

⁴⁰ Ibid, 192.

⁴¹ Ibid, 192.

spread the ideas that large capitalistic food corporations have fed us. We have consumed the idea that workers, especially if they are “crime-prone” people of color or “illegal” foreigners, deserve the low wages handed to them. We have proceeded from shaming “prostitute-like” bar or food establishment waitresses in antiquity to shaming all the “uneducated” and “lazy” food service workers who help feed us today.

The Pros and Cons of Labor “Automation” in the Service Industry

In a world where technology is constantly and rapidly advancing, the use of RAISA tech depends not only on the profits, productivity, and labor savings that may incur from their increased use, but it also causes and depends on “macroenvironmental drivers.” Drivers such as dropping fertility and birth rates, resistance to immigration, competition for employees between labor sectors, national labor laws, and consumer acceptance of technology services affects the labor market and ultimately makes RAISA tech more attractive to employers.⁴² As RAISA technologies further develop and improve, these solutions to food service industries become more practical, widely used, and ultimately increasingly inexpensive to purchase.⁴³ Dropping fertility and birth rates mean a lower domestic population from which to employ, especially in an industry which has historically relied on teenage labor, leading food service companies (amongst many other labor sectors) to import cheap labor from neighboring or foreign countries. However, new, and current RAISA tech will now help them avoid paying for any human labor at all, dodge any negative nationalist publicity, and elude dealing with labor and immigration laws, making this automation of labor even more enticing than the historical reliance on or importation of ethnic or immigrant labor to subsidize “labor shortages”. Nevertheless, we have to consider how

⁴² Ibid, 27-29.

⁴³ Ibid, 29.

the implementation of computers, robots, artificial intelligence, and service automation systems in the food service industry inholds a range of benefits and negative consequences for producers, employees, and patrons alike in a variety of different contexts within the industry.

For companies, and employers, RAISA tech can benefit them through increasing their service capacity (how many customers can be serviced simultaneously for a certain period of time), which in turn increases their productivity, and profit.⁴⁴ RAISA can also help facilitate scheduling and planning of operations, turning an increasing number of establishments into 24/7 food service locales.⁴⁵ Tech will not ask for sick or vacation days, and can serve numerous customers in a work day or even at the same time.⁴⁶ Moreover, RAISA can help improve a company's environmental and financial sustainability due to its decreased use of resources, waste produced, tasks in the production cycle, etc.⁴⁷ This new tech also aids management and employers by: enhancing perceived service quality via changes in how service is provided and how technologies engage with patrons (such as robots or services that can communicate in different languages); aid in high employee turnover rates; provide predictive analytics or consumption patterns, which can help them better cater their products and services, and personalize or automate their pricing; and the introduction of RAISA can also help attract publicity from the press (in a positive sense, in this case) for their "high-tech" or innovative methods of service.⁴⁸ This, in turn, will pique the curiosity of shoppers who want to see automated food services they saw in the media.⁴⁹ Some food service companies will consequently use automation and new tech as a marketing tool like robot waiter restaurants, or rotary sushi restaurants. Companies depend on consumer demands and opinions to decide what

⁴⁴ Ibid, 25.

⁴⁵ Ibid, 25.

⁴⁶ Ibid, 27.

⁴⁷ Ibid, 25.

⁴⁸ Ibid, 25-26.

⁴⁹ Ibid, 27.

to sell, how to sell it, how to organize and provide service, and ultimately how to make profits. As food service industries become more interested in using and implementing RAISA tech into their establishments, they have to devise how to convince clients to embrace RAISA tech as well. Some consumers even seem to prefer RAISA tech products or services when utilitarian or cognitively driven goals, consumption desires, or tasks are required.⁵⁰

With the recent pandemic of COVID-19, which demonstrated the value of the food service industry, it has been predicted that the use of RAISA in kitchens will increase or new innovations will arise to meet new global expectations.⁵¹ Additionally, to combat the “lack” of workers available, many companies have shifted client-company relations and expectations through RAISA, turning customers into “prosumers” or “partial employees”. For instance, some restaurants advertise “online-only” deals, promoting users to order online and simply pick-up their food, which frees up employees from taking orders manually and adds to the “convenience” of fast-food or restaurant service. In 2022, the pizza chain Dominos, promoted a \$3 “no-delivery” credit, whereby the company encouraged purchasers to not only order online, but also pickup their pizza, instead of having it delivered, in order to receive a \$3 credit. Though this may seem like an expense or disadvantage, many corporations have been attracted to implementing more RAISA, in order to further turn the “food service for the customer” into a “food service for the company”, and all without having to pay human employees’ minimum wage. They save big from not hiring and retaining delivery workers, instead encouraging people to go into the store themselves for “store credit”, which can only be used there.

The most feared or cited reasons for the implementation of technology is of course the same financial benefits that companies and employers can enjoy. Reducing human workers

⁵⁰ Nozawa, et al., “Consumer Responses,” 3.

⁵¹ Ibid, 9.

means displacing people from their jobs, and for certain communities or groups of people, it means closing them off from the job market almost all together. Still, RAISA is applauded for helping food service establishments speed up their service process, making services funnier and entertaining, and decreasing human employee errors by eliminating certain jobs or tasks from humans, things which humans could have done if offered better wages.⁵² Instead, this automation and “de-skilling” of food service labor allows the industry to hire and use “low-skilled” employees to complete the tasks they need, allowing companies to expand their pool of potential employees.⁵³

The implementation of RAISA tech can, however, still provide a variety of benefits to employees. RAISA, as it is meant to handle particular tasks, can save personnel time from having to perform “3D tasks (dull, dirty, dangerous)” and gives employees more time to focus on more creative, revenue generating, and/or customer orientated tasks.⁵⁴ Self-service and other technologies can also help reduce the amount of responsibilities that employees must complete, and allow them to focus on other aspects of their job.⁵⁵ Another benefit, as found by Bear Robotics, a company that created “Penny” a service-oriented, waitress robot that delivers food, is that it can minimize physical burdens on servers. Based on pedometer readings they gathered from servers at a restaurant, a server (in a typical 8 – 12-hour shift) could walk “between 5 to 9 miles [8 to 14.5km] in a small (about 1,500 sq. ft.) restaurant.”⁵⁶ By having penny help deliver food, you can minimize the exhaustion servers face by carrying food and drinks around restaurants, which could allow them to better focus on customer experience. Likewise, robot waiters have also been considered and implemented, by some, in order to help integrate people

⁵² Ivanov and Webster, *Robots*, 43.

⁵³ *Ibid*, 24.

⁵⁴ *Ibid*, 25.

⁵⁵ *Ibid*, 60.

⁵⁶ *Ibid*, 202.

with disabilities into the workforce. For example, Café Dawn in Tokyo, Japan explains that one of the missions of its robot waiters is to help increase the employment of people with disabilities (such as spinal cord or mobility disabilities), allowing these newly integrated workers to operate robots and work from home.⁵⁷ In a good case scenario, employees could receive a job “up-skilling” or additional education or training to enhance their employment. Employers would need to invest in employee training, which could increase employee bargaining power, competition in the labor market, and consequently increase salaries.⁵⁸ With new tech, workers could also have “more leisure time to pursue hobbies, family and community interests and self-improvement activities.”⁵⁹

RAISA technology could even bring benefits to food service clients. Self-service technologies can shorten customer waiting time, ensure quality control, consistency of service provided, and improve patron’s dining experience due to convenience and relative ease of use.⁶⁰ Service quality and experience of patrons can potentially be enhanced with “attractive, efficient, and interactive ways of delivering service, engagement, and communications with customers” through RAISA and by using tech like “chatbots, robots, and self-service kiosks [which] could have multilingual capacities beyond the limited linguistic capabilities of human employees.”⁶¹ From a customer perspective, these technologies can offer a more convenient, customized, accessible, and less burdensome service experience. Services such as reservations, can be made online 24/7, and orders can be customized easily in a variety of ways. Online ordering services, sometimes promote restaurant accounts, which can keep track of customer orders, payment information, and sometimes offer rewards. These online or “Self-Service Technologies” (SST)

⁵⁷ Ibid, 203.

⁵⁸ Ibid, 24.

⁵⁹ Collier, “Service Sector Revolution,” 18.

⁶⁰ Ivanov and Webster, *Robots*, 10.

⁶¹ Ibid, 44.

can also occasionally be more accessible, with some ordering kiosks even having hearing impaired services or a variety of languages to choose to order in.⁶² Many buyers also report using SST's simply to avoid or minimize direct and personal contact with employees, allowing them to order ahead of time online, and/or even have it delivered by the company itself or a food delivery service. SST's can also empower purchasers, in a way, by allowing them to easily make changes and view the details of their orders or reservations.⁶³ Furthermore, prices from food services could decline if properly combined with both high productivity (on part of human and machine labor) and lower labor costs, caused by the automation of certain tasks or removal of some human employees.⁶⁴

Despite these pros, there are a variety of different drawbacks that may arise from implementing RAISA or new tech into the food service industry, for businesses, employees, and clients alike. RAISA tech can, "generally only work in highly structured situations, lack creativity and personal approach", which could actually decrease the service quality or dining experience for some patrons.⁶⁵ Though efficiency and serving time are common issues in the food service industry, especially fast-food restaurants which market their speed, computers and tech do not seem like a way to completely eliminate long lines, but rather, at most, seem like a human "enhancer". For example, "a Hong Kong restaurant serves about 600,000 (versus 400,000 in the United States). To handle long lines, 50 or more employees move along in the lines taking orders with handheld computers. The orders are transmitted wirelessly to the kitchen."⁶⁶ This process did not eliminate lines nor the human workforce, but rather enhanced the efficiency and quality of human labor, allowing them to serve customers personally, and quickly.

⁶² Ibid, 62.

⁶³ Ibid, 72

⁶⁴ Ibid, 24.

⁶⁵ Ibid, 23-24.

⁶⁶ Ritzer, *McDonaldization*, 142.

With new types of technology also comes a higher investment of time, resources, and money, on part of the mother company or employer. The implementation of RAISA may decrease the flexibility of food customization (as orders are made increasingly pre-portioned or prepared off-site), and may require the reorganization of the food establishment, in order to permit robots to freely move about.⁶⁷ Just as new positions could supposedly be created for employees at the food establishment, corporations themselves may also need new departments, jobs, and communication links in order to accommodate the implementation of RAISA into franchises or service areas.⁶⁸ There are also a variety of other costs that come with simply obtaining RAISA technologies, including: initial acquisition fees; installation; maintenance; software updates; tech insurance; and even damage costs that must be paid for by the company for RAISA accidents.⁶⁹ Even on the lower end, some of the costs for purchasing robots, kiosks, chatbots, AI software, or other technologies, can be quite high. “A self-check-in kiosk can easily cost above 1,000 USD, although cheaper and more basic versions also exist. A restaurant waiter robot can be purchased at prices between 2500 and 7500 USD.”⁷⁰ More advanced tech will therefore likely only be accessible to larger corporations, such as big brand fast-food chains, and is much less likely to be seen, though not unthinkable, at a small or local restaurant. More readily available to almost all food service businesses are commercial and automatic cooking machines, credit/debit card machines, and online reservation systems. There will also still be human labor costs that come with the introduction of RAISA tech. Companies may have to hire “specialists to operate and maintain the robots/kiosks/chatbots” or they may have to pay for staff to be trained

⁶⁷ Ivanov and Webster, *Robots*, 25.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 27.

⁷⁰ *Ibid.*, 45.

to “effectively and efficiently operate the new technology”, which could be initial or even periodic training.⁷¹

However, there are developing changes in technology acquirement methods. RAISA tech is indeed still a very costly thing to invest in. But there have been efforts made, on part of RAISA technology manufacturers, to offset this issue. Manufacturers are starting to lease their technology, which can eliminate large initial investments, making them more affordable as they will be paid monthly or so.⁷² Leasing also prevents companies from investing heavily in RAISA tech that could quickly become outdated, and allows them to slowly implement tech into their businesses, so they can compare tech costs with human labor costs, and test how employees and patrons react to the new RAISA tech.⁷³ Nonetheless, tech rental still leaves gaps in the implementation process of RAISA tech in the food service industry.

Labor shortage issues, though meant to be offset by new tech, have not yet disappeared for companies. Though they can now access a larger pool of potential employees, since tasks do not require “high-skills”, companies still risk not finding employees due to the unattractive salaries or wages that may accompany the deskilling of jobs.⁷⁴ With the increasing use of RAISA, there have been changes in the demand and salaries for specific human jobs, adjusting their job descriptions, skill requirements, and time needed.⁷⁵ When a job is ultimately de-skilled the salary for it decreases or does not stay in line with other company salaries, discouraging many from applying for these jobs in the first place.⁷⁶ Due to these wage cuts, many companies and service sectors have come under fire for attempting to replace human employees in order to satisfy their own capitalistic needs. Many of the benefits cited for both employers and employees

⁷¹ Ibid, 46.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid, 48.

⁷⁵ Ibid, 51.

⁷⁶ Ibid, 51.

(made by the same employing companies) are all the same reasons ethnic, working-class communities have heard throughout history when it came to the job market and historical “de-skilling” of many professions. After seeing the disastrous socio-economic consequences of manufacturing cities, like Detroit, Michigan in the early 20th century, it is hard to believe that the food service industry will result in the benefits claimed by other automated industries. This has led employees to hold negative attitudes about RAISA technologies because they, along with much of the general public, consider these as attempts by employers to substitute, rather than enhance, human labor. This causes a great anxiety amongst workers over the security and stability of the food service sector, which may, in turn, cause increasing turnover rates.⁷⁷ Immigrant, ethnic, and working-class communities have not only historically faced high levels of job insecurity and instability, but as they traverse through employment industries, these issues follow them. Companies implementing or considering tech must work to prevent complaints or issues from arising. They must consider the image of their company’s transition and the impact on employees, as a negative transition may, in turn, affect buyer’s perceptions and consumption.⁷⁸

This backlash is not simply an employee or anti-technological issue but also stems from consumer experiences. Since many shoppers tend to view AI or technology as having less emotional experiences or being less sociologically orientated, many devalue some of the emotion or social oriented services, products, or tasks provided by RAISA.⁷⁹ A study done on consumer responses to luxury or non-luxury restaurant use of AI, found that patrons tended to evaluate restaurants where AI is the service provider, much more negatively, especially in luxury

⁷⁷ Ibid, 23.

⁷⁸ Ibid, 63.

⁷⁹ Nozawa, et al., “Consumer Responses,” 3.

restaurants.⁸⁰ Furthermore, the presence of AI alongside cooking staff seemed to also negatively affect the expectations of food quality, service, ambiance, and the intention of clients to return to the establishment.⁸¹ Tech usage may benefit restaurant efficiency, productivity, accuracy, and speed, but businesses must keep in mind who their target audience is and how their reputation or food service classification may affect the implementation of RAISA.⁸² Other things that can affect RAISA adoption is the size, market positioning and market culture of the company, the complexity of RAISA tech (how easy it can be used or employed by workers or clients), “the cultural characteristics of customers and service providers”, and public safety concerns.⁸³ Shoppers may avoid Self-Service Tech if they do not feel that: customization options are enough; their needs are not met; that their personal information is safe; and if they feel unable to properly use the technology.⁸⁴ Furthermore, sometimes the failure of SST’s, with no employees to turn to, may lead to a negative experience or reluctance to use such machines again.⁸⁵ The usage of SSTs by buyers can also be affected by the presence of other customers, where a purchaser unaccustomed to SST’s may be discouraged to use them if other people are nearby, though reluctance does decrease with familiarity.⁸⁶ What use does tech provide anyone if no one can or wants to use it?

In terms of who RAISA implementation is going to affect in the labor force, it has been historically detailed by various companies and civilians that if a task or job can be done by a machine, most companies will choose to do so. As the de-skilling of jobs continues to break down the service process into smaller and “less-skilled” tasks, it becomes easier for employers to

⁸⁰ Ibid, 8.

⁸¹ Ibid, 9.

⁸² Ibid, 9.

⁸³ Ivanov and Webster, *Robots*, 52.

⁸⁴ Ibid, 63.

⁸⁵ Ibid, 64.

⁸⁶ Ibid, 68.

replace workers, following a seemingly “Taylorist” ideal that anything that is unnecessary or inefficient, must go. In the same fashion, if tech were not perceived as enhancing the service provided, or not well received by customers, it would be highly unlikely that the job will be replaced, for now.

Demographics of Human Labor in the U.S Food Service Industry

Cited benefits and consequences of the automation of the food service industry must be put into perspective by discussing who historically makes up the labor force and how automation is projected to affect them. Between 1958 – 1976, employment in eating and drinking establishments rose by an annual average of 3.9% and by 1977, there was an estimated total of 3.7 million food/drinking service workers.⁸⁷ This meant that people were starting to eat out more, and the food service industry needed to adjust to fit increasing demands. But, by 1975, 51% of all food/drink industry employees worked part-time, dropping its proportion of full-time, year-round jobs to a mere 22% in 1976 (the lowest of any occupational sector at the time).⁸⁸ A part-time job, would mean a part-time wage, and for people who already generally do not earn as much, this means financial trouble. Surges in fast food establishments being opened and changes in food, technology, equipment, and consumer demands were occurring, causing increased demand for “low-skilled,” “cheap” workers in the food industry.⁸⁹ The demographics of and outlook on food service employment was now shifting. Women made up 64% of all workers in the food service industry and were “generally more likely than men to hold part-time jobs in the

⁸⁷ Carnes and Brand, “Productivity and New Technology,” 11.

⁸⁸ Ibid.

⁸⁹ Ibid.

industry.”⁹⁰ Women, who historically have faced a gender pay gap, were now fighting the negative connotations that surrounded the role of “food service employee,” connotations which supposedly justified their lower wages. “Between 1960 and 1970, the median age of food service workers declined from 42 to 33 years”, resulting in, by 1975, teenagers making up 30% of all food service workers, particularly in the growing fast-food sector.⁹¹ The need for “skilled”, experienced, and full-time labor, worthy of a higher wage, was dwindling.

As of the 21st century, the demographics of this industry have undergone some changes. As of 2021, there were approximately 76.1 million (16 years or older) workers that were being paid hourly rates (PAR), and out of these, an estimated 910,000 received below minimum wage.⁹² Of the 58 million White paid hourly workers, 1.2% were at below minimum wage, with the statistics of Hispanic or Latinos following at 17 million PAR workers and 1.1% of them earning below minimum wage.⁹³ Black PAR workers numbered at 11 million, with 1% of them receiving less than minimum wage, and Asian PAR workers numbered at 3.8 million, with .9% of them earning below minimum wage.⁹⁴ Though the statistics may not seem staggeringly different, with all of them being at about 1%, one must take into account the population sizes. Whites make up the largest population of PAR workers and thus have the highest percentage of workers receiving less than minimum wage. However, it should be noted how the White population and Hispanic or Latino population have very close percentages of below minimum wage earners, despite the White PAR population having nearly 3X the amount of workers that the Hispanic or Latino population has. Of the 76.1 million PAR workers that are at or below the federal minimum wage, 6.4 million of them work in the “Food preparation and serving related

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² U.S. Bureau of Labor, “Characteristics of Minimum Wage,” 3.

⁹³ Ibid.

⁹⁴ Ibid.

occupations,” (FPSO) with 51,000 of those employees working at minimum wage, and 593,000 working at below minimum wage.⁹⁵ In regard to the education of PAR workers, it is reported that approximately 8.5 million have less than a high school diploma, 67.6 million have graduated high school, and 16.8 million have a bachelor's degree or higher.⁹⁶ Millions of people work in the food preparation industry, many of whom are people of color, working-class, and immigrants. They come from communities who have faced underfunded social services, including education, and whose work has historically been devalued and underpaid. Even now, as new tech is constantly implemented, the vulnerability of these workers has not changed statistically. When so many employees are being paid at below the minimum wage, it is no wonder the food service industry struggles with a low staff turnover rate. Of the workers paid at hourly rates, people of color seemed to face higher rates of below minimum wage employment in relative comparison to the White population.

Another shift in the food service labor force can be seen in 2021, where approximately 7.37 million people (aged 16 or older) worked in “Food Preparation and Serving Occupation” (FPSO), with the largest age group being 25–34-year old’s, numbering at 1.56 million.⁹⁷ The “Food Preparation and Serving Occupation”, includes: chefs and head cooks; first-line supervisors; cooks; food prep workers; bartenders; fast food and counter workers; waiters and waitresses; food servers, non-restaurant; dining room, cafeteria attendants, and bartender helpers; dishwashers; hosts and hostesses; and, all other food prep and serving related workers.⁹⁸ The positions that had the highest median ages were chefs and head cooks at 41.5 years, and cooks at 34.9, whom made up the biggest group of workers in the occupation, estimated at 1.9 million

⁹⁵ Ibid, 9.

⁹⁶ Ibid, 12.

⁹⁷ U.S. Bureau of Labor, “Occupation and Age,” 7.

⁹⁸ Ibid, 7-8.

workers.⁹⁹ The youngest median age was the hosts and hostess workers at 21.4. This age shift, towards older workers, contrasts the younger groups of people that the FPSO used to rely on.

As of 2020, 115.3 million White people (16 or older) were employed, with 4.2% of this labor force working in the FPSO.¹⁰⁰ Black or African Americans numbered at 17.8 million with 5.1% in FPSO, Asians at 9.4 million with 4.4% in FPSO, and Hispanic or Latinos totaled at 25.95 million with 6.9% in working in FPSO. Though none of these communities came even close to the total amount of people employed that the White population had, all of them held disproportionately higher amounts of their populations working in the food service industry as compared to the White labor force. Though Asians held the lowest population employed, at 9.4 million, even they still had a larger percentage of their workers in FPSO than did the 11X larger White population. Additionally, of the 6.56 million food prep workers, 74.8% were White, 13.9% were Black, 6.4% were Asian, and 27.3% were Hispanic or Latino.¹⁰¹ Although White people seemingly make up a majority of food prep workers, one must take into account how little of the White population itself these workers make up (only 4.2% of the White labor force), and how high their total population is in general (115.3 million), as compared to that of any of the other reported races. This means that any negative consequences resulting from the automation of the food service industry will very disproportionately target and impact certain communities, such as working-class, impoverished, exploited, ethnic and immigrant populations. Communities that are historically relegated to low-paying jobs, may begin to see themselves without any employment options.

The food service industry has also increasingly become a viable employment path for the foreign-born. Out of 24.8 million foreign born workers, 5.7% (approx. 1.4 million) worked in

⁹⁹ Ibid.

¹⁰⁰ U.S. Bureau of Labor, "Race and Ethnicity", 28.

¹⁰¹ Ibid, 41.

FPSO in 2020, whilst out of 122.99 million native born workers, only 4.2% (approx. 5.17 million) worked in the food prep industry.¹⁰² Immigrants have historically been relied upon to fill labor gaps, and the food service industry is no exception. Looking at the populations of 25 or older, approximately 3.2 million foreign born workers (out of a total of 17.9 million), in comparison to only 2.5 million native born workers (out of a total of 83.2 million) had less than a high school diploma.¹⁰³ These statistics may also not fully account for undocumented immigrants, a highly exploited population. Immigrants are desirable for their exploitable and replaceable nature. So, how likely is it for foreign-born, minimum wage, barely high school graduate workers to pay or be recommended for new job trainings or education to implement RAISA tech?

Though these statistics may not be entirely representative of the whole labor force they represent, they give us a pretty good idea as to the patterns that exist in the food service industry. The industry relies on communities of color, and an older, foreign labor force, with a majority of the force being represented by cooks, a profession which is currently being threatened by RAISA tech such as Miso Robotics' "Flippy". Though the White population seems to hold higher percentages or a higher amount of people, their overall population majority in the United States, should be considered when contemplating which populations work the most in FPSO.

This demographic (older, less educated, foreign-born, POC) should also be considered when we discuss how automation ultimately affects people. Corporations and businesses will justify their turning to RAISA tech and the automation of their "de-skilled" jobs by clarifying that it will "enhance" current human labor, and bring new jobs for those who may lose their current ones. However, this shift towards automation or machine maintenance-based

¹⁰² U.S. Bureau of Labor, "Foreign-Born Workers", 12.

¹⁰³ Ibid, 13.

employment places bigger requirements and demands on American workers, requiring them to learn new skills. If a worker could not afford (or for some other reason) to complete a college or high school degree in the first place, how do companies, the government, and the general public expect workers to do so whilst receiving a disappointingly low minimum wage? What about workers who have families to support? How can these companies and the discouraging public expect a minimum wage worker, who is already deemed “low-skilled”, “uneducated”, and “unworthy” of a livable wage, to give up additional time and money to get retrained or learn a new skill for such an unstable job market?

Though automation and new tech will certainly bring new jobs, it is hard to believe that those who are being replaced (dishwashers, fryers, cashiers, etc.) will be able to easily obtain one of those new specialized jobs. Some workers will not be able to make or survive this shift due to “economic resources, training opportunities, mobility of family and friends, age, or education level. These workers will be permanently displaced... [and] Older workers, less-skilled workers and some lower and middle managers are prime candidates for this permanent job loss category.”¹⁰⁴ If a majority of the workforce is already made up of historically marginalized, poverty-stricken communities, how are they going to find a way to keep up with the automating labor force that tries to force them out of the few jobs available to them and into the jobs that have traditionally been kept from them? A major problem with such a rapid automation and tech-based movement in the food service sector is that “skills of the workforce tend to lag the capabilities and advances of technology. Some segments of the U.S. workforce lack the economic resources or local opportunities or motivation to update or change their job skills.”¹⁰⁵ So when employers constantly remind you of your replaceability, and deny you livable wages, it

¹⁰⁴ Collier, “Service Sector Revolution,” 19.

¹⁰⁵ Ibid, 18.

is hard to be motivated to do anything that would “benefit” you, even at your own expense. If a job was slowly de-skilled and automated once, how are these employees sure they will not be on the chopping block again?

How to Aid Human Displacement and Offset Effects of Automation

After the COVID-19 pandemic, the importance and necessity of workers in the food service industry was blatantly displayed. Apart from this, the issues that arose from people who lacked proper livable wages was also a major point of discussion. Though these people were termed “essential workers”, the way they have been historically treated, even 2 years after the start of the pandemic, does not match up with this identification and sentiment. Many have increasingly been quitting their jobs, tired of the working conditions and barely sustainable wages, only to be called “lazy”, “uneducated”, “unmotivated”, or “unskilled”. If already looked down upon and deemed unworthy of even having enough money to live, how are they to feel motivated or hopeful that they can survive the impending automation and further de-skilling employers are choosing?

The first step in offsetting and aiding the displacement of human employees in food service is to simply recognize that their labor is hard work too and that they are worthy of livable wages. The negative dichotomy that exists within US society, between low-skilled and high-skilled workers, must vanish and instead recognize that people can host a variety of different skills depending on their experiences, education, physical and mental abilities, and personality, whilst still deserving a livable wage, one that changes in conjunction with the economy and cost of living.

Though presented with various “objective” statistics, numbers, data, and reports (even including those within this paper, which may not be all encompassing but attempt to depict the effect that automation will have on certain populations), one must remember that those numbers are something much more than what is presented: they are people. It can become quite easy for many to hear about the labor shortage or view the statistics of food service employment and simply dismiss the workers as being “unmotivated” or “lazy”, with many even attributing these characteristics to certain populations due to the existing stereotypes placed on the people who make up the labor force and the job itself. One has to examine such statistics with care, as no such national poll has ever been “truly” representative of the food service work force, whether intentionally or not. Assumptions and patterns must be based off the few interviews or polls we have whilst taking into consideration what factors (migration, language barriers, culture barriers, inaccessibility, etc.) may have prevented all-encompassing statistics. We must be aware that the “history of science [is] tied to militarism, capitalism, colonialism, and male supremacy [factors that could be looked into by further studies] – to distance the knowing subject from everybody and everything in the interests of unfettered power.”¹⁰⁶ When viewing statistics, reports and claims that support the idea that automation will benefit “all” workers, consider who it is that is claiming that and who benefits from making such claims. It is easy to distinguish one’s own situation from that of the food service employees and justify their loss of employment, but though numbers seem to be objective, do not remove the bodies that belong to those statistics from those numbers, for “objectivity turns out to be about particular and specific embodiment and definitely not about the false vision promising transcendence of all limits and responsibilities.”¹⁰⁷

¹⁰⁶ Donna Haraway, “Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,” *Feminist Studies* 14, no. 3, (Autumn 1988): 581.

¹⁰⁷ *Ibid*, 582-583.

Though seemingly exciting to some customers or like a great business opportunity for small employers, the automation of the labor force can really come to represent a “scientific revolution” of sorts for those employed. Accordingly, it must be considered how new technologies have affected and continue to impact existing FPSO worker populations, especially with some of them being nearly up for replacement.

To aid those being displaced, and at the receiving end of such a worldly change, compromise must be reached between unions, workers, governments, consumers, and employers, in order to help members of such ostracized populations. An actual attempt and effort must be made (especially on part of corporations who say they are adding new jobs into the economy) “to retrain displaced workers. For those workers capable of learning new skills, tax credits must be provided to individuals and corporations to encourage the upgrading of skills (job enrichment), more cross training (job enlargement), and developing totally new skills (job shift). Training must be viewed as a sound investment in human capital.”¹⁰⁸ More money will need to be invested (properly) into the community and displaced workforce by governments and food service businesses. Considerations should also be made for those workers who “are caught in a complex set of social, economic, and technological forces beyond their control or ability to rectify and need permanent help from society during this transition period. An alternate approach would provide the worker with job displacement insurance as protection against being automated or skilled-out of a job.”¹⁰⁹ A shorter work week should be considered as well, “the government could aid this process by making overtime more expensive compared to regular time, by gradually paying shorter overtime premiums (such as ‘36 hours in 1900 and 32 hours in 2000’), or by giving employees compensatory time off.”¹¹⁰ If labor automation will truly be able to offer

¹⁰⁸ Collier, “Service Sector Revolution,” 19.

¹⁰⁹ Ibid.

¹¹⁰ Ibid, 20.

employees the “popularly cited” extra leisure time, then attempts should be made to actually provide this time for employees to spend with family, friends, or doing other things they need or like.

Conclusion

In conclusion, though the automation of the food preparation and service sector may offer a wide array of benefits to employers, consumers, and laborers alike, it is important to take into consideration the exact communities and people that this automation is affecting, as many of these are already, historically, heavily racialized, looked down upon, and disadvantaged economically. There is nothing wrong with wanting to see the cool robots, try out the automated establishments or services, or trying to make our work easier, but we must reflect on how RAISA affects our consumption practices, and impacts those who toil in these industries. Not all workers are made the same, and some may be more deeply affected by the ever-quickening automation of the food preparation sector. The implementation of RAISA tech ultimately depends on the usage and acceptance of clients, as a major fast-food chain is nothing without its profits and customers. One does not need to boycott or give up these automating establishments all together, but one does have the responsibility, as a fellow human, consumer, and laborer in the capitalistic system of the United States (and the world), to fight for the right of all to have a livable wage, and/or have access to employment. These technologies, in practice can and do enhance human employees labor in a variety of ways, such as the integration of disabled workers, and the alleviating of physical burdens on servers. However, one must also be aware that these technologies though efficient, are not always necessary or successful, and hold the power to substitute certain jobs entirely. Where a kiosk may help workers during busy periods, they can

also be used to completely take over the food ordering process. Awareness of the communities that these technologies can threaten and how these communities may react towards these upcoming changes is imperative. These communities that have been racialized, marginalized, and stripped of pride in their employment, may find it hard to adjust their skills with a constantly changing work environment. By truly attempting to provide for the basic needs of everyone, instead of simply claiming to do so, one can help subside the anxiety and fears of robots taking over the labor force and world. Though certain jobs may be replaceable to many employers, the human body, mind, and soul is not.

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Locke to *Lochner*: The Constitutional History of Freedom of Contract

Nathan Miller - Purdue University

Lawyers hate *Lochner*. Few Supreme Court decisions unite titans from so many disparate legal persuasions as *Lochner v. New York*.¹ Justice Scalia once called the decision “erroneous” and “widely opposed,”² and Justice Ginsburg said, “If anything is well established, it is well established that the *Lochner* era is over.”³ The case and its logic are so universally reviled that it has been christened one of the Supreme Court’s “anti-canon.”⁴

Lochner is anathema in legal and historical circles; it’s an assumed conclusion that one should only cite the case to disparage.⁵ The case has become a mere pejorative, utterly disclaimed by lawyers and denied legal plausibility. Such presentism makes it easy to forget that the case once carried an air of legitimacy – at least enough to win a majority at the Supreme Court. The absurdity of freedom of contract is a modern conception, only fully crystalized in response to *Lochner*. Historical analysis shows that political philosophers influential to modern understandings of liberty would not be as put off by *Lochner*’s freedom of contract as modern jurists.

Whether or not the Constitution demands states honor one’s freedom of contract stands decided – perhaps no reputable legal mind still believes in the concept. As a matter of policy, however, the doctrine would likely find allies in thinkers foundational to American conceptions

¹ *Lochner v. New York*, 198 U.S. 45 (1905).

² *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³ Ruth Bader Ginsburg, “Ginsburg Confirmation Hearing Day 3 Part 2.” C-SPAN video. 1:29:15. July 22, 1993.

⁴ Jamal Greene, *The Anticanon*, 125 *Harvard Law Review* 125, no. 2 (2011): 380.

⁵ E.g. *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting); *Casey*, 505 U.S. 988 (Scalia, J., concurring); *Seminole Tribe v. Florida*, 517 U.S. 44, 165 (1996) (Souter, J., dissenting).

of liberty. Freedom of contract was a consistent and earnest thread in American legal history, evidenced in philosophical writings at least as early as Locke, whose precedential merit endured well into the *Lochner* era.

***Lochner* Explained**

Lochner v. New York is a 1905 Supreme Court case. *Lochner* violated a New York labor law when an employee worked more than 60 hours in one week.⁶ Is such a state law valid? In *Lochner*, most of the Supreme Court Justices said no. Writing on behalf of the five-justice majority, Justice Peckham said the law could be dismissed in a few words: “There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”⁷ Such interference in *Lochner*’s ability to control the terms of his contracts with his employees, the majority reasoned, violated his “freedom of contract.” The court reasoned that such deprivation of liberty, without due process, violated the 14th Amendment.⁸

The 14th Amendment bars states from “depriv[ing] any person of life, liberty, or property, without due process of law.” For more than a century, courts have analyzed which types of liberty the Amendment protects from state deprivation. Surely the amendment doesn’t excuse adherence from any state law one disagrees with,⁹ but it must limit the exercise of some state laws, lest either state laws or the 14th Amendment become a mere pretext without any effect.

⁶ *Lochner*, 198 U.S. at 52.

⁷ *Ibid* at 57.

⁸ *Ibid* at 53.

⁹ E.g. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that the 14th Amendment’s liberty guarantee does not excuse someone from compliance with a compulsory vaccination law).

To the agita of progressives, *Lochner* found a freedom of contract protected in the 14th Amendment, but *Lochner* was close. The four justices that did not agree with the majority opinion published two dissenting opinions, where they laid out why they disagreed with the majority. History has vindicated these dissents. After years of 20th-century sparring between President Roosevelt and the Supreme Court on New Deal legislation, one could no longer locate a freedom of contract in the Constitution.¹⁰ Since then, the concept is poison.

Locke's Freedom of Contract

“Freedom of contract” is uniquely 20th-century verbiage. One will not find the concept invoked by name much earlier than 1900. Nonetheless, one can fairly identify philosophical antecedents to the doctrine in early America without engaging in unprincipled presentism. Writings at least as early as the Father of Liberalism, John Locke, begin to encircle the principles later used to defend freedom of contract in the *Lochner* era.

Locke's famous social contract posits that men trade in the absolute liberty and equality abundant in the state of nature – an ungoverned state – for the enhanced security that governments provide. Locke theorized in his *Second Treatise of Government*, his magnum opus laying out his political philosophy and explaining what made governments just, that men do not make this contract altruistically; instead, men make such a contract

only with an intention in every one the better to preserve himself, his liberty, and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good.¹¹

¹⁰ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“The Constitution does not speak of freedom of contract”).

¹¹ John Locke, *Two Treatises of Government* (1690), 131.

For a judge giving deference to this theory, the material question becomes whether New York’s labor law extended further than the common good. The *Lochner* court considered this. A state could exercise its police powers, one’s freedom of contract notwithstanding, to provide for the public’s general welfare.¹² The court applied a Locke-adjacent test in *Lochner* – analyzing whether New York’s labor law genuinely advanced the common good – and the law failed: “From the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.”¹³ Perhaps one rejects the finding that New York’s law is unrelated to public health, Justice Harlan dissented to this effect,¹⁴ but such a reservation is a finding of fact. It remains true that should Locke’s law control, *Lochner* would stand.

Locke’s defense would not end there. One can easily question whether the liberty in the 14th Amendment includes freedom of contract. The word *contract* appears nowhere in the Amendment, and holding that the Amendment wholly unrestrained every person from legal duty whatsoever would court anarchy. When *Lochner* fell, it was precisely on these grounds. In departing from *Lochner*, the court asked of freedom of contract, “What is this freedom? The Constitution does not speak of freedom of contract.”¹⁵ Locke’s conception of liberty defends against this attack; elsewhere in his *Second Treatise*, Locke concludes that “every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.”¹⁶ For Locke, a man owns his labor. In equating labor with property, Locke commanded tremendous respect for freedom of contract.

¹² *Lochner*, 198 U.S. at 53.

¹³ *Ibid* at 64.

¹⁴ *Ibid* at 70.

¹⁵ *West Coast Hotel*, 300 U.S. at 391.

¹⁶ Locke, *Two Treatises of Government*, 124.

A sacrosanct respect for property rights is ancient in English legal traditions. Section 29 of the 13th-century charter of the rights of Englishmen, the Magna Carta, provides that “no freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties ... save by lawful judgement of his peers or by the law of the land.”¹⁷ An ancestor to the U.S.’s due process clause, this section protects liberty in the same breath that it protects property. This legal tradition of blurring property with liberty was core to Locke’s ideology:

According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal [sic.] purpose of government was to protect these natural property rights, which Locke fused with liberty.¹⁸

If liberty is a product of private property, and every man has property in his labor, then it is amply reasonable to conclude that Locke would view one’s ability to labor how he pleases as intimately connected to his liberty. There can be no doubt that Locke’s social contract demands that a just government defend this liberty. “The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government,” Locke wrote, “is the preservation of their property.”¹⁹

Locke’s Influence on Early Americans

The link between labor, property, and liberty would not have been lost on America’s founders in constituting the new government. As law professor Laura S. Underkuffler summarized in her essay on the history of property rights, “During the American Founding Era, property included not only external objects and people’s relationships to them, but also all of those human rights,

¹⁷ *Magna Carta* § 29 (1297).

¹⁸ James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York, NY: Oxford University Press, 2007), 17.

¹⁹ John Locke, *Two Treatises of Government*, 134.

liberties, powers, and immunities that are important for human well-being.”²⁰ Of course, this is not a coincidence; Locke’s influence on America’s founders was tremendous.

Locke is cited in 2.9 percent of American political pamphlets published between 1760 and 1805, making him the third-most cited European writer in these foundational documents.²¹ He is the single most cited authority in pamphlets published in the 1760s and 70s.²² One should note, however, that after the Revolutionary War began, political pamphlets in early America started referencing Locke substantially less. This makes sense. Locke’s *Second Treatise* did much to help thinkers identify unjust governments, where leaders had usurped the natural law and extended their powers beyond that of the common good, but it offered little in the way of constitutional design or statecraft. It is reasonable, then, for Locke to be the most cited authority in pamphlets published when authors wrote principally to justify splitting from England while also having been cited in just 1% of pamphlets published when the founding fathers were designing the new nation.²³

Some modern minds accordingly caution against overstating Locke’s influence on American Constitutional law. Political science professor and author Donald S. Lutz warns that “Locke’s influence has been exaggerated . . . and finding him hidden in passages of the U.S. Constitution is an exercise that requires more evidence than has hitherto even been provided.”²⁴ Other historians have analyzed Locke’s availability in founding-era libraries to estimate his impact on the Constitution, where he has come up short.²⁵

²⁰ Laura S. Underkuffler, “On Property: An Essay,” *Yale Law Journal* 100, no. 1 (October, 1990): 128-129.

²¹ Donald S. Lutz, “The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought,” *The American Political Science Review* 78, no. 1 (March, 1984): 193.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ D. Lundberg and H. F. May, “The Enlightened Reader in America,” *American Quarterly* 28, no. 2 (Summer, 1976).

In analyzing references to Locke in 10 states' constitutional conventions, historian Laura J. Scalia concluded that 19th-century American statesmen were undeniably Lockean. Locke's writings were sufficiently malleable, however, that conflicting politicians could all cite Locke to contradictory ends. "Saying Americans were influenced by Locke does not say which Locke," Scalia explained.²⁶ "While [Locke's] ideas may have set the boundaries of discussion, they likely never determined the policy outcomes which emerged over time."²⁷

These discoveries should not discount the obvious Lockean threads present in early America, however. One should avoid the implication that American history is *Locke and nothing else*,²⁸ true, but no one contends that the social contract or respect for "life, liberty, and property" is not distinctively Locke's in origin. Freedom of contract is so fundamental to these ideas that where Americans invoke these concepts, there is a substantial implication that they also invoke the freedom of contract that underpins them.

Madison's Freedom of Contract

Like Locke, James Madison also fused property with liberty. In a 1792 essay on property, for instance, Madison disclaims the notion that one may have property only in external, tangible items. "In [property's] larger and juster [sic.] meaning, it embraces every thing to which a man may attach a value and have a right."²⁹ Using this more just definition of property, Madison continues to say that a man

²⁶ Laura J. Scalia, "The Many Faces of Locke in America's Early Nineteenth-Century Democratic Philosophy," *Political Research Quarterly* 49, no. 4 (December, 1996): 831.

²⁷ *Id.*, 831-832.

²⁸ Lutz, "European Writers and 18th Century American Political Thought," 196. ("Even though the motto *Locke et praeterea nihil* as it applies to eighteenth-century American political thought has been thoroughly discredited by historians, there is probably still a tendency to overestimate his importance.")

²⁹ James Madison. *Writings of James Madison, Comprising His Public Papers and His Private Correspondence, including Numerous Letters and Documents Now for the First Time Printed*, edited by Gaillard Hunt (New York: G.P. Putnam's Sons, 1900-1910), 101.

has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a *property in his rights*.³⁰

This conception was not unique to Madison; rather, it was ubiquitous among the founders.

Underkuffler noted that the property theory invoked in Madison's essay was "implicit in the writings of others in the Founding Era,"³¹ was "not an aberration in intellectual history,"³² and reflected "an understanding that was common in the writing of the English Whigs, an intellectual tradition to which the Americans were heirs."³³

Doubtless, Madison would find freedom of contract in these rights. Later in his property essay, Madison warns that a violation of one's rights may be more ominous than an outright seizure of his private property:

If there be a government then which prides itself on maintaining the inviolability of property ... and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence ... such a government is not a pattern for the United States.³⁴

Note that Madison constructs the abridgment of the right to labor as an indirect property violation. Such a frame suggests allegiance to Locke's assertion that restrictions on labor amount to a quasi-deprivation of private property. Presciently, Madison concludes that a government engaging in such a violation of freedom to labor is no model for the United States.

Madison also wrote Federalist No. 44, a political pamphlet published in a series of papers aiming to drum up support in New York for the ratification of the U.S. Constitution. Fed. 44 explains why the Constitution had denied states some types of authority. The Contract Clause is

³⁰ Ibid, (emphasis added).

³¹ Underkuffler, "On Property," 137.

³² Ibid.

³³ Ibid.

³⁴ Madison, *Writings of James Madison*, 103.

one such denial; it provides that no state shall pass a “law impairing the obligation of contracts.” Madison described laws that would violate this clause as “contrary to the first principles of the social compact.”³⁵ “Very properly,” Madison continued, “have the convention added this constitutional bulwark in favor of personal security and private rights.”³⁶ Including this clause demonstrates that Madison’s allegiance to Locke’s framing of property rights was not cheap talk. No, Madison’s respect for private property was a genuine, deeply-held belief that informed his understanding of liberty and measurably impacted the new nation’s foundational documents.

Freedom of Contract in the Contract Clause

Deference to property rights is clear among the founding fathers, so it is no surprise that the Constitution includes provisions intended to safeguard contract rights. The Supreme Court waffled on whether the Contract Clause enshrined Locke’s freedom of contract precisely, but the historical definition of liberty used by Locke and Madison colored American jurists’ understandings of the clause regardless. At least as early as 1798, just eight years after the Supreme Court’s first sitting, the Court alluded to Lockean principles in a Contract Clause case. *Calder v. Bull*³⁷ indirectly references Locke’s social contract: “The purposes for which men enter into society will determine the nature and terms of the social compact.”³⁸

The Lockean parallel is not merely nominal; the Court adheres substantively to the logic of Locke’s Second Treatise of Government. The Court concludes that there exist republican principles that “overrule an apparent and flagrant abuse of legislative power, as to authorize

³⁵ James Madison, “Federalist No 44,” *Federalist Papers: Primary Documents in American History*, Library of Congress, accessed March 20, 2023.

³⁶ *Ibid.*

³⁷ *Calder v. Bull*, 3 U.S. 386 (1798).

³⁸ *Ibid.*, 388.

manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established.”³⁹ Though the Court does not state it explicitly, I contend that one such republican principle is merely Locke’s conclusion that no logical creature would enter a social contract with the intention of being worse. Just as Locke used this principle to conclude that the power of society can never be supposed to extend farther than the common good, the Court concludes that laws violating the unenumerated republican principles are invalid: “It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that it has done it.”⁴⁰

Later, the court appears to come to the same conclusion as Madison. The ability of legislatures to violate individuals’ property rights is incompatible with a republican United States: “The legislature may ... command what is right and prohibit what is wrong, but it cannot ... violate the right of an antecedent lawful private contract or the right of private property.”⁴¹

Subsequent Supreme Court opinions did not so plainly invoke Locke as *Calder*, but this is in line with a broader trend in American history: citations to Locke giving way to others as the nation developed. Nonetheless, the general spirit of these early decisions is one that matches Locke’s vigor in protecting property and contract rights.

When Georgia attempted to renege on a land grant, for instance, the Supreme Court said it “was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States” from vitiating its executed contract with the purchaser of the land.⁴² When New Hampshire tried to contravene a colonial charter to nationalize Dartmouth College, the Court forbade it, reasoning that the Contract

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid, 388-389.

⁴² *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

Clause “must be understood as intended to guard against a power of at least doubtful utility ... and to restrain the legislature in future from violating the right to property.”⁴³

Freedom of contract did not always win the day. In the 1827 case *Ogden v. Saunders*,⁴⁴ a hair’s majority of the court held that a New York bankruptcy law excusing an insolvent debtor from compliance with a past contract – excusing him from paying back his debt – did not violate the Constitution. For a total of 5 opinions, each member of the 4-person majority wrote separately, and Chief Justice Marshall, perhaps the most influential justice ever, authored his only dissent on a constitutional question. As in historian Scalia’s analysis, most sides were Lockean; three of the opinions (representing 5 of 7 Justices since 2 Justices joined Marshall’s dissent) referenced Locke’s state of nature or the social contract.

Even in moving away from freedom of contract, much of the majority still recognized that freedom of contract was the rule in the state of nature and that departure from this freedom was the exception. Justice Johnson acknowledged that contract rights originated with the people but answered that they had been turned over to the government via the social contract:

The rights of all must be held and enjoyed in subserviency to the good of the whole ... The state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen.⁴⁵

Justice Trimble agreed:

I admit that men have, by the laws of nature, the right of acquiring and possessing property and the right of contracting engagements ... But when men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights into the hands of the government.⁴⁶

⁴³ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 628 (1819).

⁴⁴ *Ogden v. Saunders*, 25 U.S. 213 (1827).

⁴⁵ *Ibid* at 282. (Johnson, J., seriatim opinion).

⁴⁶ *Ibid* at 319. (Trimble, J., seriatim opinion).

Chief Justice Marshall's dissent is perhaps the strongest defense of freedom of contract ever published by the Court. He also found that freedom of contract was a natural right but paralleled the *Second Treatise's* logic in asserting that the people had never surrendered this right to government.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves.⁴⁷

Again, this logic invokes Locke's conclusion that no creature signs the social contract with the intention of being worse. It is illogical for people to surrender their power to contract to a legislature, Marshall concludes, so one should presume that they have not.

Marshall concedes that a state's power "to prohibit such as may be deemed mischievous, is unquestionable," but beyond this actual restraint, "the original power [to contract] remains unimpaired."⁴⁸ Such a test can equally be articulated by saying a state may contravene the freedom of contract only to the effect of the common good – exactly the test proposed by Locke and applied in *Lochner*.

Though Marshall's logic – Locke's logic – lost the day in *Ogden*, the dissent serves as a blueprint for how Locke's ideology influenced reasonable statesmen in foundational America. In identifying which governments are unjust, Locke established a boundary that the United States must not cross. Locke's boundary did not appear explicitly in the U.S. Constitution, and reasonable minds disagreed on the exact qualities of this boundary, but many sensible Americans placed the boundary short of violating what *Lochner* would later call the freedom of contract.

⁴⁷ Ibid. at 346. (Marshall, C. J., dissenting).

⁴⁸ Ibid. at 347.

With an eye toward these early conceptions of American liberty, one can better understand the logic of *Lochner* in holding that freedom of contract was part of the liberty protected by the 14th Amendment.

Rebutting Holmes

It is apparent that the definition of liberty invoked by the *Lochner* Court is in line with the historical definition used by Locke, Madison, and Marshall; one that fuses liberty with property and produces the freedom of contract. Few jurists contemporary to *Lochner* would refute this, and Justice Harlan conceded to the notion of a freedom of contract in his *Lochner* dissent.⁴⁹ In an earlier majority opinion, the great dissenter even praised the proposition that the “privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of [one’s] rights of liberty and property” as “a sound principle of constitutional law.”⁵⁰

Justice Holmes’s lone *Lochner* dissent is an aberration. Now vindicated, the dissent stood alone in criticizing *Lochner* as being “decided upon an economic theory which a large part of the country does not entertain.”⁵¹ In a biting condemnation, Holmes bemoans that “the Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”⁵²

Spencer was a 19th-century English philosopher. Holmes’s criticism likely alludes specifically to chapter 13 of Spencer’s book *Social Statics*, “The Right of Exchange,” which

⁴⁹ *Lochner*, 198 U.S. at 65. (Harlan, J., dissenting). (“The State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts.”)

⁵⁰ *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

⁵¹ *Lochner*, 198 U.S. at 75. (Holmes, J., dissenting).

⁵² *Ibid.*

begins, “Freedom to exchange his property for the property of others, is manifestly included in a man’s general freedom.”⁵³ Later in *Social Statics*, Spencer contemplates “poor laws” and “sanitary supervision” by government – two concepts relevant to the New York law challenged in *Lochner*. On the first, Spencer claims “the state has no concern” with how men use their liberty to accumulate property.⁵⁴ On sanitation supervision, “Men’s rights are infringed by these, as much as by all other trade interferences.”⁵⁵ Holmes invoking Spencer as a likely supporter of *Lochner* is sufficient to support freedom of contract, but doing so is unnecessary.

An early advocate for social Darwinism, Spencer had made a cottage industry of writing athwart government assistance. In one such writing, Spencer decried banking regulations, reasoning that those who put blind faith in banks deserved their comeuppances. “The ultimate result of shielding men from the effects of folly,” Spencer reasoned, “is to fill the world with fools.”⁵⁶ This is to say Spencer was an easy target.

But liberty of contract is not unique to Spencer, nor is any other idea Holmes invokes in his rebuttal. The Spencer reference in Holmes’s argument merely restated Holmes’s assertion that

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.⁵⁷

The principle refuted is at least as well epitomized by the harm principle described in English philosopher John Stuart Mill’s essay *On Liberty*: “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

⁵³ Herbert Spencer, *Social Statics or The Conditions Essential to Human Happiness* (New York: Augustus M. Kelley, 1969), 146.

⁵⁴ *Ibid*, 312.

⁵⁵ *Ibid*, 373.

⁵⁶ Herbert Spencer, *Moral, Political and Aesthetic* (Boston: D. Appleton & Company, 1878), 348-349.

⁵⁷ *Lochner*, 198 U.S. at 75. (Holmes, J., dissenting).

harm to others.”⁵⁸ Grounding this philosophical thread in Mill, as is fair, casts freedom of contract in a better light.

Mill’s Freedom of Contract

A Millian analysis exposes that social Darwinism is a non sequitur to freedom of contract. Though Mill never explicitly wrote on social Darwinism, the philosophy is incompatible with his writings. In one paper, political philosopher William R. Patterson found it likely that Mill would have found social Darwinism not only wrong but abhorrent.⁵⁹ So while Mill never wrote on freedom of contract with as much vigor and clarity as Spencer, there is some evidence to suggest he would ally himself with *Lochner*.⁶⁰

For instance, in at least one private letter, Mill criticized maximum-hours mandates much like the law *Lochner* struck down. Mill celebrated that Europe’s upper class had begun to realize that it was “morally responsible for the well-being of society, especially of the poor,”⁶¹ but he despised that it understood this obligation in an unworthy manner, only “by reducing it to the giving of alms.”⁶² Mill concluded that governing the poor in a paternalistic fashion by reducing their working hours and regulating their sanitary conditions completely disregarded the self-respect of the poor.⁶³

⁵⁸ John Stuart Mill. *On Liberty*. (South Bend: Infomotions, Inc., 2000), 7.

⁵⁹ William R. Patterson, “The Greatest Good for the Most Fit? John Stuart Mill, Thomas Henry Huxley, and Social Darwinism,” *Journal of Social Philosophy* 36, no. 1 (February, 2005): 74.

⁶⁰ O. Kurer, “John Stuart Mill on Government Intervention,” *History of Political Thought* 10, no. 3 (1989): 478. (“More interesting, however, is Mill’s studious avoidance of taking a position over the reduction of the working day of adult workers, which is a pretty good indication that he was opposed to it.”)

⁶¹ John Stuart Mill, *The Correspondence of John Stuart Mill and Auguste Comte*, trans. Oscar Haac (Somerset: Routledge, 2018), 382.

⁶² *Ibid.*

⁶³ *Ibid.*

Mill wrote *On Liberty* well after the Constitution was ratified, but his 19th-century philosophy is steeped in liberalism akin to that of Locke and America's founders. There is no doubt that Mill has had a massive effect on how modern judges understand the Constitution.⁶⁴ Ironically, this fact would be lost on Holmes least of all; Holmes has been identified as the progenitor of Millian thinking in the analysis of the First Amendment.⁶⁵ Most illustrative of this is Holmes's practical paraphrasing of Mill's harm principle in analyzing whether speech is protected by the First Amendment: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger."⁶⁶ Contemporary writings by Holmes indicate that Mill's *On Liberty* was on Holmes's mind when he penned this test.⁶⁷

In this same vein, compare Holmes's dissent in *Abrams v. United States* ("The best test of truth is the power of the thought to get itself accepted in the competition of the market")⁶⁸ with Mill's defense of free speech in *On Liberty* (Silencing the expression of an opinion is evil because "if the opinion is right, [people] are deprived of the opportunity of exchanging error for truth: if wrong, [people] lose ... the clearer perception and livelier impression of truth, produced by its collision with error").⁶⁹

⁶⁴ E.g. John Lawrence Hill, *The Prophet of Modern Constitutional Liberalism: John Stuart Mill and the Supreme Court* (New York: Cambridge University Press, 2020), 2. (Mill's "new conception of liberty would inevitably influence the way we think about what rights we have, how freedom can be infringed and how our Constitution should protect our basic liberties."); Eric T. Kasper and Troy A. Kozma, "Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence," *University of Massachusetts Law Review* Vol. 15: Iss. 1, Article 1 (2020): 53. ("Regardless of whether the Justices are using Mill's approach because they really believe in following Mill, they are blindly following prior opinions that used Mill, or for some other strategic reasons, the modern Supreme Court is publicly espousing a Millian approach to the freedom of speech.")

⁶⁵ Kasper and Kozma, "Absolute Freedom of Opinion."

⁶⁶ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁶⁷ Kasper and Kozma, "Absolute Freedom of Opinion," 20.

⁶⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁶⁹ Mill, *On Liberty*, 11.

This is not to say Holmes's *Lochner* dissent is debased; Judges need not genuflect to Mill any more than Spencer or Locke. But this does remind of a doctrinal coherence of *Lochner* that modern minds have generally overlooked.

A Note on Blackstone

William Blackstone is another hugely influential person in American legal history. Lockean in many respects, Blackstone organized disparate English common law traditions into a logical ruleset. He can fairly be credited with largely defining the Founders' (and therefore modern jurists') opinions of the judiciary's function.

Of America's earliest Supreme Court cases, 2% referenced Blackstone.⁷⁰ Indeed, Blackstone's Commentaries were the most cited work in those opinions.⁷¹ Today, nothing has changed; between 1990 and 2014, Blackstone appeared in 8% of signed opinions.⁷² More than what Locke, Spencer, or Mill wrote, the Court listens to what Blackstone wrote.

It is illustrative, then, of the process the Court took to abandon *Lochner* when Blackstone wrote about when it is appropriate to abandon precedents. *Stare Decisis* instructs courts to adhere to prior decisions where the same facts come up again unless doing so would be egregiously wrong. "Even in such cases, the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation,"⁷³ Blackstone wrote. "If it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but

⁷⁰ Jessie Allen, "Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone," in *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts*, edited Wilfred Prest (Oxford: Hart Publishing, 2014), 2.

⁷¹ *Ibid.*

⁷² *Ibid.*, 3.

⁷³ William Blackstone, *American Students' Blackstone. Commentaries on the Laws of England, in Four Books* (New York: Banks & Bros, 1938), 70.

that it was *not law*.”⁷⁴ Blackstone implied that law cannot become bad – it is either good or never was. To comport with this tenet, lawyers assume away the idea that a once-valid *Lochner* could spoil. Thus, lawyers must conclude that the now-derelict freedom of contract was never legitimate. Historians need not concede this point.

A measured historical analysis shows that freedom of contract was a supportable doctrine present in many different parts of pre-*Lochner* American legal history. English Whig ideology framed freedom of contract as a property and liberty right, which Locke also propounded. In penning the Constitution, Madison informed his political philosophy with this legal tradition. Early American courts generally assented to these principles, and well into the *Lochner* Era, liberal scholars like Mill had not neglected the concept. Eight members of the *Lochner* court did not doubt freedom of contract.

But today’s lawyers obfuscate this legal tradition. In declaring that freedom of contract was *not law*, contemporary jurists have lost track of the natural coda of Lockean liberalism. It is not for historians to say if *Lochner* was *good law*, but it ought to be admitted, at least, that it *was law*.

⁷⁴ Ibid.

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The Political and Religious Battles of the English Restoration

Bradley Grieser - University of Illinois Urbana Champaign

The Restoration of Charles II to the English throne appeared to be an occasion for joyous celebration, ending a prolonged period of political and religious upheaval. As historian N.H. Keeble writes, “It was, then, in an already-established spirit of festival and triumph that Charles landed at Dover. There was no less a carnival air among those who greeted him.”¹ This atmosphere of celebration continued all the way to London, where Charles had been proclaimed king on May 8, 1660. Even then it did not end: Keeble continues that a “massive cedar maypole...was not only the centre for morris dancing and festivity but, in its very nature, declared that this was no longer a Puritan age.”² It seemed that with the return of the king, England could finally rest at ease after decades of civil war and religious strife.

After years of increasing tension between King Charles I and Parliament over the extent of the king’s authority, civil war broke out in the 1640s. On one side were the king and his supporters, known as Cavaliers or Royalists. On the other side were the Roundheads, supporting Parliament, or more specifically, the House



¹ N.H. Keeble, *The Restoration: England in the 1660s* (Malden: Blackwell Publishers Ltd, 2002), 41.

² *Ibid*, 43.

of Commons. Ultimately, Charles was deposed and beheaded. His family, including the eldest son Charles, were forced to flee to France. For a period in the 1650s, the Puritan military leader of the Roundheads, Oliver Cromwell, governed the Commonwealth of England. His death led to a succession of short-lived governments, until finally Parliament invited Charles to return and take the throne as Charles II, the triumph for which he had waited for many years.

In 1685, Godfrey Kneller painted a portrait of the aging king. He found a man whose still-regal appearance masks something else.³ In the portrait, Charles' crown is not only sitting on a side table, but it is cast in shadow, easy to miss on a first glance, nearly a background piece. This seems suggestive of the king's increasing weariness, born of a two-decade struggle against relentless opposition, both political and religious. The Restoration did not settle the questions of authority raised by the English Civil War. As evidenced by the debates over religious dissent as well as the struggles between Charles and Parliament for control, the question of where ultimate authority lay was still a contentious issue. Using primary sources from Charles' reign, both from government insiders and religious outsiders, I show that the conflicts which arose following the Restoration contributed to an increasingly turbulent atmosphere. These conditions would give rise, within three years of the king's death, to a new revolution in England- the Glorious Revolution.

Charles II vs. Parliament: An Unraveling Relationship

In Charles' personal writings, especially in his parliamentary speeches, it is clear what his priorities were as the new Convention Parliament convened. There were two issues which

³ Godfrey Kneller, *King Charles II* (Liverpool.: Walker Art Gallery, 1685)

immediately drew the king's attention. First, he asked that an Act of Indemnity and Oblivion be passed to officially forgive those who had opposed the monarchy over the last twenty years, telling the House of Lords on July 27, 1660 that "I did with impatience expect that that Act should be presented to me for my assent as the most reasonable and solid foundation of that peace, happiness and security I hope and pray for, to myself and all my dominions."⁴ It was hoped that this would help reconcile a country still reeling from the Civil War and the rapid changes in government over the last several months.

But secondly, though perhaps most importantly in his mind, Charles also required money, a request which only Parliament could grant. In another speech on August 29 to the whole Parliament, the king also reminded them, "I am not richer, that is, I have not so much money in my purse, as when I came to you."⁵ Neither of Charles' requests were initially met. Many Royalist members of the Convention were not so ready to forgive those against whom they had fought so bitterly and for so long. Only grudgingly did they pass the Act before their summer session ended with the personal intervention of the king. When the newly elected "Cavalier" (Royalist) Parliament convened in 1661, they too reluctantly passed another Act of Oblivion. However, in November of that year Charles' need for money had still not, at least in his mind, been sufficiently met: "But I come to put you in mind of the crying debts which do every day call upon me..."⁶ Even eighteen months into his reign, the king still struggled to get Parliament- a very Royalist Parliament, no less- to carry out his desires without having to personally plead his case. Charles could no longer expect unquestioned loyalty from even his greatest supporters,

⁴ Charles II, *The Letters, Speeches, and Declarations of King Charles II*, ed. Arthur Bryant (New York: Funk & Wagnalls, 1968), 100.

⁵ *Ibid*, 103.

⁶ *Ibid*, 120.

who now felt free to oppose certain of his wishes without suffering major consequences for doing so.

These divisions became only clearer with the debate over religious toleration. Edward Hyde, Earl of Clarendon, was Charles' chancellor upon his return, and he chronicled what happened in his *History*, which ran until 1667 and the end of Clarendon's tenure. The earl recounts that Charles told the House of Commons "he could not but lament... that he and they and the kingdom, were yet without that present fruit and advantage, which they might reasonably promise themselves from such a harmony of affections..."⁷ The king believed that the next step in making England, and his throne, more secure, was to reduce religious conflict by allowing toleration. But once again Parliament disagreed, and in this case, it took a course directly contrary to the king's wishes.

Clarendon recounted that the Act of Uniformity passed by Parliament included a clause requiring all ecclesiastical positions in the Church of England to be filled by those directly ordained by bishops. In addition, another clause required "a form of subscription, that every man was to make, who received, or before he received any benefice or preferment in the church...every such person was to declare his unfeigned assent and consent to all, and every thing contained and prescribed in and by the Book intituled [*sic*] 'the Book of Common Prayer'..."⁸ The Cavalier Parliament, still upset by Charles' willingness to forget the past sins of his enemies, openly opposed his preference for toleration despite his pleas on behalf of this course. In fact, they went out of their way to impose adherence to the Church of England on the country at large, at least legally. Practice was another issue, as we will see later. In any case, it

⁷ Edward Hyde, *The history of the reign of King Charles the Second, from the Restoration to the year 1667* (London: M. Cooper, 1757), 315.

⁸ Hyde, *History of the reign of King Charles the Second*, 322.

was clear that the king's wishes were no longer the primary factor to consider in making laws. But for Charles, things were only to get worse as the decade wore on.

In 1665, war broke out between England and the Dutch Republic. A major point of contention had been the Navigation Act of 1660, which put protections on English shipping at the expense of the Dutch. Additionally, in 1664 the English had seized Dutch West African trading posts, as well as the Dutch North American colony of New Amsterdam, a way “to exclude the Dutch from trade with the North American colonies.”⁹ But the war went quite poorly for England, and by 1667 a Dutch admiral managed to burn the English fleet and blockade the Thames. According to N.H. Keeble, “As a guardian of the national interest, the Restoration regime was thoroughly discredited.”¹⁰ Members of Parliament set up a commission to investigate how the king had spent earlier royal grants, believing that the war had been a setup for Charles to persuade Parliament to give him more money. Charles' chancellor, the Earl of Clarendon, became the direct focus of much of the ire, and the war became the final straw in his downfall, but one cannot deny that Parliament was still suspicious of the king himself. Clarendon was merely a scapegoat on whom they could more easily concentrate their fire. The readiness to investigate the monarch and his government implied that Parliament could pose a threat to the plans of the king. But the war was only one blow of several at this time to Charles.

Another of these blows was the Great Fire of London in 1666. Samuel Pepys was a government official and a copious diarist who recorded his experience during the fire. He described people fleeing with all the possessions they could take, rather than stay to try to put out the flames. He himself even buried a wheel of Parmesan cheese to protect it from the flames. Pepys was brought to King Charles and James, the Duke of York, where he recommended that

⁹ Christopher Hill, *The Century of Revolution: 1603-1714* (Edinburgh: Thomas Nelson and Sons Ltd, 1961), 211.

¹⁰ Keeble, *The Restoration*, 103.

“unless his Majesty did command houses to be pulled down, nothing could stop the fire.”¹¹ This was an order which Charles promptly gave, but while his presence amidst the disaster was cause for praise in several quarters, it did not win over his opponents. Fears of French or Catholic involvement in the blaze spread in the following months.¹² Given that the king was often accused of being under French and Catholic influence, and that the Duke of York, who was also present during the crisis, was himself Catholic, it is reasonable to believe that these rumors did Charles no favors in the eyes of his political opponents.

But while these storms came and went, one issue refused to fade from the political scene. Over the coming years, religion would continue to be an issue between the king and Parliament. In 1672, Charles issued a Declaration of Indulgence, which was designed to encourage tolerance while also promoting the Church of England. This declaration allowed religious dissenters to meet publicly to worship according to their own practices if they still paid tithes and dues to the Church. But Charles’ treatment of Catholics became problematic. About them he wrote, “We shall in no wise allow Publick Places of Worship, but onely Indulge them their share in the common Exemption from the execution of the Penal Laws, and the Exercise of their Worship in their private Houses onely.”¹³ Catholics would be able to privately practice and would not face criminal prosecution for practicing. However, Catholics were not afforded the same level of tolerance as Protestant dissenters, who could worship publicly. But even this measured tolerance provoked not only supporters of the Church of England, but even the Protestant dissenters also covered under the declaration. Neither group was willing to tolerate Catholicism in England, and it seemed to further confirm fears that the king was too favorable to the Catholics. Eventually, the king was forced to revoke the declaration. Charles attempted to impose his will over

¹¹ Samuel Pepys, *The Shorter Pepys*, ed. Robert Latham (Los Angeles: University of California Press, 1985), p. 660

¹² Keeble, *The Restoration*, 164

¹³ Charles II, *His Majesties declaration to all his loving subjects, March 15, 1671/2* (London.: *The Savoy*, 1672), 7.

Parliament's will by royal decree, something more reminiscent of the absolutist monarchs of the past. But this effort to bolster the monarch's power failed, thanks to the strong opposition of two disparate groups.

Charles was now forced to find another way to exercise his power. The most straightforward way to neutralize opposition to his policies was to simply not call Parliament so frequently. The body was, indeed, called significantly less over the following decade. This did not mean that opposition to Charles decreased. Historian John Miller writes that it was of a different type to that which Charles I had faced earlier: "the very fact that there had been a civil war and that world had been turned upside down gravely inhibited the king's critics: most wanted to force a change in policy..."¹⁴ The king's opposition did not want war; they wanted policies that reflected their goals and desires, not those of Charles. However, the same debates over the limits of royal authority were still ongoing, even if not in the form of open war. The absence of pitched battles did not diminish the importance of these rising tensions. In fact, they came to fruition in the years after Charles' death. So, despite the lowered availability of a forum in which to express their views, these critics still posed a threat to the monarchy and its power. As political opportunities to oppose the king declined, religious dissenters' voices increasingly became dominant in England.

Living in the End Times: The Religious Resistance of the Laypeople

Following the Restoration of Charles II, the Church of England, which had lapsed and faded during the Civil War and Commonwealth periods, became part of the larger debate over religious

¹⁴ John Miller, "Politics in Restoration Britain," in *A Companion to Stuart Britain* (West Sussex: Blackwell Publishing Ltd, 2009), 411.

comprehension and toleration occurring in Parliament. However, this debate soon became irrelevant, as the Church began to return on its own. Keeble writes that “while the legislative process was stalled and ominous divisions were appearing in the Puritan ranks, restoration of the episcopal Church of England was taking place at grassroots level...”¹⁵ The Book of Common Prayer was once again being used, even though this had not yet been declared legal by the government. Though many ordinary people were eager for the Church’s return, many others explored various forms of religious dissent as well. Historian John Spurr explores these lay attitudes, concluding that for most of the regular people of England, the Church of England was merely one of their options when choosing the form of Protestantism that appealed to them most.¹⁶ No longer did the Church, of which the king was the head, hold a monopoly over the English people’s religious practices. Nonconformity and dissent were parts of everyday life, whether one adhered to them or not.

These religious dissenters increasingly saw danger and moral decay in the government of Charles II. In his *New Advice to a Painter*, poet Andrew Marvell warned Charles of Catholic influences: “Papist and Presbyterian both combine,/ And *Sampson’s* flaming Foxes Tails conjoin/ To Rob thee of thy crown, and to destroy,/ With thee our Lives, Religion, Liberty.”¹⁷ The fear of Catholics was especially prevalent at the time, given that James, the Duke of York, was a Catholic, and Charles was suspected of secretly being one as well. The danger of Catholics making a full-fledged return to power was a nightmare scenario for these dissenters, and they were paranoid about the possibility of Catholics undermining Protestantism in government.

¹⁵ Keeble, *The Restoration*, 113.

¹⁶ John Spurr, “Religion in Restoration England,” in *A Companion to Stuart Britain* (West Sussex: Blackwell Publishing Ltd, 2009), 423.

¹⁷ Andrew Marvell, *New Advice to a Painter*, (1679).

Dissenters also homed in on the sexual debauchery of the king's court. According to Keeble, Charles kept several mistresses throughout his reign, and his courtiers also pursued many affairs. In the eyes of religious nonconformists, Keeble continues, "What had been construed as a welcome emancipation from political and religious tyranny [had] now become an abnegation of all moral restraint which threaten[ed] the governance of the state."¹⁸ To them, Charles had lost all moral authority by permitting flagrant sexual immorality to be practiced at the highest levels of his government. How could the head of the Church of England allow such deeds to go unpunished? Surely, they must have thought, God could not long permit this state of things to continue without some form of retribution.

One of the primary methods for religious dissenters to publicize their opposition was through literature. Themes of moral depravity and references to the English Civil War populate the works of famed authors, and dissenters, John Milton and John Bunyan. James Turner examines some of these literary themes across Milton's and Bunyan's Restoration-era works. In Milton's *Samson Agonistes*, Turner sees evidence of the Puritan ire towards the royal court: "Samson's forgiveness of Dalila expresses not 'calm of mind' but sexual fury, combining the white-hot resentment of the divorce tracts with contemporary misogynist hatred of the royal mistresses."¹⁹ In the original story, Samson is gifted by God with superhuman strength, if he keeps a vow to never cut his hair. He falls in love with Dalila, who eventually tricks him into revealing this to her. But she betrays him, cuts his hair and hands him over to his enemies. The sexual sin of Charles' mistresses was viewed by Milton as a primary source of evil in the

¹⁸ Keeble, *The Restoration*, 175

¹⁹ James Turner, "From Revolution to Restoration in English Literary Culture," in *The Cambridge History of Early Modern English Literature*, ed. David Loewenstein and Janel Mueller (Cambridge: Cambridge University Press, 2003), 808

government, and so it stands to reason that he would choose to equate them to Dalila, Samson's seducer and betrayer.

For his part, Bunyan wrote *Grace Abounding to the Chief of Sinners*, originally published in 1666. However, as time went on and new editions of the book were published, Bunyan began to draw more and more links between the Puritans of the civil war and the Restoration dissenters: "The more distant the dread year 1660, the more Bunyan retrieves and inserts episodes explicitly set in the revolutionary decades...and amplifies the details of his youthful depravity..."²⁰ By doing so, Bunyan portrayed himself and fellow nonconformists as inheriting and continuing the revolutionary struggle, even if they were not going into outright war against the king as in the earlier years.

Additionally, in his most famous work, *Pilgrim's Progress*, Bunyan included a scene which is vividly illustrated by Frederick Barnard, as two figures called Formalist and Hypocrisy climb over the wall marked "Salvation" onto the Christian's path.²¹ Formalist represents those who follow religious practices but experience no change of heart, while Hypocrisy pretends to be spiritually pure when he is, in fact, morally bankrupt. These descriptions accurately portray Bunyan's view of the Church of England and Charles II's Restoration government. In his mind, church and government were both spiritually empty, unmoved by true religious zeal, and the government especially was full of hypocrites who proclaimed their Christianity while committing adultery and debauchery.

To be effective, religious dissenters had to maintain the moral high ground and be portrayed as morally firm, in direct juxtaposition to the immoral royal court and government.

²⁰ Turner, "From Revolution to Restoration," p. 807

²¹ Frederick Barnard, *Formalist and Hypocrisy coming into the way over the wall*, from John Bunyan, *The Pilgrim's Progress*, 1678.

This was a goal of Lucy Hutchinson when she wrote a memoir of her husband, Colonel Hutchinson, who had been a “regicide” during the Civil War. Hutchinson had been one of 59 commissioners at the trial of King Charles I who had signed his death warrant; these people became known as “regicides” for their role in killing the king. The colonel was arrested a couple of years after Charles II’s return. The couple were Puritans and had taken sides against the monarchy during the war. Colonel Hutchinson had been accused of a plot by the Duke of Buckingham, who ordered the Marquis of Newcastle to arrest him. But, Mrs. Hutchinson claimed, the marquis was impressed by her husband: “my lord was so fully satisfied the colonel was innocent of [the plot], that he dismissed him without a guard to his own house, only engaging him to stay there a week, till he gave account to the council, upon which he was confident of his liberty.”²² By claiming that even Royalists saw how upright and righteous her Puritan husband had been, Lucy Hutchinson sought to make him into an ideal: this was the type of person dissenters strove to be. Mrs. Hutchinson’s distinction was expanded on by many other dissenters, as they continued to decry the sins of Charles and his government while extolling their own virtue, and thereby legitimize their resistance.

The opposition of the religious nonconformists reached new heights in the wake of the disasters of the mid-1660s. The year 1666 had long been the subject of apocalyptic predictions, linked to 666, the biblical number of the beast. Keeble writes, “1666 was anticipated as a key date in the drama of the Last Things, perhaps the year of the conversion of the Jews, of the destruction of Antichrist, perhaps of the Second Coming.”²³ The apocalyptic predictions were well founded. In 1665, a large outbreak of bubonic plague struck England, and the following year saw the Great Fire of London. Through all of this, the Second Dutch War was ongoing, and

²² Lucy Hutchinson, *Memoirs of the Life of Colonel Hutchinson* (London: J.M. Dent, 1913), 346.

²³ Keeble, *The Restoration*, 165.

England was not faring particularly well. All of this contributed to a growing sense of discontent against Charles and his government. Yet even that was not the whole picture. According to Keeble, “National humiliation at the hands of the Dutch, rumours of plots and insurrections, Clarendon’s unpopularity and impending impeachment, all gave the impression of a government rudderless, and, what was worse, a government not much bothered by the sorry state of affairs.”²⁴ With the country in this condition, it is not surprising that opposition and resistance would spike. That is exactly what happened, especially in religious circles.

For once, the Church of England and the dissenters saw eye to eye. Both agreed that these disasters were God’s punishment against a country led by sinners. In this anonymous painting depicting the fire, one can see what the artist portrays as an apocalyptic event, as ashes rain down



and people crowd the river line to escape the flames.²⁵ For many, the end times seemed to be at hand, brought about by the wickedness of their rulers. In addition, Keeble writes, “During the Plague, on 6 July 1665, a monthly fast day was proclaimed to express national

repentance and to seek reconciliation with God, but in many quarters it was believed that the government itself had most need of repentance. Dissatisfaction came to be articulated especially through dismay at what was taken to be its preference for hedonistic indulgence over duty.”²⁶

Even the government, we see, felt the need to ask for the Lord’s forgiveness for the sins of the

²⁴ Ibid, 164.

²⁵ Anonymous, *The Great Fire of London* (London: Museum of London, 1666-1675)

²⁶ Ibid, 166.

country, but refused to take the blame, putting the onus on England at large to repent for their sins without acknowledging their own. But the dissenters and nonconformists were determined to hold the monarchy accountable for its' lack of morality and leadership. In their eyes, Charles II and his government had brought the country into disfavor with God, and now they were being punished. There was no longer inherent trust in the monarch to carry out God's will.

Conclusion

As we have seen, the resistance to the Restoration at all levels of society and from various quarters shows the degree to which England was still in turmoil. Blind faith and trust in the monarch no longer existed; everything was subject to question. In politics, not even Royalist members of Parliament were willing to let the king simply have his way without question. Charles found himself increasingly having to persuade legislators that his position was right before they would do anything to fulfill his wishes. Religion continued to be a flash point in debates over toleration. Increasingly, King Charles and his court were seen as morally degenerate; to the nonconformists and dissenters, there was no inherent reason why he was entitled to rule, because there was no moral superiority on his part. Meanwhile, everyday people felt no obligation to the Church of England, increasingly seeing it as only one option among many forms of Protestantism. The low point came in the mid-1660s with the disasters of plague, fire, and war. Apocalyptic sentiments led many to believe that England was being punished for immorality, especially in the king's government. Combined, it was clear that the Restoration had not magically brought peace to a troubled country.

The lingering questions from the Civil War continued to fester. While Charles would be spared the fruits of this dangerous combination, his successor, James II, would not. Religious tensions and political resistance to monarchical overreach would lead to the Glorious Revolution, and the true beginnings of constitutional monarchy in Britain. Charles had been unable to smooth over the tensions that eventually brought the country to this point. His actions in the events described above show that, while he comprehended the need for peace in England, his royal mindset had not been shifted enough by the Civil War to accommodate the move toward constitutional monarchy. In the end, Charles was caught between two eras of monarchy- absolutism and constitutionalism- and he found himself out of place and adrift in a world he did not understand.

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