



**FREEDOM OF CONTRACT
AND THE “POLITICAL ECONOMY”
OF *LOCHNER V. NEW YORK***

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Abstract

*In his much heralded dissent in *Lochner v. New York*, Holmes deployed scathing epigrams to condemn the Court's decision upholding freedom of contract under the Due Process Clause of the Fourteenth Amendment. Two counts of Holmes' indictment will be identified. They contain charges that will resonate through a century of criticism. First, that the Court imposed its own ideology on a neutral Constitution. Second, that the Court exceeded its authority by invalidating a regulatory statute within the police powers of the legislature, leading to mischievous consequences. The first count is discredited based on evidence from the founding period that exhibits an unmistakably Lockean pedigree, while an evaluation of the second is more nuanced, with the Court's defenders of contractual freedom emerging as too restrained. Finally, an alternative grounding for liberty of contract is suggested, one that would have been more consonant with the Constitution's underlying political ethos.*

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Introduction

If any one proposition about the “Old Court”¹ receives universal assent, it is that *Lochner v. New York* (1905) is one of the most reviled decisions that the Supreme Court ever handed down. Although not quite in the league of horrors with *Dred Scott v. Sandford*² or *Plessy v. Ferguson*,³ *Lochner* nevertheless reverberates through constitutional adjudication to this day, with justices variously distancing their decisions from the trap of “Lochnerizing”⁴ or anathematizing their wayward

¹ Some date the “Old Court” or “*Lochner* era Court” to 1897 and *Allgeyer v. Louisiana*, the Court’s first decision finding that the Due Process Clause of the Fourteenth Amendment protects liberty of contract. 165 U.S. 578 (1897) (holding that the state cannot interfere with the right of a company to contract with an out-of-state insurance company). Others date it to 1905 and *Lochner v. New York*, which applied the liberty of contract principle to the contractual relationship between an employer and employee. 198 U.S. 45. There is much more agreement, however, about when the era ended: *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), in which five members of the Court found that a minimum wage law for women did not offend the Due Process Clause, marks its demise.

² *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (denying that a slave taken to a free state and free territory was a citizen of the United States and invalidating the Missouri Compromise of 1820). See *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (comparing *Dred Scott* and *Lochner* as prime examples of erroneously decided cases and suggesting that the former served as the original, substantive due process precedent for the latter).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state legislated racial segregation on the railroads against Thirteenth and Fourteenth Amendment challenges). Comparisons of *Plessy* and *Lochner* as exemplars of two discredited lines of cases can be found in *Casey*, 505 U.S. at 862-63 (O’Connor, Kennedy, Souter joint opinion) and at 957-63 (Blackmun partial concurrence, partial dissent, and concurrence in judgment).

⁴ *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Justice Douglas, delivering the opinion of the Court in a test case of a law criminalizing the use and provision of contraceptives, famously remarked:

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 690 (1999) (denying federal jurisdiction in a sovereign immunity case). Justice Scalia, in his opinion for the Court in which he was joined by only the other four conservatives, commented:

Finally, we must comment upon JUSTICE BREYER’s comparison of our decision today with the discredited substantive-due-process case of *Lochner v. New York* (citation omitted). It resembles *Lochner*, of course, in the respect that it rejects a novel assertion of governmental power which the legislature believed to be justified. But if that alone were enough to qualify as a mini-*Lochner*, the list of mini-*Lochners* would be endless. Most of our judgments invalidating state and federal laws fit that description. We had always thought that the *distinctive* feature of *Lochner*, nicely captured in Justice Holmes’s dissenting remark about “Mr. Herbert Spencer’s Social Statics,” 198 U.S. at 75, was that it sought to impose a particular economic philosophy upon the Constitution. And we think that feature aptly characterizes, not our opinion, but JUSTICE BREYER’s dissent, which believes that States should not enjoy the normal constitutional protections of sovereign immunity when they step out of their proper economic role to engage in (we are sure Mr. Herbert Spencer would be

colleagues with having committed this original sin.⁵ Commentators, too, have long condemned *Lochner* and its progeny,⁶ and it is only in recent years that a body of revisionist work has appeared, some of which questions the grounds on which *Lochner* was indicted while still finding what has come to be called “substantive” or “economic” due process⁷ unacceptable, and some of which displays a decided sympathy for the *Lochner* Court’s objective of protecting economic liberty.⁸ Long the “third rail” of constitutional scholarship, *Lochner* is now not quite so lethal.

The last fifteen years of the nineteenth century and the first three decades of the twentieth century saw a great outpouring of regulatory legislation by the states and, early on to a lesser extent, the federal government.⁹ In the 1930s with

shocked) “ordinary commercial ventures,” *post*, at 2. What ever happened to the need for “legislative flexibility”?

⁵ *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting) (arguing that a Texas sodomy statute is constitutional even though it imposes constraints on liberty). “So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, *working more than 60 hours per week in a bakery*” (emphasis added); *Seminole Tribe v. Florida*, 517 U.S. 44, 165 (1996) (Souter, J., dissenting):

It is, in fact, remarkable that as we near the end of this century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to textually unwarranted common-law rules, for it was just this practice in the century’s early decades that brought this Court to the nadir of competence that we identify with *Lochner v. New York*.

⁶ *E.g.*, Roscoe Pound, *Liberty of Contract*, 18 *YALE L. J.* 454 (1909); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); for an expansive list see David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 *TEX. L. REV.* 1, 4 n. 14 (2003).

⁷ Both terms are anachronistic characterizations of the era applied after its demise. The *Lochner*-era court used neither.

⁸ For the former, see, for example, PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998). For the latter, see, for example, BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* (2001); David E. Bernstein, *Lochner Era Revisionism, Revisited: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L. J.* 1 (2003); David E. Bernstein, *Phillip Sober Controlling Phillip Drunk: Buchanan v. Warley in Historical Perspective*, 51 *VAND. L. REV.* 4 (1998); James E. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENTARIES* 315 (1999); MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S* (2001).

⁹ Early federal regulatory acts included the Interstate Commerce Act (1887) (establishing the Interstate Commerce Commission, the first modern federal regulatory agency); two acts passed during President Theodore Roosevelt’s administration expanded the power of the ICC to regulate the railroads, set maximum rates, and regulate other common carriers (the Elkins Act (1903) and the Hepburn Act (1906)); the Sherman Antitrust Act (1890) prohibited combinations or conspiracies in restraint of trade. Also under the Roosevelt Administration, Congress enacted the Pure Food and Drug Act (1906) (creating the Food and Drug Administration with oversight of drugs and food purity), as well as the Meat Inspection Act of 1906 (mandating standards of cleanliness and federal inspection of animals for slaughter). Federal, Progressive-inspired social and economic legislation reached its peak during the presidency of Woodrow Wilson. The most notable examples were: the Owen Glass Federal Reserve Act (1913) (providing federal oversight of the banking industry); the Federal Trade Commission Act (1914) (creating the FTC to enforce antitrust laws); the Clayton Antitrust Act (1914) (building upon the earlier Sherman Antitrust Act to refine the definition of unfair business practices, and providing various protections for labor unions); the Farm Labor Act (1916) (aiding farmers in securing loans); the Keating-Owen Child Labor

Roosevelt's New Deal the federal government would become the prime engine of social experimentation. Economic regulation in the states proceeded under the states' "police powers" to protect the health, safety, morals, and general welfare of the population. Federal regulation required a narrower justification, mainly under the national government's constitutional power to regulate interstate and foreign commerce. State regulatory legislation covered all manner of economic affairs including: health and safety standards and inspections for factories and mines, railroad safety regulations and rate fixing, maximum hours laws, minimum wage laws, limits on child labor, price fixing for goods and services, prohibitions on the production of alcoholic beverages, banking and insurance regulation, bans on the sale of ordinary products or the sale of products at prices below set minimums, licensing and restrictions on the practice of the professions and trades, grants of exclusive monopolies, workmen's compensation, building codes, zoning codes, anti-trust laws, food and drug regulation, and laws to prevent employers from firing members of labor unions. This list is far from exhaustive. Remarking on the great proliferation of regulatory legislation that had already been enacted by 1904, a year before *Lochner* was decided, Ernst Freund, a treatise writer not unfriendly to economic regulation under the states' police power, stated: "A vast amount of police legislation is justified on this ground, and the state is readily conceded more incisive powers than despotic governments would have dared to claim in former times."¹⁰

Of course, not all economic regulation began in the latter part of the nineteenth century, and much health and safety regulation had an earlier lineage. However, the scope and intrusiveness markedly intensified in this period. The country became more urban and more industrialized, placing people and their conflicting property and economic interests in much closer proximity to each other. Yet this does not explain all of the regulatory zeal: undoubtedly, a key element was the emergence of Progressivism with its enthusiasm for a greatly expanded public domain, a belief in change regulated and advanced by government rather than faith in the market, and a suspicion of private concentrations of wealth, capital, and, thus, political power.¹¹ Rather than viewing the state as a potential threat to liberty if not

Act (1916) (forbidding the interstate sale of goods produced by child labor, which would be overturned by the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); the Adamson Act (1916) (setting an eight-hour workday for railroad workers); the Workingmen's Compensation Act (1916) (providing insurance against workplace accidents for federal employees). On the Roosevelt era acts, see LEWIS L. GOULD, *THE PRESIDENCY OF THEODORE ROOSEVELT* 28, 33, 52, 106, 149, 150, 156, 159-60, 164, 165-9 (1991). On the Wilson era acts, see KENDRIC A. CLEMENTS & ERICA CHEEZUM, *WOODROW WILSON* 116 (2003); LEON H. CANFIELD, *THE PRESIDENCY OF WOODROW WILSON: PRELUDE TO A WORLD IN CRISIS* 34, 35, 76-7 (1966).

¹⁰ ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 109 (1904).

¹¹ The following statement by President Woodrow Wilson is emblematic of Progressive thinking:

There can be no equality or opportunity, the first essential of justice in the body politic, if men and women and children be not shielded in their lives, their very vitality, from the consequences of great industrial and social processes which they can not [sic] alter, control, or singly cope with. Society must see to it that it does not it-

cabined by ingenious constraints of constitutional design and bills of rights, as the older tradition held, the Progressives looked to government as a beneficent agency for social good when guided by enlightened bureaucrats and legislators.

The conventional wisdom about the “*Lochner* era,” first nurtured by Progressive politicians and intellectuals and later solidified by New Dealers, is too well known to require lengthy elaboration. Portrayed as a period of unprecedented judicial activism with Supreme Court justices routinely and repeatedly invalidating state economic regulation, the Court was charged with overstepping its proper bounds by invading the preserve of the legislatures, the people’s representatives. Unelected justices, serving for life, imposed their own laissez-faire ideology, and they did so often, mercurially, and without explicit constitutional justification, inventing out of whole cloth a doctrine of freedom of contract not heretofore contained in the standard meaning of due process of law. The Court used this fictional freedom of contract to protect big business interests at the expense of common workmen and their attempts to secure protective legislation and to unionize.

Revisionists in recent years have questioned much of this received orthodoxy, most effectively in discounting the notion that the Court overturned hundreds of laws regulating economic relations under the Fifth and Fourteenth Amendments’ Due Process Clauses, with one scholar, Michael J. Phillips, finding the number a much more modest fifty-six, with only fifteen of them decided on freedom of contract grounds.¹² Others have discounted the charge of mere ideological bias or crude favoritism towards business interests, discerning instead a principled jurisprudence. Still others think that the Court of this period could more aptly be referred to as the “Progressive Court,” since it accepted most of the regulatory legislation that came before it. Today there is much agreement that the Court did not decide with great consistency, that it did not overturn a great number of laws, and that the regulations approved by the Court greatly outnumbered those overturned. Yet the conventional view still holds considerable sway, particularly

self crush or weaken or damage its own constituent parts. The first duty of law is to keep sound the society it serves. Sanitary laws, pure food laws, and laws determining conditions of labor which individuals are powerless to determine for themselves are intimate parts of the very business of justice and legal efficiency.

President Woodrow Wilson, First Inaugural Address 9 (March 4, 1913) (available at THE AVALON PROJECT AT YALE UNIVERSITY, <http://www.yale.edu/lawweb/avalon/presiden/inaug/wilson1.htm>).

¹² 12. MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY, *supra* note 8. Phillips identifies fifty-six cases in what he terms the “core substantive due process cases” and fifty-four “borderline” cases. *Id.* at 57. The borderline cases include “rate decisions and regulatory orders for businesses affected with a public interest.” He views the latter group as “basically takings decision” incorporating the Fifth Amendment’s Taking Clause into the Fourteenth Amendment’s Due Process Clause. *Id.* at 55-56. In the core cases, he found that unsuccessful due process challenges exceeded successful ones by 199 to 56 (3.55 to 1) and for both groups together figures are 269 to 110 (2.45 to 1). For employment cases alone, he found the unsuccessful exceeding the successful by 43 to 12 (3.6 to 1), for business regulation cases, 59 to 12 (4.9 to 1), and for general police power cases 28 to 3 (9.3 to 1). From this he concluded that: “In other words, *Lochner*-era substantive due process attacks had their lowest kill ratios in precisely those areas where the doctrine is supposed to have done the most damage.” *Id.* at 57.

among today's sitting justices, with conservatives as well as liberals shunning identification with *Lochner*. Few scholars, even among those who have questioned the orthodoxy, have much sympathy for judicial oversight of economic regulation, nor do any but a handful wish to return in any form to liberty of contract under the Due Process Clause. Thus, although key elements of the conventional wisdom have been deflated, the resulting animus against the constitutionalization of economic liberty as a fundamental, due process right is still very much with us.

Without a doubt, the iconic form of *Lochner* denigration is found nowhere else than in the pithy, sardonic dissent of Justice Oliver Wendell Holmes¹³. After a century of scathing criticism of the *Lochner* majority by Progressives, New Dealers, historians, and legal scholars antagonistic to the constitutionalization of liberty of contract, and often to economic liberty itself, there is much to be gained from returning to the source. Holmes' epigrammatic formulations, repeated countless times, have framed all subsequent discussion of the case and of the era that it spawned. Part I of this article will disaggregate Holmes' indictment, identifying two major counts. The next two Parts will take up each count of the indictment in turn, focusing on the maximum hours and minimum wage cases that formed the heart of liberty of contract jurisprudence. Part IV will examine whether a different strategy, one more ideological, more explicitly tied to the Constitution's political heritage, and one adumbrated by Justices Joseph P. Bradley and Stephen J. Field in the 1870s and 1880s could have produced a more viable, consistent, and defensible ground upon which to stake liberty of contract under the Due Process Clauses of the Fifth and Fourteenth Amendments.

I. Peckham's Opinion and Holmes' Indictment

A. The Opinion

Famously, in *Lochner v. New York*, a 5-4 majority of the Supreme Court overturned the misdemeanor conviction of a bakery owner for requiring or permitting an employee to work more than sixty hours in a week. Under a state labor law that restricted bakery employees to labor no longer than ten hours per day or sixty hours per week, *Lochner*, for his second offense, was fined \$50 and threatened with up to fifty days in jail until the fine was paid. The Court found that the state's invocation of the police power to protect the health of bakers was unpersuasive, doubting that the measure was "really a health law" and considering it merely a labor law to "regulate the hours of labor between the master and his employés."¹⁴ Rejecting the state's paternalistic argument that it had a right to protect certain classes of workers, including bakers, from their own imprudence in laboring beyond a healthful limit, Justice Rufus Peckham, writing for the majority, pierced the police power veil to find the health concern too meager to justify the measure as a proper exercise of the police power:

¹³ *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

¹⁴ *Lochner*, 198 U.S. at 64.

It seems to us that the real object and purpose were merely to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.¹⁵

Chronicling how the majority reached this conclusion is not a simple task, which may explain in part why the critics found the decision such an irresistible target. While it is difficult to discern a clear test for the legitimacy of regulation in Peckham’s opinion, or a clear statement about who bears the burden of proof, the justice was perspicuous enough about framing the issue. Individuals have a “general right” to make employment contracts, yet this right is held under the state’s “somewhat vaguely termed police powers” to protect the safety, health, morals, and general welfare.¹⁶ *Allgeyer v. Louisiana*¹⁷ (overturning for the first time a state law on the grounds of liberty of contract under the Due Process Clause of the Fourteenth Amendment) is cited for the first proposition, while *Mugler v. Kansas*¹⁸ (upholding a state prohibition on the manufacture and sale of intoxicating liquors against a due process challenge) is cited for the second. Which “right” should prevail?

Stare decisis muddied the waters, as it is wont to do, since the Court had previously upheld as a legitimate exercise of the police power a Utah statute, in *Holden v. Hardy*,¹⁹ that limited the workdays of miners and smelters to eight hours, over the dissents of the two most loyal devotees of liberty of contract, Justice David J. Brewer and Peckham himself. Citing several other cases in which the Court had given a “liberal” interpretation to the police power—upholding a Sunday law and a compulsory vaccination statute, among others—Peckham cautioned that the Court did have a role to play in deciphering the limits of the police power, or the Fourteenth Amendment would be vitiated and the police power would become nothing more than a pretext for the “supreme sovereignty of the State to be exercised free from constitutional restraint.”²⁰ He made an initial attempt to formulate a test for distinguishing legitimate from illegitimate regulatory legislation:

Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those con-

¹⁵ *Id.* at 64.

¹⁶ *Id.* at 52.

¹⁷ *Allgeyer v. Louisiana*, 161 U.S. 578 (1897).

¹⁸ *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹⁹ *Holden v. Hardy*, 169 U.S. 366 (1898).

²⁰ *Lochner*, 198 U.S. at 56.

tracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?²¹

In a passage far from pellucid, and destined to raise the ire of critics, Peckham remarked that:

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.²²

It is no wonder that Peckham's reasoning triggered such a maelstrom, since it is obvious that the Court cannot perform the test, undeniably calling for an act of judgment, without "substituting the judgment of the court for that of the legislature," at least in those cases where the Court finds the legislature's judgment impaired. Peckham proceeded in short order to do just that, dismissing the state's vaunted police power rationales for restricting the hours of bakers. As a labor law, and that was how the state classified it, "there is no reasonable ground" for interfering with the "liberty of person or the right of free contract" of a baker, since bakers are neither "wards of the State" nor of less intelligence than other men, and thus capable of exercising independent judgment "without the protecting arm of the State" interfering.²³ The act cannot be saved, either, by a claim to be protecting the health of the general public since the quality of bread does not depend on the number of hours labored by the baker. Here, Peckham made another stab at stating a police power test:

The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.²⁴

This is the more familiar means/ends test invoked in various "strict" or "intermediate" forms in our modern "fundamental rights" adjudication, but, of course, without the final condition of "his power to contract in relation to his own labor." Yet, when stated by Peckham, it would not mollify *Lochner's* critics, since the surrounding argumentation would seem to them entirely subjective.

As Peckham had dismissed both a labor law and a general health justification for the ten-hour restriction on bakers, he likewise could find no justification for the contractual impediment in the claim that it protected the health of the bakers,

²¹ *Id.*

²² *Id.* at 56-57.

²³ *Id.* at 57.

²⁴ *Id.*

despite the opinion to the contrary by a bare majority of the New York Court of Appeals. The state’s highest court had decided that sufficient, although not uniform, evidence existed to support the proposition that the occupation of baker was unhealthy. But Peckham feared that if baking were declared an occupation unhealthy enough to be regulated in this fashion, then, since no occupation is entirely free from health impingements, no one would be immune from this sort of regulation by the state. All occupations would, then, be “at the mercy of legislative majorities.”²⁵ Even bank, law, real estate, or brokers’ clerks working in buildings that receive scant sunlight could be likewise restricted, should this regulation pass muster, Peckham admonished.

Peckham was derisive in dismissing the state’s final rationale for the ten-hour restriction on bakers: that it furthered the state’s interest in maintaining a strong and robust population. Fearing that if this claim were accepted, liberty of person and freedom of contract would be utterly vitiated whenever a state invoked the police power, he remarked that under such a guise lawyers, scientists, athletes, and artisans could be forbidden by the states from tiring their brains or bodies, all in the name of preserving the fighting capability of the state.

Clearly, Peckham was frustrated with the state’s police power rationales, as he found each variously unreasonable, arbitrary, insufficiently supported by common sense experience, overreaching, and sometimes just plain silly, as in the state’s attempt to link working over ten hours each day with producing unclean bread. Would working ten-and-a-half or eleven hours, rather than the designated ten, suddenly produce unhealthy bread, Peckham chided, or does the state’s grasping at such implausible arguments “give rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.”²⁶ Warning of the states’ ever increasing propensity to interfere with the “ordinary trades and occupations of the people,” he cited examples in several states where their own courts had overturned, on due process grounds, regulations on the trade of horseshoeing that had required examinations and certificates in order to practice this common occupation.²⁷

Any brief characterization of the Court’s opinion in *Lochner* has inherent limitations, since the opinion is, to say the least, discursive and convoluted. It will be helpful to summarize the legal standard that Peckham tried to employ. (1) The state has a “right,” or sometimes he called it a “power,” to protect the health, safety, morals, and general welfare of its citizens, but that power has its limits when it comes into conflict with the liberty of person and freedom of contract of the indi-

²⁵ *Id.* at 59.

²⁶ *Id.* at 63.

²⁷ *Id.* State courts had been the crucible for developing liberty of contract under state due process provisions, overturning much more regulatory legislation than federal courts ever would, and doing so earlier.

vidual as protected by the Due Process Clause of the Fourteenth Amendment. (2) Courts have a role to play in reviewing legislative infringements on these protected liberties, so the legislature's judgment that some regulation fits within the police power is not determinative. (3) Regulations must not be unreasonable, unnecessary, or arbitrary; they must have a direct relationship, as a means to an end; and the end must be appropriate and legitimate.

Likewise, it will be helpful to our subsequent appraisal of *Lochnerizing* to tease out what I shall call, following the nineteenth century practice, the "political economy" that animated the majority's opinion. A "political economy" embodies a conception about the nature of man, about the purpose of the state, and about the limitations of state action in economic matters.²⁸ To begin with the nature of man, Peckham twice employs the term *sui juris* to describe both the employer and employee, and this is key to his understanding of man's nature, that is, of the nature of men with "full social and civil rights" and of "full age and capacity."²⁹ Such men are capable of exercising judgment in their own interests, of appraising their options for betterment, and thus of making voluntary contracts with others concerning conditions of their employment. The purpose of the state is not to engage in paternalistic interferences with the economic relationships of "grown and intelligent men," nor is it to subject the freedom of each person to the "mercy of legislative majorities."³⁰ For Peckham the state was not a disinterested, reified ideal, as it was for Progressives, but rather a collection of fallible, self-interested men. Thus, the state must be confined within appropriate, if difficult to define and test, limits. The state can be overweening, and thereby imperil personal liberty. Yet, the state has a useful role to play in guarding the public from acts of individuals that are inherently dangerous: in modern parlance, from acts with negative externalities. The police power may even extend to protecting individuals from dangers that they might not themselves perceive, and so the state may place reasonable limitations on inherently dangerous occupations. Peckham would confine such police powers narrowly, and when it came to liberty of contract, more narrowly than adherence to Supreme Court precedents would allow him to tread. Safety and health regulations for factories, of the sort that New York had imposed along with the illegitimate ten-

²⁸ The concept of "political economy" was more expansive than what in the modern era has become the field of economics, although the Public Choice School harkens back to the older notion by integrating economic principles with politics. In British political economy, beginning with ADAM SMITH, *WEALTH OF NATIONS* (1776) and carried through the nineteenth century, "political economy" included political theory; that is, the discussion of economic principles followed upon or was integrated with a discussion of the nature of man, how governments were formed and what ends they served, and how they could or, more often, could not intervene in the economy to promote prosperity. The term was used in the United States as well.

²⁹ BLACK'S LAW DICTIONARY 1148 (7th ed. 1999). Men is used in the text by design, since women were still under legal impediments at this time. Although many impediments, such as inheritance laws, had already undergone changes, women still did not have the suffrage.

³⁰ *Lochner*, 198 U.S. at 59.

hour provision, seemed acceptable to him, although even here his acquiescence seemed a bit grudging.

B. The Indictment

Justice Holmes’ dissent, the substance of which is contained in a mere two paragraphs, manages at once to be epigrammatic yet diffuse. What it lacks in precision it makes up for in memorable phrases, the most stellar of which is undoubtedly that: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”³¹ Perhaps the clearest count of Holmes’ indictment can be discerned in the following passage:

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinion natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.³²

Here it is a “political economy” that Holmes really means, rather than what he denominates an “economic theory.” This can be seen from his characterization of the position antithetical to *laissez faire* as “paternalism and the organic relation of the citizen to the State.” He is referring to a “political economy” antagonistic to individualism, one that views the person as a part of a greater whole. Organic theorists typically analogize the individual/state relationship to that between the parts of the human body—legs, arms, eyes, ears, etc.—and the whole person. People are appendages of the state with no truly independent existence, and their purpose is given to them by their role in the state, just as eyes and ears have their distinct functions in the human body. This conception of the state and the person’s place in it leads naturally to paternalism, as Holmes rightly recognized. The natural implication is that the state may intervene in the whole range of human endeavors, including the economic realm, in order to look after the welfare of its parts. The state must harmonize individuals’ interests in order to avoid conflict and subordinate their partial interests to the overarching interest of the whole, the state, which is what really matters.

Antithetical to the organic theory, as Holmes notes, is *laissez faire*, an ideology that he charges the Court’s majority with having embraced in *Lochner*. Thus his opening salvo was that the decision was reached “upon an economic theory which a large part of the country does not entertain.”³³ The “shibboleth” of *laissez faire* Holmes characterizes in a manner consonant with Herbert Spencer’s “law of

³¹ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

³² *Id.* at 75-76.

³³ *Id.* at 75.

equal freedom.”³⁴ Laissez faire, Holmes writes, is: “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.”³⁵ Holmes takes Spencer to be the exemplar of laissez faire, undoubtedly because he was wildly popular in America at the time. However, apparently unbeknownst to Holmes, Spencer was an odd bird even as political philosophers go, since he combined individualism and natural rights with an overarching organicism that extended not only to how he conceived society, but to his conception of the universe. In fact, one of his ubiquitous analogies was the typical organicist’s favorite: body parts to person as individuals to state.³⁶ Thus, the real Spencer, as contrasted with Holmes’ foil, actually transcends Holmes’ dichotomy between paternalism/organicism and laissez faire.

Laissez faire, or the leave-it-alone principle, has been variously grounded, but in the seventeenth and eighteenth centuries a natural rights foundation typically undergirded it, while as the nineteenth century progressed natural rights fell out of fashion and utilitarian arguments, influenced by Jeremy Bentham and John Stuart Mill, gained greater saliency. Whether grounded on natural rights or utility, the “political economy” of laissez faire embraces some rough-and-ready principles, all of which the standard organicist (that means effectively all organicists except Spencer) rejects: namely, that it is the individual who counts; that the individual knows his interests better than anyone else can, including the state; and that the state serves a minimalist function of preserving civil order, protecting society from foreign aggressors, and providing public services where individual action would not suffice (that is, for what we now call “public goods”).

Holmes maintains that it is not the role of the judge to deliberate on ideology because majorities have a “right . . . to embody their opinions in law.”³⁷ Returning at the end of his dissent to his initial gambit, Holmes adds this:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.³⁸

³⁴ HERBERT SPENCER, *SOCIAL STATICS* 397, 414 (1851).

³⁵ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

³⁶ SPENCER, *supra* note 34, at 405, 407, 408, 409. Spencer envisioned an evolutionary apotheosis in which the highest individualism would be joined to the greatest mutual dependence. *Id.* at 396. Evolution was gradually producing “that manner of men who, in spontaneously fulfilling his own nature, incidentally performs the functions of a social unit.” *Id.* at 397. For an analysis of Spencer’s organicism see Ellen Frankel Paul, *Herbert Spencer: The Historicist as a Failed Prophet*, 44 J. OF THE HISTORY OF IDEAS 619 (1983).

³⁷ *Lochner*, 198 U.S. at 75.

³⁸ *Id.* at 76.

Naturally, he thought that the present law passed such a test rather handily, since a “reasonable man might think it a proper measure on the score of health,”³⁹ and even as an opening move in a general regime of regulation of workers’ hours, he thought reasonable men would uphold it.

The difference between his opening statement on majority rule and his final statement is substantial, with the first seemingly a blanket permission for the majority to have its way, and the second placing some limitation on majority will, but with no great precision. Are “fundamental principles” those rights explicitly protected by the Constitution? Are they principles to be discerned from rights protected in previous cases? How are fundamental principles to be teased out of our “traditions”? Like much of Holmes’ dissent, these questions are unanswerable from his cryptic remarks. One could even argue that the Peckham majority had done for the Court precisely what Holmes urged by finding, in Holmesian terms, that the ten-hour law necessarily infringed fundamental principles as embodied in our traditions and law by regulating in a novel area formerly left to the discretion of individuals.

Be that as it may, despite the frustrating sketchiness and ambiguity of Holmes’ dissent, the **first count** of his indictment can be fairly distilled into this: *That the Constitution is neutral in respect to political economy, neither embracing organicism/paternalism nor individualism/laissez faire, and, thus, majorities should be able to enact their own theories into law unless clearly barred by the Constitution beyond the doubt of any reasonable man.*

The second complaint that weaves its way through Holmes’ dissent is that the *Lochner* majority decided erratically, condemning this regulation on bakers while formerly the Court had endorsed all sorts of regulations that interfered with the liberty to contract, including Sunday laws, usury laws, prohibitions on lotteries, compulsory vaccination statutes, anti-combination laws, prohibition on the sale of stocks on margin or for future delivery, and an eight-hour law for miners.⁴⁰ This complaint dovetails with the main charge levied in the other dissent, penned by Justice John M. Harlan and joined by Justices Edward D. White and William R. Day. Harlan’s dissent is far less memorable than Holmes’, but what it lacked in punch lines it more than made up for in clarity. Harlan cited numerous cases upholding police power regulations over freedom to contract when legislatures determined that an exercise of private right would interfere with the health, safety, or general welfare of the people.⁴¹ He accepted the majority’s means/end test, but emphasized that the Court had a much more limited role than the majority had displayed in reviewing regulatory legislation. He urged that “a legislative enactment . . . is never to be disregarded or held invalid unless it be, beyond question,

³⁹ *Id.*

⁴⁰ *Id.* at 75.

⁴¹ *Id.* at 64-7 (Harlan, J., dissenting).

plainly and palpably in excess of legislative power.”⁴² With this high hurdle for judicial negation, it was no wonder that Harlan thought the majority had exceeded its proper function, acted inconsistently with past decisions upholding police power regulations of various but no less intrusive sorts, and ventured into new, uncharted territory that will “involve consequences of a far-reaching and mischievous character”⁴³

The **second count** of the indictment runs roughly⁴⁴ like this: *The Court exceeded its authority by trenching on what should have been left to legislative discretion, and the results of this overreaching will be erratic and “mischievous.”* Parts II and III will examine each of the two counts in turn.

II. The First Count: The Ideological Neutrality of the Constitution

Waves of revisionists have labored over the Constitution’s founding in an effort to re-conceptualize it as something other than it was. In the Progressive and then the New Deal eras, revisionists found economic motivation dominant among the founders, rather than lofty ideals of inalienable rights, while in more recent times “civic republicans” have read classical virtues and communitarian aspirations into the founding.⁴⁵ Yet, sometimes things are just as they originally seemed to be and as contemporaries and near contemporaries understood them, and I think this is one of those cases. Hardly anyone would be taken seriously who argued that Marxism had little or nothing to do with the founding of the old Soviet Union. Although not quite to that standard of indisputability, it seems difficult to gainsay that John Locke’s *Second Treatise of Government* was the regnant “political economy” of the founding period, of the founders themselves, of the Anti-Federalists, and more importantly for our purposes, of the people’s representatives who ratified the Constitution at the conventions in the several states. While other theorists were of immediate practical influence at the Constitutional Convention—Montesquieu, since he dealt with the nuts and bolts of constitutional construction, and Blackstone

⁴² *Id.* at 68 (Harlan, J., dissenting). Doubt, he urged, must be resolved in favor of validity, leaving unwise legislation to be dealt with by the legislature. Unlike the majority, he stated who had the burden of proof: those who challenge the legislation. He reviewed facts and statistics about health and mortality in the baking industry and concluded that there were sufficient reasons for thinking that the profession was an unhealthy one, and thus for exercising the police power to regulate it. He would have upheld the ten-hour regulation on bakers because it was not “plainly, palpably, beyond all question, inconsistent with the Constitution.” *Id.* at 72.

⁴³ *Id.* at 74 (Harlan, J., dissenting). Harlan continued, “for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens. Those are matters which can be best controlled by the States.” *Id.*

⁴⁴ I realize that the two counts are to a certain extent intertwined in Holmes’ dissent, but given its circuitousness, some license is necessarily taken in disentangling these two counts. The second count borrows “mischievous” from the Harlan dissent, since it neatly encapsulates Holmes’ animus.

⁴⁵ For the former, see, for example, CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); and for the latter, J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC TRADITION* (2003, rev. ed.).

on the common law—these figures shared the essential Lockean, classical liberal assumptions.

Locke’s “political economy” embraced the following elements that are too well known to require extensive elaboration. Locke held that men were born free, equal, and independent without any earthly master,⁴⁶ and that they were born into a state of nature with reason or natural law, which amounted to the same thing, as their guide.⁴⁷ In marked contrast to Hobbesian man in the state of nature, whose life was “solitary, poor, nasty, brutish, and short,”⁴⁸ with men constantly warring against each other, Lockean man was a reasonable creature, and the state of nature was merely inconvenient, rather than a perpetual state of Hobbesian warfare. Men could be partial in judging their own cases and punishment would be erratic.⁴⁹ Men could do better, and they did, by voluntarily consenting to leave the state of nature and by agreeing to a social contract and then forming a government by majority decision.⁵⁰ While still in the state of nature men had natural rights to life, liberty, and property that they did not relinquish when entering civil society, again unlike Hobbesian men who gave up all of their natural rights except the right to flee should the sovereign come to kill them. Property and the right to property exist in the state of nature, flowing from each individual’s right to self-ownership, and from each mixing his labor with that which was formerly in the commons. In appropriating and making use of previously undeveloped property, Locke argued, the appropriators thereby become great benefactors of mankind, and the invention of money surmounts the initial limitations on acquisition that he had identified: that enough and as good be left for others and that waste be avoided.⁵¹ Men enter civil society and establish government to protect their rights, most importantly, the right to property. “The great and *chief end* therefore, of Mens uniting into Commonwealths,” Locke wrote, “and putting themselves under Government, *is the Preservation of their Property.*”⁵² Government is a fiduciary, and when it exceeds its obligations to act as the agent of the people, and infringes their rights, it can be legitimately overthrown.⁵³ Short of that, to keep government within its bounds, Locke envisioned checks and balances between the branches and majority rule through the people’s representatives. In “A Letter Concerning Toleration,” Locke championed religious liberty, toleration, and the separation of the magistrate from religion. Religious conviction was no part of the magistrate’s concern, so long as believers did not owe allegiance to another power. Thus, he excluded Catholics from toleration, since they owed allegiance to the Pope, and he was concerned

⁴⁶ JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 4 (Peter Laslett, ed., Cambridge University Press 1988) (1690).

⁴⁷ *Id.* at § 6.

⁴⁸ THOMAS HOBBS, LEVIATHAN 100 (Michael Oakeshott ed., Collier Books 1962) (1651).

⁴⁹ LOCKE, *supra* note 46, at § 13.

⁵⁰ *Id.* at §§ 95–96.

⁵¹ *Id.* at §§ 25–51.

⁵² *Id.* at § 124.

⁵³ *Id.* at § 222.

about the “Mahometan” who recognizes allegiance to the Mufti of Constantinople, and hence the Ottoman Empire. Atheists, because their oaths could not be trusted without fear of divine punishment, and antinomians, because they thought God had given them the right to ignore rules, were likewise intolerable.⁵⁴

Whether one looks to the Declaration of Independence, to the revolutionary era constitutions of the rebellious colonies, to the Constitution itself, or to the ratification documents from those states that called for the addition of a bill of rights to the Constitution,⁵⁵ Lockean principles are ubiquitous.

A. The Declaration of Independence

Although it is out of fashion to import values from the Declaration of Independence into constitutional adjudication,⁵⁶ the Declaration cannot be ignored, here, because it encapsulated the prevailing “political economy” of the newly declared nation in its clearest and most pristine form, unencumbered by the details of having to construct a functioning government. It is not necessary to belabor the obvious: the Declaration is through-and-through an embodiment of Lockeanism, penned by one of its most literate exemplars, Thomas Jefferson. He captured all of the essential elements of Lockean liberalism in one sentence:

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

B. The Revolutionary Era State Constitutions

Twelve states adopted new constitutions immediately before or shortly after independence was proclaimed, while two others retained their royal charters well into the nineteenth century.⁵⁷ (Vermont asserted itself as the fourteenth state

⁵⁴ John Locke, *A Letter Concerning Toleration* (1689) (available at http://www.univ.trieste.it/~storia/GuidoOnLine/Locke_Toleration.htm and <http://www.constitution.org/jl/tolerati.htm>).

⁵⁵ Links to all of the historical documents cited in sections A-D are available at THE AVALON PROJECT AT YALE UNIVERSITY (with the exceptions noted below at note 57), “18th Century Documents,” <http://www.yale.edu/lawweb/avalon/18th.htm>.

⁵⁶ Scott Douglas Gerber, however, found Justice Clarence Thomas to be, in his pre-confirmation articles and speeches, an enthusiast for importing the values of the Declaration into the Constitution. *See*, GERBER, SCOTT DOUGLAS, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 38–47 (1999).

⁵⁷ THE FEDERAL AND STATE CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe, ed., 1909). All of the revolutionary era state constitutions are available at THE AVALON PROJECT, *supra* note

shortly after independence was declared).⁵⁸ All of the new constitutions established republican forms of government,⁵⁹ with power divided between legislative, executive, and judicial branches. One of the constitutions was narrowly focused on setting up the bare mechanics of government in extraordinary circumstances. New Hampshire in January of 1776, faced with the departure of its governor and several council members, felt itself to be “destitute of legislation” and courts to punish criminals, and acted hastily to remedy the crisis. Other states included elaborate declarations of rights, with the Virginia Declaration of Rights, authored by George Mason, echoing through many of them. Even states that did not begin their first constitutions with such invocations of natural and civil rights, included provisions for religious liberty (at least for all Christians), trial by jury, freedom of the press, prohibitions on bills of attainder, the right to vote (with various wealth restrictions), and other traditionally liberal protections.⁶⁰

Roughly, the constitutions fall into three categories: (1) those that begin with a declaration of rights or include within them a full panoply of rights, (2) those that specify particular rights but do not include an elaborate declaration, and (3) and one that merely establishes the institutions of government. The first category includes Virginia, Delaware, Vermont, Pennsylvania, Maryland, North Carolina, New York (with some reservations),⁶¹ and Massachusetts. The second includes New Jersey (which begins with a statement about dissolving the compact of the people between the colonies and Great Britain and guarantees unconditional reli-

55, with the following three exceptions and one caveat. The constitution of Massachusetts from this era is available at <http://www.nhinet.org/ccs/docs/ma-1780.htm> The Massachusetts constitution was adopted in 1780, later than the other state constitutions from the revolutionary period. Rhode Island continued, until 1843, to be governed by its Royal Charter of 1663 granted by England’s King Charles II. See: “Introduction to the Rhode Island Constitution,” available at http://www.rilin.state.ri.us/gen_assembly/RiConstitution/constintro.htm In 1843 a new constitution was adopted which included an elaborate declaration of rights and principles. Connecticut also retained its Royal Charter until it adopted a new constitution in 1818. The Delaware Declaration of Rights and Fundamental Rules (available at <http://www.lonang.com/exlibris/organic/1776-ddr.htm>) is incorporated into the Delaware Constitution of September 10, 1776, in Article 30, which states that “No article of the declaration of rights and fundamental rules of this Sate, agreed to by this convention . . . ought ever to be violated on any pretence whatever.”

⁵⁸ In January 1777, Vermont declared independence from claims made against its territory by New York under the authority of King George III. On July 8, 1777, it adopted a constitution. Vermont joined the Union in 1791, becoming the fourteenth state.

⁵⁹ The colonies were urged to adopt constitutions conducive to their happiness and safety by the Continental Congress on May 15, 1776.

⁶⁰ New Hampshire is an exception, but the state revised its constitution in 1784.

⁶¹ New York is the trickiest one to categorize, and also the lengthiest and windiest. It includes within it the Declaration of Independence, so it endorses Jefferson’s Lockean “political economy,” but it does not have a discrete section listing protected rights. In this sense, it shares characteristics with the second group, protecting specific rights: to vote (with the typical restrictions), to unconditional freedom of religion to “all mankind,” to a right to counsel in criminal matters, to trial by jury, to a prohibition on acts of attainder (other than for crimes committed during the war but not to “work a corruption of blood).” I have placed New York in the first category because it enshrined the “political economy” of the Declaration, but a case could be made for its inclusion, instead, in the second.

gious freedom, no establishment of religion, full civil rights and capacity for elective office to all Protestants, and trial by jury); Georgia (which begins with the typical repudiation of Britain's rule without consent of the Americans in violation of the "common rights of mankind" by the "laws of nature and reason," states that all power is derived from the people, and contains specific guarantees for the right to vote, unconditional religious freedom, prohibitions on excessive fines or bail, habeas corpus, freedom of the press, and trial by jury); and South Carolina (which proclaims religious toleration for all who accept monotheism but establishes Christian Protestantism, embraces a law of the land clause protecting "life, liberty, and property,"⁶² and protects liberty of the press). Finally, New Hampshire is the lone inhabitant of the third category, but by 1784 the state ratified a new constitution that contained an elaborate Bill of Rights, which endorsed natural rights and a full panoply of specific rights. This constitution elevates New Hampshire to the first category. (Connecticut and Rhode Island retained their Royal Charters until 1818 and 1843, respectively, when they adopted new constitutions.)⁶³

Although the eight constitutions in the first group display some variations in the particulars, seven of them follow the Virginia model in embracing, often in the same words, the rights protected in the Virginia Declaration of Rights and incorporated at the beginning of the Virginia Constitution. Thus, it will be sufficient to examine Virginia's formulations, since the others track it so closely. First, though, the Massachusetts constitution is worth mention in its own right. Although it was adopted later than the rest, in 1780, it takes pains to explicitly enunciate a theory of government before proceeding to a declaration of rights in the Virginia mold. The constitution's preamble begins:

The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and

⁶² South Carolina's Article XLI is derived from Magna Carta: "That no freeman . . . be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land." S.C. CONST. of 1778, art. XLI. This is actually the second constitution that the state adopted, superseding a temporary one adopted in March of 1776, before independence was declared.

⁶³ Connecticut's constitutional document of 1776 continued its Charter of 1662 in force, but without fealty to the crown. In addition, three brief paragraphs protected specific rights of the people: due process and equal protection concerns predominated. Thus, Connecticut should be added to the second group, although theirs was not a truly new constitution. 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 257-58 (compiled by Benjamin P. Poore 1878).

each citizen with the whole people that all shall be governed by certain laws for the common good.

This is pure Lockeanism.

Our proxy, the Virginia Constitution, begins as most of the others do, with the following declaration, reminiscent of the Declaration of Independence, and of course, of Locke himself:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁶⁴

I shall reprise the most salient provisions of the remaining fifteen guarantees, which include: “That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amendable to them”;⁶⁵ that government exists for the common benefit, happiness, and safety of the people and that when any government fails to adhere to these purposes, a “majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it . . .”;⁶⁶ that legislative and executive should be separate from the judiciary, and that the members of the first two should be at fixed periods returned to a private station to be replaced by regular election;⁶⁷ that all men having a permanent interest in the community should have a right to vote, and that they cannot be “taxed or deprived of their property for public uses, without their own consent, or that of their representatives . . .”⁶⁸ Other provisions protect the criminally accused, including a right to hear the accusation, to be confronted by one’s accusers, to call witnesses, to receive a speedy trial by an impartial jury, to be found guilty only by the jurors’ unanimous consent, and to not be compelled to give evidence against oneself. Due process for the accused is likewise guaranteed:

⁶⁴ VA. CONST. of 1776, sec. 1. A few more examples will show how representative the Virginia formulation is. The corresponding passage in the Massachusetts Constitution is Article I:

All men are born free and equal and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

And the first article of “A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania,” reads:

That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

PA. CONST., art. I.

⁶⁵ VA. CONST. of 1776, sec. 2.

⁶⁶ *Id.* at sec. 3.

⁶⁷ *Id.* at sec. 5.

⁶⁸ *Id.* at sec. 6.

that “no man be deprived of his liberty, except by the law of the land or the judgment of his peers.”⁶⁹

The Virginia Declaration of Rights also contains a ban on general warrants, thus protecting individuals from searches without evidence.⁷⁰ Trial by jury was guaranteed not only for criminal trials but for civil disputes involving property and personal controversies.⁷¹ Freedom of the press is characterized as “one of the great bulwarks of liberty,” with only despotic governments restraining the press.⁷² Other important protections include: that the military should be subordinate to civil authority and that the people’s militia is the proper defense of a free state, rather than standing armies;⁷³ that religion is subject only to reason and conviction and, thus, men are entitled to the “free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”⁷⁴

The other state constitutions in the first group emulate Virginia’s declaration, but the emphasis, wording, and placement of various provisions offer subtle variations. For example, Pennsylvania’s constitution prominently features the guarantee of freedom of religion as its second provision, rather than Virginia’s placement of it last. Pennsylvania also appends to Virginia’s freedom of the press, the right of the people to freedom of speech and of writing; adds to Virginia’s militia clause the right of the people to bear arms; and states that all men have a natural, inherent right to emigrate to other states. Vermont’s declaration of rights went significantly beyond slaveholding Virginia’s inherent rights provision to state that all men over twenty-one and all women over eighteen could not be held as servants, slaves, or apprentices against their will; guaranteed that when private property is taken for public use, the owner would receive an equivalent in money; and penned a more godly religious provision than Virginia’s, recognizing as natural and unalienable the right to worship God, but restricting to Protestants the protection against infringement of civil liberties and stating that all sects must respect the Sabbath. North Carolina’s constitution included a provision that the people have a right to assemble, to instruct their representatives, and to appeal to the legislature for a redress of grievances. Delaware’s Declaration of Rights provides that no soldier should be quartered in anyone’s home during peacetime without the owner’s consent.

In sum, the Lockean spirit that runs through these original state constitutions is unmistakable. All the key elements of Locke’s “political economy” are en-

⁶⁹ *Id.* at sec. 8. Section 9 bars excessive bail, excessive fines, and cruel and unusual punishments.

⁷⁰ *Id.* at sec. 10.

⁷¹ *Id.* at sec. 11.

⁷² *Id.* at sec. 12.

⁷³ *Id.* at sec. 13.

⁷⁴ *Id.* at sec. 16.

shrined in declarations of rights in the constitutions of the first group, while those in the second group embrace specific rights central to individual liberty and enact republican governments that provide separation of powers and checks and balances.

C. The United States Constitution

The First Congress adopted the Bill of Rights at the insistence of seven of the states that conditioned their acceptance of the Constitution upon the inclusion of more specific protections for individual and states’ rights. Even before inclusion of the first ten amendments, the Constitution embodied a “political economy,” a philosophy of government, that was highly protective of individual liberty and manifestly Lockean. Separation of powers between the executive, legislative, and judiciary, with checks and balances built into the system to prevent overweening government or, in the worst case, tyranny, is straight from the classical liberal, Lockean playbook. A federal government of delegated and enumerated powers, it was not expected by its framers and supporters to have any powers not specifically granted to it. Hence, some, including James Madison, were reluctant to include a bill of rights, though he eventually would draft the rights-protective amendments for the First Congress.

Yet, even without the first ten amendments there were many guarantees of personal liberty built into the Constitution. Article I, Section 9 prevents the national government from suspending the writ of habeas corpus with exceptions for emergencies, issuing bills of attainder or ex post facto laws, levying taxes or duties on goods exported from states, and granting titles of nobility. Section 10 of Article I adds prohibitions against certain state actions that would impinge upon personal liberty and property rights, including bans on: making anything but gold and silver legal tender for the payment of debts; passing bills of attainder or ex post facto laws; passing laws that impair the obligations of contracts or grant titles of nobility; and taxing imports or exports without the assent of Congress beyond what is necessary for carrying out state inspection laws. Article III, Section 2 guarantees trial by jury for criminal offenses. Article IV, Section 2 guarantees that citizens of each state are entitled to all the privileges and immunities of citizens of the several states.⁷⁵ The Constitution in its original form, then, was akin to the second category of early state constitutions, in that it enshrined a republican form of government; protected certain particular, specified rights; and counted on separation of powers, checks and balances, and frequency of elections to prevent usurpations. Of course, it differed from these state constitutions in that the federal government’s powers extended only to delegated and, hence, delimited realms.

⁷⁵ The third clause of the same section gives no solace to fugitive slaves, however, insisting that despite the laws of the state to which a fugitive escapes, he must be returned on demand of his owner.

D. Ratification of the Constitution by the States

Ratification of the Constitution led to the adoption by the First Congress of twelve amendments that were submitted to the states, ten of which became our familiar Bill of Rights. Six states ratified the Constitution without conditions: Delaware, Pennsylvania, New Jersey, Connecticut, Georgia, and Maryland. (Interestingly, three of these—Delaware, Pennsylvania, and Maryland—fell into our first category of states with strong declarations of rights in their own state constitutions.) The remaining seven expressed various degrees of displeasure with the lack of protection for individual rights and certain states' rights, and they requested further protections of various sorts to be added as amendments to the Constitution, some eventually adopted and some not. The extent of their requests varied. South Carolina's list was the slimmest of them all, by far. South Carolina was concerned about state sovereignty over elections, wanted it to be understood that the states retain every power not expressly relinquished to the federal government, and requested that clarification be made to the restrictions on the central government in the raising of taxes.⁷⁶

Massachusetts and New Hampshire offered nine and twelve amendments respectively, with the first nine nearly identical. Both, interestingly, contain as their fifth proposed amendment "That Congress erect no Company of Merchants with exclusive advantages of commerce."⁷⁷ This was echoed by Rhode Island, and New York made a similar request, "That Congress do not grant Monopolies or erect any Company with exclusive Advantages of Commerce."⁷⁸

Three states—New York, North Carolina, and Rhode Island—closely emulate Virginia's call for Congress to consider a declaration of rights embracing some twenty numbered provisions as well as twenty amendments. Virginia's proposed declaration of rights and amendments were based on a master draft authored by George Mason. The first three items of the declaration echo the familiar Lockean framework:

First, that there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are

⁷⁶ And one more thing: that "no" be inserted between "other" and "religious" in Article VI, Section 3, so that it would read "no other religious test shall ever be required as a Qualification to any Office or public Trust under the United States." Ratification of the Constitution by the State of South Carolina (May 23, 1788) (available at <http://www.yale.edu/lawweb/avalon/const/ratsc.htm>). All of the ratification documents are available at THE AVALON PROJECT, *supra* note 55.

⁷⁷ Ratification of the Constitution by the State of Massachusetts (Feb. 6, 1788) (available at <http://www.yale.edu/lawweb/avalon/const/ratma.htm>); Ratification of the Constitution by the State of New Hampshire (June 21, 1788) (available at <http://www.yale.edu/lawweb/avalon/const/ratnh.htm>). The language is identical in both the Massachusetts ratification document of February 6, 1788 and New Hampshire's document of June 21, 1788.

⁷⁸ Ratification of the Constitution by the State of New York (July 26, 1788) (available at <http://www.yale.edu/lawweb/avalon/const/ratny.htm>).

the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Second. That all power is naturally vested in and consequently derived from the people; that Magistrates, therefore, are their trustees and agents and at all times amenable to them. Third. That Government ought to be instituted for the common benefit, protection and security of the People; and that the doctrine of non-resistance against arbitrary power and oppression is absurd slavish, and destructive of the good and happiness of mankind.⁷⁹

Rhode Island is an interesting case, since as we saw in Section B it did not adopt a constitution in the founding period, retaining its Royal Charter until 1843. Yet, its ratifying document reveals that it too endorsed a full range of individual rights, as did the state constitutions in the first category. (Its constitution of 1843 does enshrine an elaborate declaration of rights.) Rhode Island was so chary of federal power that it was not until May of 1790, well after the federal government had been established and Congress had formulated and submitted to the states its proposed list of amendments, that the state finally ratified the Constitution. Even so, it still felt the need to elaborate eighteen provisions that it wanted to see adopted, and insisted that its militia would not serve out of state beyond six weeks until amendments were adopted. It issued additional warnings to the federal government about not interfering with elections or levying direct taxes within the state.

E. The Lockeanism of the founding

The founding, it would be fair to say, was a “Lockean moment.”⁸⁰ The accuracy of this portrayal would not change, but would only be enhanced by delving into the transcripts of the Constitutional Convention and the writings of Madison, Jay, and Hamilton in the *Federalist Papers*. This is all well-trodden ground.⁸¹ The path that I took through the state constitutions and the ratifying documents is somewhat less familiar ground, but even more relevant, since these artifacts represent the thinking of far more people than those few in attendance at the convention and their three famous defenders.

Thus, on the first count of the indictment, Holmes was simply wrong. The Constitution does embrace a “political economy,” or what Holmes in his inexact way called an “economic theory.” That theory was most decidedly individualistic, protective of natural rights, chary of government, and zealous in the protection of property rights. *Laissez faire*—leave it alone—and the equal liberty principle that Holmes so scornfully dismissed are the late nineteenth century heirs of eighteenth century America’s “political economy”: of Lockean classical liberalism. The Constitution, contra Holmes, did endorse the individualism that he was at such pains to

⁷⁹ Ratification of the Constitution by the State of Virginia (June 26, 1788) (available at <http://www.yale.edu/lawweb/avalon/const/ratva.htm>).

⁸⁰ This formulation, obviously, plays off Pocock’s *Machiavellian Moment*. POCKOCK, *supra* note 45.

derogate. Holmes' alternative, to let the dominant view of the majority prevail, with a nebulous constraint if what it enacted breached fundamental principles and traditions beyond a doubt, is contrary to the framers' Constitution. The framers built into it all kinds of safeguards—in its division of powers, checks and balances, convoluted schemes for indirectly electing presidents and senators, and its various protections for individual rights—to protect individual liberty against the temporary enthusiasms of majorities. The Bill of Rights underscored the people's Lockeanism, their determination to protect individual liberty from the passions and oppression of the majority.

Ernst Freund, treatise writer on the police power and sympathizer with Progressivism, attempted to confront head on this issue of whether the Constitution embodied a political philosophy. The contortions that he went through may explain why, a year after the publication of Freund's treatise in 1904, Holmes tried in his *Lochner* dissent to simply declare that no theory animated the Constitution, rather than to argue directly for that proposition. Freund's passage is well worth scrutiny, since it foreshadowed later efforts by both Progressives and New Dealers to jettison the Lockeanism of the framing period and replace it with a statist ideology. Freund's contortions occur just after his discussion of the Due Process Clause of the Fourteenth Amendment as a limitation on legislation. In treating due process, he noted that not all "legislation is due process or the law of the land; an arbitrary statute is neither The just cause of legislation is the performance of some legitimate function of government. A statute not supported by such cause is not due process" ⁸² He then counted it a strength of the American system that "the power of conclusive determination is withdrawn from a body accustomed to follow considerations of expediency and interest" ⁸³ and vested in the judiciary. The next numbered section, entitled "Justice and judicial policy," contains the problematic passage, which is opaquely written, in contrast to his usual clarity of expression:

The guaranty of due process is thus a guaranty against any abuse of governmental power under the plea of public policy, but it cannot be as readily construed into a guaranty of a certain system or theory of government. Our constitutions, however contain other general clauses. Thus they state the principle of the Declaration of Independence that life, liberty and the pursuit of happiness are the inalienable rights of man, that governments are instituted to secure these rights, and that the enumeration of certain rights in the constitution shall not be construed to impair other rights retained by the people. If these clauses can be regarded as binding upon the legislature and as embodying a definite theory of government, then it follows *that the policy of the legislature can be met by the policy of the constitution*

⁸¹ For the same reason, I decided not to discuss the Lockean elements of the Bill of Rights.

⁸² ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 20 (1904).

⁸³ *Id.*

and consequently be overridden by the courts under the plea of justice (emphasis added).⁸⁴

Here he seems to have shifted to the *state* constitutions, although it is the Due Process Clause of the Fourteenth Amendment that he had been discussing, but, as we saw in Section B, the early state constitutions did mimic the “political economy” of the Declaration of Independence. But just as he concedes the animating spirit of these constitutions, he intimates that perhaps these “general clauses” might be disregarded, even though, as we saw, they appear in pride of place in the state constitutions that contain them. He then proceeds to try to eviscerate these constitutional expressions of Lockean liberty by suggesting that “liberty” might not mean what everyone thought it meant at the founding. Note, too, the continuation of his gambit (above) to place constitutional provisions on the same plane as legislative acts, describing both as “policy”:

The conflict between justice and policy becomes here in reality nothing more than a conflict between different policies, and the judicial control over legislation assumes a doubtful aspect. What is meant by liberty depends very much upon economic and social ideas; should then the precise content of liberty be held to be fixed by the constitution, or to be variable in accordance with changing ideas as to the proper scope of government? *If the fundamental law is to fulfill its purpose, it should be flexible and yield to the changing conditions of society* (emphasis added).⁸⁵

Now liberty is malleable, subject to fluctuation with changing “economic and social ideas.” So, it is not a conflict between “justice” as embodied in the constitutions and as interpreted by courts, and “policy” as enacted by the legislature, but rather a question of the constitutions’ policy as interpreted by the courts under the dubious guise of “justice,” versus the policy of the legislature, leaving the courts on much weaker ground. Since the constitutions are plastic, if the courts overrule the legislatures it means that the courts are simply not keeping abreast of “changing ideas as to the proper scope of government.”

While the constitutions embraced one philosophy, we are free to interpret their words in whatever manner we like. Freund continues:

A number of state courts have enforced their views of liberty against legislation enacted for the protection of laborers. Much of this legislation, while perhaps unwise or premature, represents an effort of the legislature to realise [sic] a new ideal of social justice, consisting in the neutralisation [sic] of natural inequality by the power of the state. *Even conceding that the older principles of justice are more conformable to the spirit of the founders of our con-*

⁸⁴ *Id.* at § 21.

⁸⁵ *Id.*

*stitutions, it does not follow that their unexpressed ideals should absolutely control the progress of the law (emphasis added).*⁸⁶

Here, Freund concedes that in overturning some protective labor laws the courts acted in conformity with the founders' constitutions. But this no longer matters because the founders' ideals were "unexpressed" and should not "absolutely control the progress of the law," since the legislature is trying to realize a new, and by implication, more advanced and enlightened, "ideal of social justice" based on neutralizing inequality by the power of the state. One obvious problem with Freund's gambit is that he already conceded (in the first passage quoted above) that the state constitutions did "contain other general clauses," namely the ones embodying the theory of the Declaration of Independence. Now, conveniently, these passages have been read out of the constitutions as simply "unexpressed." Freund concludes with a dire admonition:

It is true that popular opinion acquiesces in the judicial decisions, conceding to the courts as it were a suspensive veto. But under democratic institutions the courts cannot be permanently at variance with the matured and deliberate popular will. *Practically the present system of judicial control over legislation has meant in many cases that unless all three departments of the government are convinced of the justice and reasonableness of a radical change in social or economic policy it cannot become embodied in principles of law (emphasis added).*⁸⁷

But that, in a nutshell, is our constitutional system of checks and balances: legislatures pass laws; executives have to sign off on them; and courts rule on their constitutionality when challenged. Our constitutions, state and federal, were constructed precisely to prevent social theories of the majority from infringing the constitutionally protected rights of individuals.

One might even sympathize with Freund's contortions, since, unlike Holmes a year later, Freund at least tried to come up with an argument to get from the natural rights liberalism embodied in the constitutions to early twentieth century Progressivism in which these constitutions mean pretty much anything that the majority wants them to mean, guided by au courant social and economic theories. It is no wonder that Holmes preferred epigrams, since the argument is so palpably weak. That the "flexible constitution" is in our day the regnant theory of constitutional interpretation is a testament to Progressivism's continuing influence, rather than to the cogency or the historical accuracy of the argument.

Thus, the first count of Holmes' indictment—that the Constitution enshrined no particular "political economy"—has withered under overwhelming documentary evidence to the contrary. Lockean liberalism of natural rights, gov-

⁸⁶ *Id.*

⁸⁷ *Id.*

ernment by compact of the people, and government limited as the people’s fiduciary to the protection of their preexisting rights, was the “political economy” enshrined in the Declaration of Independence, the state constitutions, the United States Constitution, and the Bill of Rights demanded by the majority of state ratifying conventions, adopted by the First Congress, and ratified by the states.⁸⁸

III. The Second Count: Exceeding Its Authority and Mischievous Consequences

The second count of the Holmesian indictment is that the Court exceeded its authority by trenching on legislative prerogatives in deciding social and economic policy and that the result of this overreaching will be erratic and mischievous decision making. Thus, the second count leads directly to the line taken by Progressives who would assault the Court’s future due process decisions overturning various legislative acts, both state and federal, on the grounds that the judges improperly replaced the judgment of legislatures with their own. Although Progressives and other critics tended to ignore them, it is now well-accepted that there were numerous police power/due process cases that endorsed interferences with freedom of contract of various sorts both before and even more after *Lochner* was decided, and that these cases swamp the relatively few instances in which the Court found legislation offensive to the Constitution on due process grounds,⁸⁹ although some commentators maintain that these cases had a disproportionate impact to their numbers.⁹⁰ The *Lochner* progeny were few and far between, and by the time liberty of contract under the Due Process Clause was interred in *West Coast Hotel v. Parrish* in 1937 there was not much of it left to bury. In evaluating count two, I will focus on the maximum hours and minimum wage cases, arguably the most central to liberty of contract jurisprudence under the Due Process Clauses. *Lochner* is the maximum hours case that would come to personify the era, and it was a minimum wage case, *West Coast Hotel*, that would mark the demise of liberty of contract. In treating the minimum wage cases, *Adkins v. New York* (1923),⁹¹ in which the Court overturned a minimum wage law for women, will be the focus,

⁸⁸ Although this was not part of Holmes’ indictment, it should be said that the evidence is compelling, also, that the Republican-dominated Congress that passed the Fourteenth Amendment, was led to that course by men who shared the same Lockean framework of natural rights, and most particularly the protection of private property and contractual rights. See SIEGAN, PROPERTY RIGHT, *supra* note 8, at 219–41.

⁸⁹ See Michael J. Phillips, *The Substantive Due Process Decisions of Mr. Justice Holmes*, 36 AM. BUS. L. J. 437, 451 n. 81, 452 n. 82 (1999). Phillips found over forty cases from 1902–1932 in which the Court upheld various regulations challenged on freedom of contract/due process grounds, and only thirteen, five of them simply relying on one of the earlier cases, in which the Court overturned legislation on this ground. He also found two other decisions overturning legislation that fell outside Holmes’ time on the Court. The cases upholding legislation, cited and characterized in Phillips’ note 81, range widely over virtually every kind of interferences with freedom of contract. The few cases listed in his note 82 that overturned regulations are more narrowly focused. Phillips repeats this argument in his book, *supra* note 8, at 58.

⁹⁰ SIEGAN, ECONOMIC LIBERTIES, *supra* note 8, at 110.

⁹¹ *Adkins v. New York*, 261 U.S. 525 (1923).

since it did for minimum wage what *Lochner* had done for maximum hours: it set the high-water mark for liberty of contract in its line of cases. *Adkins* is interesting, too, because in his opinion for the Court, Justice George Sutherland, who would eventually dissent in *West Coast Hotel*, tried manfully to differentiate minimum wage from maximum hours statutes that had by that late date been upheld by the Court. But first, we will examine the maximum hours cases, among which *Lochner* does look anomalous.

A. The Maximum Hours Cases

Preceding *Lochner*, the Court had decided two maximum hours cases of some significance.⁹² One relatively narrow decision, *Atkin v. Kansas* (1903),⁹³ held that it was within the power of a state or its municipal agent to make it a criminal offense for contractors on public works to require or permit their workers to labor more than eight hours in a day. Even though contractors were required to pay prevailing wage rates in the community that were based on a ten-hour workday, this element did not play a part in the Court's decision. Chief Justice Melville W. Fuller and Justices Brewer and Peckham dissented, but without penning an opinion. Justice Harlan wrote for the majority that the decision of a state about how its public works will be done for itself or its municipalities is unreviewable by courts, that the state has complete control over its affairs as guardian and trustee of its people, and that exercising this power does not deprive contractors or their employees of any part of their liberty.⁹⁴ Harlan warned, as he would two years later in dissent in *Lochner*, that legislators, not courts, must change laws if they are mischievous:

No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives.⁹⁵

Harlan stated a high threshold for overturning legislation, again foreshadowing his *Lochner* dissent: legislation should be upheld unless it is "plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."⁹⁶

⁹² Interestingly, the federal government had passed an eight-hour law for federal employees in 1868, but when an issue arose over an employee working longer hours without more compensation, the Court found that the law was merely a recommendation, and that the government could contract for whatever number of hours it liked. This was not a liberty of contract/due process case. *United States v. Martin*, 94 U.S. 400 (1877).

⁹³ *Atkin v. Kansas*, 191 U.S. 207 (1903).

⁹⁴ *Id.* at 222-23.

⁹⁵ *Id.* at 223.

⁹⁶ *Id.* Curiously, despite the stern test that Harlan invoked here and in his *Lochner* dissent, he wrote the Court's opinion in *Adair v. United States*, 208 U.S. 161 (invalidating a congressional act making it a crime to discharge an employee for membership in a labor union). The test that Harlan employs there is

The other pre-*Lochner* case, *Holden v. Hardy* (1897),⁹⁷ preceded *Atkin* by six years and was broader in its impact; its reasoning would be echoed in *West Coast Hotel* forty years later. The Court, with Brewer and Peckham again dissenting, upheld as a valid exercise of police power a law that limited workers in mining, smelting, and refining to an eight-hour day, and made it a misdemeanor to employ anyone for longer hours, as Holden had. Justice Henry B. Brown, writing for the majority, lumped together Holden’s three Fourteenth Amendment grounds: privileges or immunities, due process of law, and equal protection of the laws. He remarked that “law is, to a certain extent, a progressive science,”⁹⁸ and that the Constitution, inflexible and difficult to amend, should not be interpreted by courts to deprive states of the power to attend to the public welfare of their citizens in new ways that continue to evolve.⁹⁹

This was especially true, he thought, in respect to relations between employers and employees, and particularly those involved in dangerous or unhealthy occupations. With industrialization came the growth of dangerous occupations and police power grew apace, with states enacting a wide panoply of safety and health regulations on industries and instituting regimes of municipal inspection. Thus, Brown found the hours restriction on miners to be a valid exercise of the police power: “so long as there are reasonable grounds for believing that this is so [i.e., that excessive hours are detrimental to the health of miners], its [the legislature’s] decision upon this subject cannot be reviewed by the Federal courts.”¹⁰⁰ In a refrain destined to capture the imagination of the *West Coast Hotel* majority, Brown commented that the legislature recognized that workers and owners “do not stand upon an equality, and that their interests are, to a certain extent, conflicting.”¹⁰¹ The former wants to extract as much labor, while the latter, often fearing discharge, must conform to requirements that if he were not under such exigency he would find detrimental to health. Thus, “self-interest” is an unsafe guide, and the legislature may properly interpose its authority.¹⁰² The fact that both parties are “of full age and competent to contract” does not bar the state from interfering “where the parties do not stand upon an equal footing.”¹⁰³

The test of constitutionality in *Holden* is a fairly weak one of reasonableness: whether the state exercised a “reasonable discretion” or whether “its action be a mere excuse for unjust discrimination, or the oppression, or spoliation of a par-

the much vaguer of the two *Lochner* formulations: whether an act is fair, reasonable, and appropriate, or unreasonable, unnecessary, and arbitrary. *Id.* at 174. His “beyond all question” test is nowhere mentioned. Holmes remained adamant, despite the precedent of *Lochner*, filing a dissent.

⁹⁷ *Holden v. Hardy*, 169 U.S. 366 (1897).

⁹⁸ *Id.* at 385.

⁹⁹ *Id.* at 387.

¹⁰⁰ *Id.* at 395.

¹⁰¹ *Id.* at 398.

¹⁰² *Id.*

¹⁰³ *Id.*

ticular class.”¹⁰⁴ The New Deal Court would later embrace this type of weak formulation, and it would find both the paternalism and evolutionary view of the law in *Holden* attractive. The *Lochner* majority, as we saw in Part I, would find this test of reasonableness far too weak and neither paternalism nor an evolutionary view of fundamental law attractive. Although *Lochner* would not overrule *Holden*, *Lochner* would confine *Holden*’s ruling to inherently dangerous occupations.

After *Lochner*, maximum hours laws fared just as well in the Supreme Court as they had before *Lochner*.¹⁰⁵ *Muller v. Oregon* (1908)¹⁰⁶ established that the police power could be successfully invoked against a liberty of contract challenge when the legislature’s target, or beneficiary, depending upon one’s perspective, was women. The “Brandeis brief,” marshaling sociological and medical evidence to demonstrate that women were adversely affected by working long hours, proved persuasive, as one of the two staunchest devotees of due process contract rights, Justice Brewer, wrote the opinion for a unanimous Court, Peckham included. The Oregon law had limited women to ten hours of labor in mechanical establishments, factories, or laundries, and Muller was convicted of a misdemeanor for requiring a woman to work beyond that limit. Muller’s counsel raised due process objections to the statute, arguing that it prevented persons, *sui juris*, from negotiating their own contracts and that it was class legislation because it did not apply to all persons similarly situated. He noted the fact that in Oregon women had undergone emancipation in both property and contractual rights, albeit not yet voting rights. Brewer, however, seemed much more impressed by the mound of sociological evidence amassed by Brandeis on behalf of the state.

Beginning his analysis with *Lochner*, Brewer emphasized “as to men” in his statement of what the case stood for—that “ten hours in a day was not as to men a legitimate exercise of the police power of the State”¹⁰⁷ The New York law had referred to employees in bakeries with no distinction as to gender and gender was not an issue in the case, although Peckham did assume that bakers were men.¹⁰⁸ *Lochner*, Brewer cautioned, was not decisive, and the difference between the sexes

¹⁰⁴ *Id.*

¹⁰⁵ Two additional maximum hours cases should be noted, although the first was not decided on due process grounds and the second was basically a Commerce Clause case. *Ellis v. United States*, 206 U.S. 246 (1907), was decided on the same grounds as *Atkins v. Kansas*, *supra* note 93, namely that the federal government had the same power to set terms for its public contracts as the states possessed. Although Ellis’ counsel raised a Fifth Amendment due process objection to the eight-hour restriction, freedom of contract played no role in Holmes’ decision for the Court. The second case, *Baltimore and Ohio RR. Co. v. Interstate Commerce Commission*, 221 U.S. 612 (1911), was essentially a Commerce Clause case, although the Court stated that a law limiting the hours of labor of railroad workers was reasonable to promote efficiency and safety, and thus not unconstitutional as an interference with freedom of contract.

¹⁰⁶ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁰⁷ *Id.* at 419.

¹⁰⁸ The penultimate paragraph of the Court’s opinion in *Lochner* does mention men: “It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes [sic] (all being men, *sui juris*)” *Lochner*, 198 U.S. at 64.

needed to be explored before the constitutional question could be decided. Here, Brandeis’ efforts paid off. Brewer found compelling the “copious collection”¹⁰⁹ of legislation from the states and other countries as well as the “over ninety reports”¹¹⁰ from various experts here and in Europe—from factory inspectors, statistical bureaus, and investigative committees. The evidence seemed to him overwhelming that women’s physical organization and maternal functions in bearing and raising children and maintaining the home required a limitation in the hours of their labor.¹¹¹ Conceding that legislation and expert opinion are not legal authorities “technically speaking,”¹¹² he considered them, nevertheless, indicative of widespread public opinion. But then he struggled, none too clearly, with his long-held belief that a written constitution is fixed in its meaning and public opinion cannot change constitutional limitations. Yet, when a “question of fact” is debatable, he hedged, the extent of a constitutional limitation can be affected by true facts.¹¹³

Thus, although it is well settled that the general right to contract in business is part of Fourteenth Amendment liberty, “it is equally well settled that this liberty is not absolute”¹¹⁴ Since healthy women produce vigorous offspring, their physical health becomes an object of “public interest and care to preserve the strength and vigor of the race.”¹¹⁵ (This vigor-of-the-race argument had been summarily rejected by Peckham in *Lochner*, but he was thinking of bakers as men.) Even though many legal and educational impediments have been removed, Brewer noted, her physical disadvantage in relation to men persists: “in the struggle for subsistence she is not an equal competitor with her brother.”¹¹⁶ This has led courts to consider her as “needing special care.”¹¹⁷ Thus, he dismissed the “class legislation,” equal protection complaint, concluding that she is “properly in a class by herself”¹¹⁸ and will continue to need the protection of the state, even when similar legislation could not be justified for men. Even if all political, contractual, and personal rights were equal between the sexes, women would still look to men for protection, and protective legislation would be necessary to secure her “a real equality of right”¹¹⁹ and “protect her from the greed as well as the passion of man.”¹²⁰ The denial of the franchise to women in Oregon is not decisive, he added, and the

¹⁰⁹ *Muller v. Oregon*, 208 U.S. at 419.

¹¹⁰ *Id.* at 420.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 421.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 422.

¹¹⁷ *Id.* at 421.

¹¹⁸ *Id.* at 422.

¹¹⁹ *Id.*

¹²⁰ *Id.*

Court's decision turns on a deeper issue, "the inherent difference between the two sexes"¹²¹ and their different functions in life.

Upholding this regulation on the hours of women's work in a laundry, Brewer concluded, does not question "in any respect the decision in *Lochner v. New York*."¹²² But, of course, it carved out a huge exception to *Lochner*, finding a whole class of people beyond contractual protection from maximum-hours laws under the Due Process Clause. The paternalism castigated in *Lochner* for adult men *sui juris* is embraced enthusiastically here for women, and in a manner that is grating to our modern sensibilities, although typical of early twentieth century opinion across all ideological divides, as the unanimity of the Court attests. Progressives shared this sensibility and embraced it for far longer than would their more libertarian opponents. In 1923 Holmes would dissent in *Adkins v. Children's Hospital*, adamantly clinging to paternalism, as would the majority in *West Coast Hotel* fourteen years later. In fact, it was the freedom of contract cohort on the Court that abandoned paternalism towards women in *Adkins*—overturning a minimum wage law that just affected them—not the Progressives. *Muller* spawned a bevy of cases upholding maximum hours and other restrictions on the timing of women's labor¹²³ that would present nasty precedents for those who, in the 1920s and 1930s, would try to lay down a line placing minimum wage legislation for women over it, while not overruling *Muller*.

Castigated as a zealot for laissez faire by Progressives, Brewer's protective inclinations towards women seemed to trump any supposed overarching ideological commitment to freedom of contract. That these maximum-hours restrictions might place women at a competitive disadvantage in securing employment with men, did not, apparently, enter his mind. Nor did it occur to him that men, finding competition in the laundry and factory from cheaper women's labor, might be encouraging their representatives to enact such legislation out of precisely the "greed" from which he thought the legislation was protecting them.

The opinion may be faulted, too, for failing to articulate any test for how to distinguish legitimate police power interferences with liberty of contract from illegitimate ones. In place of an argument, Brewer cavalierly referred the inquisitive to *Allgeyer v. Louisiana*, *Holden v. Hardy*, and *Lochner v. New York*, hardly helpful, espe-

¹²¹ *Id.* at 423.

¹²² *Id.*

¹²³ See, e.g., *Riley v. Massachusetts*, 232 U.S. 671 (1914) (upholding a statute limiting women in manufacturing to ten hours per day or fifty-six hours in a week); *Hawley v. Walker*, 232 U.S. 718 (1914) (upholding an Ohio law limiting women over eighteen in factories, workshops, telephone and telegraph offices, and millineries to ten hours in a day or fifty-four hours in a week); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (upholding as a health regulation a statute that barred night work between 10 p.m. and 6 a.m. for women employed in restaurants); *Miller v. Wilson*, 236 U.S. 373 (1915); *Radice v. New York*, 264 U.S. 292 (1924) (both upholding a California law limiting women to eight hours in a day or forty-eight hours in a week).

cially since the second of the trilogy embraces Hughes’ nearly impossibly high hurdle for invalidating regulatory interferences with contract, which led him to dissent in *Lochner* when the Court would embrace a much lower threshold. Progressives faulted the Court for ruling from its own ideological whims when it overturned state economic regulations on due process grounds, but the *Muller* Court also upheld such regulation, and it failed to articulate any test for its decision. The opinion, even on a charitable reading, is woefully lacking in legal rigor, but it did get the ideology “right.”

As *Muller* plied women from the reach of *Lochner*, by 1917 the Supreme Court decided another case from the same state, *Bunting v. Oregon*,¹²⁴ that would eviscerate *Lochner*, even if not overrule it. In fact, Chief Justice Taft, who would dissent in *Adkins v. Children’s Hospital* six years later, thought that *Bunting* could not be reconciled with *Lochner* and that *Lochner* had been “overruled *sub silentio*,” and Holmes in his *Adkins* dissent shared that view.¹²⁵

Bunting upheld a 1913 statute making it a misdemeanor to employ any person in a mill, factory, or manufacturing establishment more than ten hours per day, with emergency repairs and imminent danger excepted, and allowing three hours of overtime at time-and-one-half pay. The Court, at Felix Frankfurter’s recommendation as counsel for the state, declined to view this as a wage regulation case, cabining the statute’s purpose to merely regulating hours of service, despite the overtime requirement of time-and-a-half. The Court chose to view this stipulation as a deterrent and penalty on employers, rather than as an attempt by the state to dictate the amount of workers’ pay. Frankfurter urged that the boundaries between the liberty of the Fourteenth Amendment and the police power ought not be set by theory, but drawn in each particular case in the light of experience. Unfettered competition, he argued, is no longer considered, even in England, as an invincible economic principle, and the hours of labor are no longer viewed as a “mere contest between labor and capital, but as a concern of the State as an *organic whole*” (emphasis added).¹²⁶ Being an apt student of the effect on the Court of the “Brandeis Brief,”¹²⁷ Frankfurter included one of his own, trying to demonstrate that the old *Lochner* view that long hours were not deleterious to workers’ health was simply not good science.

The Court’s majority, speaking through Justice Joseph McKenna, and with the dissent of three justices—including two, Willis Van Devanter and James C. McReynolds,¹²⁸ who would go on to form half of the notorious band of “the four

¹²⁴ *Bunting v. Oregon*, 243 U.S. 426 (1917).

¹²⁵ *Adkins v. Children’s Hospital*, 261 U.S. at 564 (Taft, J., dissenting) and at 570 (Holmes, J., dissenting).

¹²⁶ *Bunting*, 243 U.S. (Frankfurter’s oral argument).

¹²⁷ Brandeis was by now serving on the Supreme Court, having been appointed by President Wilson in 1916, but he did not take part in this case.

¹²⁸ The third dissenter was Chief Justice White. The dissenters did not file an opinion. Van Devanter was appointed by President Taft and took his seat in January 1911; McReynolds, curiously, was nominated

Horsemen” in the 1930s—upheld the statute as a valid health measure within the state’s police power. (Peckham and Brewer had long departed the Court, the former in 1909 and the latter in 1910.) McKenna took “the law at its word”¹²⁹ that it was a health measure designed to limit the hours of work, not a measure to fix overtime pay, thereby declining to question the motives of the legislature, as the Court had done in *Lochner*. Much like *Muller*, the Court did not fashion a test to determine the limits of the police power, merely stating that “we need not cast about for reasons for the legislative judgment [i.e., about including overtime provisions]. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.”¹³⁰ If the legislation was passed in furtherance of an “admitted power of government,”¹³¹ then its precise contours need not concern the Court, for new policies may be inexact in their initial formulations and “as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.”¹³² This seems to be a circuitous way of saying that the courts should defer to legislative judgments, so long as a reason is given by the legislature that fits within the police power, which is very close to the almost total deference that *West Coast Hotel* would adopt twenty years later. The opinion is scant on legal reasoning (remarkably, citing on its own initiative only one case¹³³), and it does not mention any test, let alone the means/ends type of analysis urged by counsel for Bunting. The case seems to stand for the proposition that courts will not examine means so long as a legitimate end is mentioned in the act. The Court did not even bother to mention *Lochner*, nor address counsel’s complaint that the legislation impinged on all sorts of ordinary occupations of life that are neither dangerous nor unhealthful.

If *Lochner* is an instance of the Court imposing its whims with scant legal justification, it looks like a paragon of legal reasoning next to the superficial and highly conclusionary *Bunting* opinion. *Bunting* reads as though McKenna could not be bothered to come up with a legal argument, nor to name, discuss, and distinguish the legal precedents. But *Bunting*, like *Muller*, arrived at the “right” conclusion from the perspective of Progressives, so it was immune from ridicule.

Whom might *Lochner* still have protected to freely negotiate hours of labor after *Muller* and *Bunting*? Theoretically, men not working in mills, factories, or manufacturing establishments, but the practical effect of *Bunting* was to negate *Lochner*. Maximum-hours legislation, apparently, would no longer raise constitu-

by President Wilson and took his seat in 1914. President Wilson, an avid Progressive, could not have been pleased with his creation. Both justices would serve for over twenty-six years.

¹²⁹ *Bunting*, 243 U.S. at 435.

¹³⁰ *Id.* at 437.

¹³¹ *Id.*

¹³² *Id.* at 438.

¹³³ *Id.* at 437. The qualification is because the Court quoted counsel for Bunting citing *Coppage v. Kansas*, 236 U.S. 1 (1915). The one case that the Court did bring up was *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 365 (1916), for the proposition that the Court need not know the precise reasons for an enactment to be convinced of its wisdom.

tional concerns. Sutherland, in *Adkins*,¹³⁴ would cling to the slender reed that the Court had never approved a maximum-hours law that covered everyone, but that may have been simply because it never heard one, since *Bunting* pretty much made fighting maximum hours laws in the Supreme Court a hopeless proposition.

B. The Minimum Wage Cases

By 1923, reinvigorated by two of President Harding’s four appointees,¹³⁵ the Court was again enthusiastic about liberty of contract.¹³⁶ However, it would have the exceedingly difficult task of trying to make a cogent distinction between the maximum-hours cases—which by that time had gone against liberty of contract, most particularly for women in *Muller v. Oregon*—and a minimum wage law for women. An effort, seemingly, to square the circle, the ruling in *Adkins v. Children’s Hospital* nevertheless did prevail for many years, even holding firm as late as 1936,¹³⁷ only to be vanquished one year later when Justice Roberts, in the famous “switch in time that saved nine” turned the 5-4 majority of 1936 for liberty of contract and against minimum wage regulation for women, into a 5-4 majority the other way.

Adkins concerned a congressional act covering women in all occupations in the District of Columbia and establishing a wage board to investigate and set minimum wages in various occupations in order to guarantee wages sufficient to cover the necessities of life and keep women in good health and protect their morals. The board was empowered to issue orders to the affected businesses demanding their compliance and making their refusal a misdemeanor punishable by fine or imprisonment.¹³⁸ The decision covered two cases. One was brought by Children’s Hospital on Fifth Amendment due process grounds and tried to restrain the board from making the hospital pay higher wages than it had agreed upon with some of

¹³⁴ *Adkins v. Children’s Hospital*, 261 U.S. at 548. “No statute has thus far been brought to the attention of this Court which by its terms, applied to all occupations.”

¹³⁵ Two of Harding’s appointees, Edward T. Sanford (1923) and Chief Justice William Howard Taft (1921), would dissent in *Adkins v. Children’s Hospital*, while Sutherland (1922) would write the majority opinion upholding liberty of contract with the assent of Pierre Butler (1923).

¹³⁶ But it should be noted that in 1921, with only one of Harding’s appointees on the bench, Chief Justice Taft, the Court protected property rights under the Due Process Clause of the Fourteenth Amendment in a case dealing with a union’s “secondary boycott” of a restaurant, ruling that a state law that barred the owner from getting an injunction against the union was a due process violation. See *Truax v. Corrigan*, 257 U.S. 312 (1921). It was another close 5-4 decision, like many of these cases. A remark by Justice Holmes in dissent is worth mention:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments than an important part of the community desires . . . *Id.* at 344 (Holmes, J., dissenting).

¹³⁷ *Morehead v. New York*, 298 U.S. 587 (1936). On two other occasions between *Adkins* and *Morehead*, the Court likewise disfavored minimum wage regulations for women: *Murphy v. Sardell*, 269 U.S. 530 (1925), and *Donham v. West-Nelson Manufacturing Co.*, 273 U.S. 657 (1927), both without opinions and on the authority of *Adkins v. Children’s Hospital*.

¹³⁸ *Adkins v. Children’s Hospital*, 261 U.S. at 541.

its female employees. The other was brought by a twenty-one-year-old woman who had been employed in a hotel as an elevator operator but was let go when the board imposed a higher salary than she was making, despite her wish to continue at her original wage, her belief that the employment was healthy and conducive to morality, and her employers' wish to keep her on their agreed terms. Both challenged the minimum wage law as a violation of freedom of contract under the Due Process Clause of the Fifth Amendment.

In a 5-3 decision, with Justice Brandeis not participating, Justice Sutherland, writing for the Court, took great pains to exhaustively examine the legal precedents, unlike the cursory opinions upholding statutory incursions on liberty of contract in *Muller* and *Bunting*. Beginning cautiously, he repeated a familiar refrain that "every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."¹³⁹ But congressional acts must give way to the Constitution, the "supreme law," if they are "by clear and indubitable demonstration" opposed to it.¹⁴⁰ Then came the usual disclaimers that "of course, there is no such thing as absolute freedom of contract,"¹⁴¹ and that freedom of contract was subject to a:

great variety of restraints. But freedom of contract is nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.¹⁴²

Here, Sutherland tried valiantly to lay down a general rule for freedom of contract cases in terms clearer than had been employed in *Lochner*, as well as to systematize the exceptions to that rule. Because Sutherland was so rigorous, it would only highlight how little was left of liberty of contract by 1923. The exceptions had nearly gobbled his rule. Much like John Stuart Mill's non-intervention principle—with *laissez faire* the general rule and state intervention the exception—in pretty quick order the exceptions became so numerous that the general rule nearly evaporated.¹⁴³

Sutherland identified four categories of cases in which statutes interfering with liberty of contract had been upheld. (1) Statutes setting rates and charges for businesses impressed with a public interest, as most famously in the grain warehouse case, *Munn v. Illinois*,¹⁴⁴ under the theory that where property is devoted to a

¹³⁹ *Id.* at 544.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 546.

¹⁴² *Id.*

¹⁴³ See ELLEN FRANKEL PAUL, *MORAL REVOLUTION AND ECONOMIC SCIENCE* 186-99 (1979).

¹⁴⁴ *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding the setting of maximum rates for grain warehouses and elevators). Sutherland also cited a railroad case, *Louisville & Nashville R. R. Co. v. Mottley*, 219 U.S. 467 (1911).

public use the owner thereby is taken to have granted the public an interest in it, which makes it subject to public regulation for the common good. (2) Statutes dealing with contracts on public works, which stand for the government’s right to set the conditions for work on its own projects. (3) Statutes regulating the time, methods, and character of the payment of wages, where the intent was to prevent unfair or fraudulent methods. These interferences, I might add, were not trivial, including specifying how coal was to be measured for paying miners, requiring that wages paid in store orders be redeemable in cash, and specifying that railroad workers must be paid semi-monthly, among many other cases upholding restrictions that he could have cited.¹⁴⁵ (4) The first three categories were not germane to the present case, Sutherland concluded, but the fourth category was the tricky one: maximum hours laws. Sutherland wended his way through the cases, lingering long, and one might say, lovingly, over *Lochner*—quoting many of its most memorable passages. He then reviewed the other maximum hours cases and a few cases fixing wages or other price fixing that had gone against liberty of contract, trying to show their narrow reach: *Bunting v. Oregon*¹⁴⁶ (limiting to ten the hours of labor in mills, factories, and manufacturing establishments) was justified as a health measure with the Court declining to view the overtime elements of the statute as an attempt to regulate wages; *Wilson v. New*¹⁴⁷ (establishing an eight-hour day and setting a minimum wage for railroad workers in interstate commerce) was upheld because it was only for a limited period to meet a great emergency¹⁴⁸ and it regulated a business affected with a public interest; the rent control cases, *Block v. Hirsh* and *Marcus Brown Holding Co. v. Feldman*¹⁴⁹ (sustaining temporary powers to control the rental of residential dwellings) were upheld under the theory that in an emergency renting buildings became affected with a public interest, thus justifying the regulation; and *Muller v. Oregon*¹⁵⁰ (upholding a ten-hour limit on the hours of labor for women) was approved because of the differences between the sexes, women’s physical inferiority, her role as mother, and her dependence on men.

Muller, obviously, presented the biggest challenge to the *Adkins* majority. Sutherland argued that revolutionary changes in the contractual, political, and civil status of women, particularly the Nineteenth Amendment granting women the right to vote, had so transformed women’s condition since *Muller* that the differences between the sexes “have now come almost, if not quite, to the vanishing point.”¹⁵¹ Not taking the drastic step of declaring that *Muller* had simply been wrongly decided, Sutherland, instead, tried to limit the case’s reach. He conceded

¹⁴⁵ The cases are *McLean v. Arkansas*, 211 U.S. 539 (1909); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901); and *Erie R. R. Co. v. Williams*, 233 U.S. 685 (1914).

¹⁴⁶ *Bunting*, 243 U.S. 426 (1917).

¹⁴⁷ *Wilson v. New*, 243 U.S. 332 (1917).

¹⁴⁸ The act was passed in 1916 to prevent a threatened general strike of the railways during World War I.

¹⁴⁹ *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

¹⁵⁰ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁵¹ *Adkins v. Children’s Hospital*, 261 U.S. at 553.

that women's physical differences might in appropriate cases permit legislators to fix the hours or conditions of her employment, but that:

we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.¹⁵²

Thus, modern legislation had made the "old doctrine"¹⁵³ of special protection and special restraints in women's contractual and civil affairs outmoded.

Sutherland got himself into real difficulties with the heart of his argument, which was his attempt to distinguish maximum hours statutes from the minimum wage regulation in *Adkins*. Maximum hours restrictions, he contended, are akin to category three regulations—those that affected merely the time, character, and methods of payment of wages.

[Both kinds] deal with incidents of the employment having no necessary effect upon the heart of the contract, that is, the amount of wages to be paid and received. A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to hours, by an adjustment in respect of the amount of wages.¹⁵⁴

Dubious to be sure, this attempt at distinction left Sutherland wide open to Holmes' scalpel. In dissent, Holmes skewered Sutherland:

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinction of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.¹⁵⁵

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 553-54.

¹⁵⁵ *Id.* at 569 (Holmes, J., dissenting). Holmes continued to view *Muller* as good law, and after *Bunting* he had thought that *Lochner* "would be allowed a deserved respose." *Id.* at 570. He also offered this opinion, markedly at odds with Sutherland's, on the status of women:

It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. *Id.*

Here is a clear example where the so-called conservatives on the Court were more modern in their views on the status of women than someone much more sympathetic to Progressivism.

It is difficult to see how Holmes did not have the better of this argument. Chief Justice Taft made the same point in his dissent, commenting on maximum hours and minimum wage regulations that: “One is the multiplier and the other the multiplicand.”¹⁵⁶ Sutherland might, technically, have had a point when he said that the Court had in the past recognized an essential difference between maximum hours restrictions and minimum wage. However, where it tried to make a distinction between hours and fixing wages in *Bunting*, as we saw, it had just asserted that time-and-a-half pay for up to three hours of overtime was not a regulation of wages, an assertion smacking more of denial than logical rigor.

The remainder of Sutherland’s opinion contained an admixture of moral and economic arguments. Legal arguments, such as the vagueness of the standard provided to the wage board by the statute, played a subordinate role. Interestingly, Sutherland proved immune to the “Brandeis brief” onslaught of reports, expert opinion, and the list of states that had already adopted similar statutes. To the claim that women’s wages had risen where minimum wage statutes had been enacted, he could find no logical connection between minimum wage and this desirable change, since earnings everywhere had risen, even more among men, and in states beyond the reach of such laws. The real test, he thought, would only come in time of depression—and how right he would be the country would not long have to wait to determine with the depression a mere six years away—when in the “struggle for employment . . . the efficient will be employed at the minimum rate while the less capable may not be employed at all.”¹⁵⁷ (The tendency of increases in the minimum wage to depress employment, especially among minorities, the young, and the least skilled is in our time acknowledged by most economists.)

Sutherland viewed the measure as “simply and exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men.”¹⁵⁸ Its justification as protecting women’s health and morals under the police power he considered spurious, arguing that there is no set connection between these objectives and wages, but, instead, what is necessary to protect health and morals “presents an individual and not a composite question, and must be answered for each individual considered by herself”¹⁵⁹ Much of the remainder of Sutherland’s argument was taken up with two points: first, that the legislation only took account of the interests of one side of the labor bargain, and second, that there is no principled difference between the case of selling labor and that of selling goods. As for the first argument, the employer is compelled to pay the minimum regardless of the merit of particular workers, their capacity to produce the equivalent of the minimum wage, or the financial wherewithal of the employer, thus leaving the employer with the hollow “privilege of abandoning his business as

¹⁵⁶ *Id.* at 564 (Taft, J., dissenting).

¹⁵⁷ *Id.* at 560 (Sutherland, J., opinion of Court).

¹⁵⁸ *Id.* at 554.

¹⁵⁹ *Id.* at 556.

an alternative for going on at a loss.”¹⁶⁰ The employer cannot go on for long against the inexorable economic law that he cannot take out more than is put in. To these economic concerns he added an ethical one:

To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.¹⁶¹

The statute is also ethically deficient because it ignores the “moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence . . .”¹⁶² The employer, even when not paying a wage that covers the necessities, is nevertheless relieving an employee’s distress to a certain degree, a distress which he in no way created.

As to the second argument, selling labor is no different from selling goods, and one would not expect that from the butcher, baker, or grocer one is entitled to receive more in food than the worth of what one pays. “If what he gets is worth what he pays,” Sutherland continued, “he is not justified in demanding more simply because he needs more . . .”¹⁶³ If a statute gave a commission the power to decide how much food is necessary for life, and then required the grocer to sell to his customers that amount at a fixed price, the unconstitutionality of such a statute would be obvious, he thought. Of course, just over a decade later, in 1934, with the depression at full throttle and prices in decline, in *Nebbia v. New York*¹⁶⁴ the Court would approve price fixing for the ordinary commodity of milk. Albeit not precisely the scenario Sutherland envisioned, the principle is the same. In the hope of propping up the farmers, a state board had set the minimum price for a quart of milk at nine cents, and grocer *Nebbia* was convicted of a misdemeanor for selling two quarts and a five cent loaf of bread for eighteen cents, thus giving customers more for their money than the board had ordained.

But *Nebbia* would lie in the Court’s future. For now, Sutherland concluded where he had begun: that individual liberty is not absolute, that it must “frequently yield to the common good,”¹⁶⁵ that no set limit can be drawn between liberty of contract and the state’s power to intervene, and that changing circumstances may

¹⁶⁰ *Id.* at 557.

¹⁶¹ *Id.* at 557-58.

¹⁶² *Id.* at 558.

¹⁶³ *Id.* at 558-59.

¹⁶⁴ *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁶⁵ *Adkins v. Children’s Hospital*, 261 U.S. at 561.

affect where the line is placed. To the further contention that “social justice”¹⁶⁶ required liberty of contract to yield in this case, Sutherland concluded, instead, that the limit had been breached:

To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.¹⁶⁷

By the time *West Coast Hotel v. Parrish* would be decided in 1937, effectively burying freedom of contract under the Due Process Clauses, “changing circumstances” would bite Sutherland with a vengeance. The flavor of Chief Justice Taft’s dissent in *Adkins* would match the temperament of the Great Depression much more closely than that of Sutherland’s majority opinion. In his *Adkins* dissent, Taft had written of employees that they “are not upon a full level of equality of choice with their employer”¹⁶⁸ and that their necessitous circumstances make them “accept pretty much anything that is offered.”¹⁶⁹ Workers are at the mercy of “overreaching,” “greedy” employers, and the evils of the “sweating system.”¹⁷⁰ Here, Taft echoed the temper of 1897’s *Holden v. Hardy*,¹⁷¹ and this same temper would grip the Court’s majority in *West Coast Hotel*. *Lochner* and *Adkins*, the first with a very short coattail and the second with a slightly longer one, look like interlopers.

West Coast Hotel originated with a complaint by a female chambermaid who sued her employer, a hotel, to recover the difference between her wages and the minimum wage set by Washington state’s Industrial Welfare Committee. The committee was empowered by statute to determine the minimum wage in various occupations, in a statute that was in all significant respects indistinguishable from the one found unconstitutional in *Adkins*. The state Supreme Court had upheld the statute, reversing the trial court, and the case then reached the U.S. Supreme Court on appeal by the hotel. The only important difference between *Adkins* and *West Coast Hotel* is that in the former a woman sued in opposition to a minimum wage law, while in the latter a woman sued to claim her due under a minimum wage statute.

Chief Justice Hughes now wrote for a five-vote majority. By a shift of one vote, Justice Robert’s, a minimum wage law was now held valid where just the year before, in *Morehead v. New York*,¹⁷² one was invalidated on the grounds that it was indistinguishable from *Adkins*. In *Morehead* the state had only argued that its statute

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 561.

¹⁶⁸ *Id.* at 562 (Taft, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Holden v. Hardy*, 169 U.S. 366 (1898).

¹⁷² *Morehead v. New York*, 298 U.S. 587 (1936).

was distinguishable from the one in *Adkins*, while this new case gave the Court the opportunity to challenge *Adkins* directly, and it would embrace the challenge. Economic conditions made a reexamination of *Adkins* “imperative,”¹⁷³ Hughes contended, as he began his analysis by pointing out that the Washington statute had been in effect since 1913, that is, through the *Adkins* era.¹⁷⁴ In marked contrast to Sutherland in *Adkins*, Hughes displayed little patience with the doctrine of freedom of contract under the Due Process Clauses:

What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is *liberty in a social organization* which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process (emphasis added).¹⁷⁵

While it is true that even the most zealous enthusiasts of liberty of contract had always said that it was not absolute and that reasonable measures could be taken under the police power that would encroach on this liberty, it is also true that many of those less than enthusiastic for liberty of contract had nevertheless conceded that it existed in some sense. The emphasis in Hughes’ remark is quite different from the latter, and much closer to Holmes’ outright disdain for what he considered a mere dogma. The italicized phrase, “liberty in a social organization,” is key: it is not liberty of the individual that matters so much any more, rather it is that element of liberty that is good for the whole. Hughes seems impatient to be rid of the pesky doctrine of freedom of contract, and the Due Process Clause, a restraint on government going back to Magna Carta, now looks more like a green light to government to regulate in the “interests of the community.”

The test for the legitimacy of regulations that Hughes embraces, here, is about as loose as it can be: legislation must just be “reasonable in relation to its subject” and adopted in the “interests of the community” and the Due Process Clauses are satisfied. Later in the opinion, Hughes quotes *Nebbia v. New York*¹⁷⁶ for a test that looks a bit tougher, but the difference between the two is negligible, and the spirit of the looser formulation would prevail as the Court after *West Coast Hotel* virtually deserted the field for reviewing economic regulation under the Due Proc-

¹⁷³ *West Coast Hotel v. Parrish*, 300 U.S., at 390.

¹⁷⁴ He also pointed out that in 1917 the Supreme Court, by an equally divided vote, had sustained the ruling of the Supreme Court of Oregon that a similar act was valid: in *Stettler v. O’Hara*, 243 U.S. 629 (1917). *West Coast Hotel*, 300 U.S. at 390.

¹⁷⁵ *West Coast Hotel*, 300 U.S. at 391.

ess Clauses. The *Nebbia* test had “proper legislative purpose” instead of Hughes’ mere “subject” and the phrase. “neither arbitrary nor discriminatory,” for his weaker “in the interests of the community,” but the differences clearly would not matter.¹⁷⁷ When the Court stated in *Nebbia* and quoted in *West Coast Hotel* that courts are not concerned with the wisdom of policy and that every presumption should be in favor of the validity of a legislative act unless it is “palpably in excess of legislative power,”¹⁷⁸ these phrases were not novel. They had echoed through the earlier maximum hours and minimum wage cases, and been repeated in only slightly less emphatic terms even by enthusiasts of liberty of contract.

This time would be different in one important respect: while Roosevelt’s Court-packing scheme had failed, in the six years after *West Coast Hotel*, with five retirements and two deaths, the president would have the opportunity to almost completely remake the Court. In 1943, only two justices would remain from the *West Coast Hotel* Court—Stone, the misbegotten Coolidge appointee whom FDR had elevated to Chief Justice in 1941, and Roberts, of the renowned “switch in time.” Henceforth the Court would do virtually nothing to review interferences with freedom of contract.

In *West Coast Hotel*, Chief Justice Hughes made quick work of meeting the *Nebbia* test, finding the legitimate end in a public interest in the health of women and “their protection from unscrupulous and overreaching employers”¹⁷⁹ and then considering the minimum wage an admissible means. The fact that other states had adopted similar means led him to the conclusion that the measure could not be regarded as arbitrary or capricious and, thus, that the legislature should be entitled to its judgment.¹⁸⁰ For good measure, Hughes added a final consideration, one destined to irritate Sutherland and the other three “horsemen” in dissent. Recent economic conditions, Hughes stated, had brought into stark relief that a class of workers who are not on an equal footing in bargaining power can be exploited. Their maintenance, then, is thrown on the taxpayers. Despite the absence of a “factual brief,”¹⁸¹ Hughes claimed that it was permissible to take judicial notice of the State of Washington’s likely experience with this social problem, since a huge demand for relief had been endemic in the country until the recent recovery. “The community,” he continued, “is not bound to provide what is in effect a subsidy for unconscionable employers.”¹⁸² These employers’ “selfish disregard of the public inter-

¹⁷⁶ *Id.* at 398 (citing *Nebbia v. New York*, 291 U.S. at 537, 538).

¹⁷⁷ *West Coast Hotel*, 300 U.S. at 398. The first item in each of the two series is from the *Nebbia* quotation in *West Coast Hotel*.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 398-99.

¹⁸¹ *Id.* at 399.

¹⁸² *Id.*

est”¹⁸³ can be addressed by lawmakers. And with that, *Adkins v. Children’s Hospital* was explicitly overruled.

Justice Sutherland’s dissent repeated the arguments that he had made in his majority opinion in *Adkins*, including his unpersuasive reasons for why minimum wage was different from the maximum hours regulations that had been upheld.¹⁸⁴ Hughes repeated in *West Coast Hotel* the argument from Taft’s dissent in *Adkins*, namely that there really was no difference between the two sorts of regulations, and Sutherland provided nothing new in response. While Sutherland himself in *Adkins* had written that changing needs and circumstances might alter the line between legitimate police power regulation and illegitimate interference with liberty,¹⁸⁵ he seemed genuinely incensed that the Court had considered new economic conditions in overruling *Adkins*, insisting that “the meaning of the Constitution does not change with the ebb and flow of economic events.”¹⁸⁶ He used strong words to chastize the majority: “The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation.”¹⁸⁷ But the simple truth was that Sutherland’s position no longer commanded a majority, and never again would.

C. Appraising count two

Now, after reviewing the maximum hours cases—the cases in the direct line of *Lochner*—and the closely related minimum wage cases that led to the demise of freedom of contract under the Due Process Clauses, what can we make of the second count of Holmes’ indictment? Perhaps, only one thing is clear: this second count cannot be resolved as unambiguously as the first count. The second count has two elements: first, that the Court exceeded its authority by trenching on what should have been left to legislative discretion; and, second, that the results of this overreaching will be erratic and mischievous.

To begin with the second element, what is apparent from our review of just these two narrow and intertwined lines of cases, is that there was erratic decision making. *Muller* in 1908 released women from *Lochner*’s protection for freedom of contract in the hours of labor, while *Bunting* in 1917 did the same for both men and women in all industrial occupations, a category that would certainly include bakers, as Taft later pointed out in his *Adkins* dissent.¹⁸⁸ As for the minimum wage cases, *Adkins* enjoyed stronger support by the Court for a longer period of time, and it was not nibbled away piecemeal, as *Lochner* had been, but by the mid-1930s it essentially relied on one vote, and when that one vote shifted, it was doomed in

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 407 (Sutherland, J., dissenting).

¹⁸⁵ *Adkins v. Children’s Hospital*, 261 U.S. at 561.

¹⁸⁶ *West Coast Hotel v. Parrish*, 300 U.S. at 402 (Sutherland, J., dissenting).

¹⁸⁷ *Id.* at 404.

¹⁸⁸ *Adkins v. Children’s Hospital*, 261 U.S. at 563 (Taft, J., dissenting).

West Coast Hotel. The key cases in both lines were decided by narrow votes, which cannot be blamed on the opponents of maximum hours and minimum wage regulations. What was the alternative to erratic decision making? The alternative to erratic decision making in these two lines of cases would have been for the Court to either rubberstamp all challenged regulations or invalidate all of them; the composition of the Court made either course impossible. Erratic decision making was inevitable when opinion was so closely divided, and when even the enthusiasts for freedom of contract conceded that it must yield to reasonable regulation under the police power.

Were the effects of *Lochner* mischievous, though? If we take this to mean mischievous in its effects on society, rather than more narrowly on how it affected the consistency of the Court’s rulings and its reputation, the question is even more difficult to answer. If one values liberty in human endeavors, including economic liberty, then *Lochner* and *Adkins*, the key cases that each upheld liberty of contract in these lines, were rightly decided. They defended a supremely valuable principle. Alternatively, if one views economic liberty as a distant step-child to the other personal and civil liberties, as the Court would after *West Coast Hotel*¹⁸⁹ and as many justices seemed to even before, then the Court had, indeed, acted mischievously. It is not a question that can be answered in the abstract, free from ideological proclivities. A regime of freedom of contract and minimal regulation by government is more efficient and leads to greater economic growth than a highly interventionist regime; so economic arguments count against the charge of mischievousness, in addition to the aforementioned moral argument of liberty. For those to whom “social justice” arguments appeal, economic regulation by government is a good thing because it protects the weak from exploitation by those possessing wealth and, thereby, power. However, regardless of one’s ideological leanings, it is not clear at all that these two leading cases had much negative effect on regulatory zeal in the states, many of which continued to have maximum hours and minimum wage statutes even in the heyday of *Lochner* and *Adkins* as well as a myriad of other regulations on business.

Turning next to the first element of count two: did the Court exceed its authority by trenching on matters of legislative discretion? If the Court’s libertarians are to be faulted, it is, perhaps, not for being too aggressive in invalidating government economic interventions by defending liberty of contract, but for being too

¹⁸⁹ See the famous Footnote four in *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938), that foreshadowed modern “fundamental rights,” heightened scrutiny for laws affecting personal liberties and “discrete and insular minorities.” As for economic regulations, Justice Stone had this to say in the body of his opinion:

Even in the absence of such aids [legislative reports, etc.] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a

passive. The instances of the Court overturning legislation on liberty of contract grounds were so few; Phillips found fifteen during a forty year period while more than forty cases upheld regulation.¹⁹⁰ When those sympathetic to economic intervention had the votes in *Bunting* and later in *West Coast Hotel*, they did not hesitate, respectively, to eviscerate *Lochner* and to flat out overrule *Adkins*. Yet, when the libertarians were on the ascendancy in the 1920s, in *Adkins* they merely tried to distinguish the maximum hours cases that had gone against liberty of contract from minimum wage, making a wholly unconvincing argument that was ridiculed in the two dissents and repeated by the victorious majority in *West Coast Hotel*. The libertarians never had the courage, or maybe they just did not have the votes, to do what their adversaries would accomplish in *West Coast Hotel* by simply overruling *Adkins*. If the libertarians of the 1920s in *Adkins* had stated that *Muller* and *Bunting* were wrongly decided and taken an appropriate opportunity to overrule them, they would have been on much more solid ground. The libertarian side, even in victory in *Adkins* took a cautious stance, repeating the familiar refrains that freedom of contract is not “absolute,”¹⁹¹ that “every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt,”¹⁹² and that an enactment must clearly breach a constitutional provision before it can be invalidated.

During this period, everyone on the Court gave at least lip service to the position that courts had some role to play in reviewing economic regulation when it might interfere with constitutional protections. Most, until the mid-1930s, also gave liberty of contract some credence, with Holmes being the most skeptical. Even Holmes agreed that there was some role for judicial review of economic regulations that traduced fundamental principles. The question for the libertarians was always one of where to draw the line, and they could never offer a clear answer. As Chief Justice Taft remarked in dissent in *Adkins*:

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark. Our Court has been laboriously engaged in picking out a line in successive cases.¹⁹³

Perhaps, this line-drawing approach, this case-by-case methodology, was simply doomed, with states passing all sorts of regulatory legislation interfering with freedom of contract and with the Court finding reason to defer to most of it when challenged. By the time *West Coast Hotel* interred freedom of contract, the exceptions had pretty much eaten Sutherland’s rule in *Adkins*—that liberty of contract

character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *Id.*

¹⁹⁰ Phillips, *supra* note 89.

¹⁹¹ *Adkins v. Children’s Hospital*, 261 U.S. at 546.

¹⁹² *Id.* at 544.

¹⁹³ *Id.* at 562 (Taft, J., dissenting).

was the general rule and interference the exception. Interference had become ubiquitous. Was there another line of reasoning that could have placed liberty of contract on firmer ground?

IV. The Path Not Taken

In the two leading liberty of contract cases that we examined from our two lines of maximum hours and minimum wage cases, *Lochner* and *Adkins*, neither one articulated a clear line for distinguishing impermissible economic regulation from the permissible. Although Sutherland offered a more sophisticated analysis in *Adkins* than Peckham had nearly two decades earlier, even Sutherland in his attempt to categorize the myriad exceptions to his general principle of freedom of contract, could not satisfactorily contend with the maximum hours cases that had upheld restrictions. *Lochner* suffered even more than *Adkins* from failure to articulate a clear theory of why a ten-hour restriction on bakers was unconstitutional while many other restrictions on contractual freedom had been upheld, thus giving the appearance of a Court merely exercising its own judgment over that of the legislature and even questioning the legislators’ motives. A better theoretical underpinning for their position could have been found, I will suggest, in Justice Joseph P. Bradley’s fundamental rights argument from his dissent in the *Slaughter-House Cases* (1873).¹⁹⁴ Justice Stephen J. Field’s concurrence in an 1884 case, *Butchers’ Union v. Crescent City*,¹⁹⁵ in which the same grant of monopoly again came before the Court as in *Slaughter-House*, built upon Bradley’s argument. Before examining *Butchers’ Union*, it will be helpful to briefly review its more renowned predecessor.

The *Slaughter-House Cases* upheld by a 5-4 vote a grant of a twenty-five year monopoly by Louisiana to a slaughterhouse. Three of the key clauses of the first section of the Fourteenth Amendment—Privileges or Immunities, Due Process, and Equal Protection—were interpreted in ways that vitiated their power to protect economic liberties. The Court crippled the prohibition on abridging the privileges or immunities of citizens of the United States. By taking the narrowest interpretation of its reach, the Court limited the protection afforded by this Clause: to interacting with government for the purpose of making claims, transacting business, and administering its functions; to demanding protection over life, liberty, and property on the high seas or in foreign countries; to peaceably assembling and petitioning for redress of grievances; to using the seaports and navigable waters of the country; to exercising the writ of habeas corpus; to choosing to become a citizen of any state; and to enjoying all rights secured to citizens by treaties with foreign countries. As for all other privileges and immunities—the protection of civil rights and liberties—citizens must look to their states for protection. Thus, the Court declined to read what it called the leading interpretation of the Constitution’s original Privileges and Immunities Clause into the newly afforded Fourteenth Amendment protection

¹⁹⁴ *Slaughter-House Cases*, 83 U.S. 36 (1873).

¹⁹⁵ *Butchers’ Union v. Crescent City*, 111 U.S. 746 (1884).

protection for United States citizens.¹⁹⁶ Writing in 1823 on circuit in the leading case of *Corfield v. Coryell*,¹⁹⁷ and quoted in part by the *Slaughter-House* majority, Justice Bushrod Washington had characterized the privileges and immunities of citizens of the several states as “fundamental” principles that “belong of right to the citizens of all free governments,” comprehended generally as “Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.”¹⁹⁸

The *Slaughter-House* majority was even more dismissive of the Due Process and Equal Protection Clauses as protections for the rights of butchers to practice their trades as they saw fit. As for due process, the Court declared that “under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of this provision.”¹⁹⁹ The Equal Protection Clause would not serve the butchers either, for the Court immured it to the protection of the emancipated slaves from discriminatory laws passed by the states, doubting that the Clause would ever be used for any other purpose than protecting “negroes” against discrimination.²⁰⁰ Seers they were not, for the Due Process Clause would in the *Lochner* era be reinvigorated for the protection of economic liberties and the Equal Protection Clause would also play its part in weeding out so-called “class legislation.” The Privileges or Immunities Clause, however, would not be reborn in this era.

I shall not review Field’s dissent in *Slaughter-House*, but focus instead on his concurrence in *Bluchers’ Union*, since a fundamental rights argument was not a prominent feature of the former, but was the heart of the latter. Field’s dissent in *Slaughter-House*, however, is entirely compatible with his argument in the *Butcher’s Union* concurrence.²⁰¹ Field’s concurrence in *Butchers’ Union* builds on an argument developed by Justice Bradley in his dissent in *Slaughter-House*. Bradley argued that the fundamental rights of Englishmen that the colonists brought with them were identical to the rights of man proclaimed in the Declaration of Independence:

¹⁹⁶ U.S. CONST. art. IV, § 2. “The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states.”

¹⁹⁷ *Corfield v. Coryell*, 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

¹⁹⁸ *Slaughter-House Cases*, 83 U.S. at 76 (citing *Corfield*, 6 F.Cas. at 551).

¹⁹⁹ *Id.* at 81.

²⁰⁰ *Id.*

²⁰¹ Field did briefly mention the Declaration of Independence and inalienable rights in his *Slaughter-House* dissent, but it was not a prominent feature. Writing of the Fourteenth Amendment, he said:

That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. *Slaughter-House*, 83 U.S. at 105 (Field, J., dissenting).

Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: ‘The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.’²⁰²

The sacred rights of Englishmen having been violated, the colonists rebelled:

. . . personal rights were deemed equally sacred [with political rights], and were claimed by the very first Congress of the Colonies, assembled in 1774 . . . and the Declaration of Independence, which was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: ‘that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.’ Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.²⁰³

For these rights to be enjoyed, Bradley continued, the individual citizen must be left free to pursue such callings as he shall find conducive to his happiness, and “Without this right he cannot be a freeman.”²⁰⁴ Not surprisingly, he considered Louisiana’s monopoly grant to one slaughterhouse and prohibition against all others that had practiced the same trade, a mere “pretense of making a police regulation for the promotion of the public health”²⁰⁵

In *Butchers’ Union, Crescent City Slaughter-House’s* monopoly was again the object of dispute. This time, though, it was the monopolist, or former monopolist, who was aggrieved. Crescent City had been granted its twenty-five year monopoly in 1869, but in 1879 Louisiana changed its constitution to prohibit the granting of monopolies in the slaughterhouse business and to abolish such grants as had already been made. The state’s parishes retained the limited right to regulate these businesses for the public health. The Butchers’ Union Slaughter-House Co. then tried to establish its business in the vast territory that had been exclusively granted to Crescent City. The erstwhile monopolist secured a permanent injunction against

²⁰² *Id.* at 115 (Bradley, J., dissenting).

²⁰³ *Id.* at 115-16.

²⁰⁴ *Id.* at 116.

²⁰⁵ *Id.* at 111.

the interlopers, and they appealed to the Supreme Court. While the Court was unanimous in its decision for the competitors, four judges would have reached that conclusion for different reasons, with Field penning one concurrence and Bradley the other, joined by Harlan and William B. Woods.

Justice Miller, writing the opinion for the Court, saw the question as one between the Constitution's prohibition on the states from impairing the obligation of contracts,²⁰⁶ on the one hand, and the state's police power, on the other. He thought it beyond doubt that the 1869 monopoly grant had all the trappings of a contract on which Crescent City had relied to make a large investment, nor did he doubt that New Orleans "impaired these supposed obligations"²⁰⁷ by allowing competition. But that did not end the story, since the Court found that the police power to protect the health and safety of the people cannot "be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure."²⁰⁸ A legislature, when it comes to exercising the state's police power, cannot bind itself or future legislators to the detriment of the public welfare, and thus the constitutional change and the ordinances of the City of New Orleans that relied on the change were not void for impairing the obligation of a contract.²⁰⁹

While Field concurred with the Court in this doctrine, that the legislature cannot contract away its power to enact laws for the public health and morals, he wanted to probe deeper into what he saw, building on the *Slaughter-House* dissents, as the root problem with Crescent City's claims. The problem as he saw it was that the original grant of monopoly in an ordinary employment of life was illegitimate and, therefore, void. Field begins by stating that none of the dissenters in *Slaughter-House* denied that the states possessed the police power to protect the "health, the good order, the morals, the peace, and the safety of society . . ."²¹⁰ The language of natural rights that he uses is revealing: "When such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted."²¹¹

Although he briefly repeats his common law arguments against monopoly from his *Slaughter-House* dissent, the heart of his argument, now, is one from inherent rights as articulated in the Declaration of Independence:

As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recogni-

²⁰⁶ U.S. CONST. art. I, § 10, cl.1.

²⁰⁷ *Butchers' Union*, 111 U.S. at 749.

²⁰⁸ *Id.* at 751.

²⁰⁹ *Id.* at 754.

²¹⁰ *Id.* at 754 (Field, J., concurring).

²¹¹ *Id.*

tion of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: ‘We hold these truths to be self-evident’—that is so plain that their truth is recognized upon their mere statement—‘that all men are endowed’—not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but ‘by their Creator with certain inalienable rights’—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—‘and that among these are life, liberty, and the pursuit of happiness, and to secure these’—not grant them but secure them—‘governments are instituted among men, deriving their just powers from the consent of the governed.’²¹²

Here, Field takes pains to interject comments that emphasize each of the Lockean elements in the Declaration. Among these inalienable rights is the pursuit of happiness, which means, he continues, the pursuit of “any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.”²¹³ Field quotes Adam Smith in the *Wealth of Nations* making the Lockean point that from every man’s ownership of himself, property flows:

‘The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he things proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.’²¹⁴

The original grant of monopoly by Louisiana deprived a thousand people of what had been their lawful occupation, making illegal one day what had been legal the day before. “I cannot believe,” Field inveighs, “that what is termed in the Declaration of Independence a God-given and an inalienable right can be thus ruthlessly taken from the citizen, or that there can be any abridgment of that right except by regulations alike affecting all persons of the same age, sex, and condition.”²¹⁵ Field implores that the Privileges or Immunities, Due Process, and Equal Protection Clauses of the first section of the Fourteenth Amendment ought to be applied as “restrictions against the impairment of fundamental rights.”²¹⁶ The states

²¹² *Id.* at 756-57.

²¹³ *Id.* at 757.

²¹⁴ *Id.* (quoting ADAM SMITH, *WEALTH OF NATIONS*, Bk.1, Chap. 10 (1776)).

²¹⁵ *Id.* at 758.

²¹⁶ *Id.* at 759.

would still retain the same powers that they had before to legislate for traditional police power reasons of promoting health, good order, and peace, and for developing resources, enlarging industries and advancing prosperity. “The principal, if not the sole purpose of its [the Fourteenth Amendment’s] prohibitions is to prevent any arbitrary invasion by State authority of the rights of person and property, and to secure to every one [sic] the right to pursue his happiness, unrestrained, except by just, equal, and impartial laws.”²¹⁷

Bradley’s concurrence, which commanded the allegiance of two other justices, argues for essentially the same point that Field made: that the original grant of monopoly was invalid. Bradley, reprising his critique of the narrow privileges or immunities interpretation in *Slaughter-House*, states that due process and equal protection would likewise condemn monopoly grants, but he only fleetingly mentioned his inalienable rights argument based on the Declaration of Independence that he had formulated in his dissent in that case.²¹⁸

It would be a stretch to say that this argument from Lockean “political economy” and the Declaration of Independence based upon it commanded anything like the broad adherence that could have launched it as the guiding methodology for a counterfactual *Lochner* era grounded on natural rights and the Declaration. What I do wish to suggest, though, is that if such a path had been taken, liberty of contract could have been grounded on a firmer foundation: that adhered to by the founders. As we discussed in Part II, that foundation was thoroughly Lockean, from the Declaration, through the early state constitutions, to the United States Constitution, and to its ratification. Field’s “political economy” would have been less vulnerable to a charge that the Court was simply imposing its ideological beliefs, or its economic theory, on what should have been the preserve of legislatures. A Fieldian natural rights grounding might have aroused even more antipathy from Progressives than did the Court’s case-by-case attempts at line drawing when it overturned legislation on liberty of contract grounds. However, the critics would have been in the same uncomfortable position that we saw Freund trying to squirm his way around. Critics would have had to make a convincing argument that the Constitution had no Lockean provenance, an argument which would have been made even more difficult by a constant barrage of Fieldian-like historical arguments descending from the Court. At the very least, a Fieldian argument would have been easier for the libertarians to make credible in the court of public opinion.

²¹⁷ *Id.*

²¹⁸ *Id.* at 762 (Bradley, J., dissenting). He wrote:

The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence, which commenced with the fundamental proposition that ‘all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.’ This right is a large ingredient in the civil liberty of the citizen.

Even with Field’s natural rights foundation, line drawing would have been needed,²¹⁹ since he conceded that the state could legitimately exercise its police power to protect public health, safety, and morality, to promote education, and even to encourage the development of industry and natural resources,²²⁰ but the police power would have been more successfully corralled. More statutes interfering with economic liberties, including freedom of contract, would have been invalidated under a Fieldian methodology, and that might have produced a more clear-cut demarcation between the permissible and impermissible in economic regulation. Regulations tied tightly to health and safety, including factory legislation and inspection laws, vaccination laws, and building codes would likely have passed constitutional muster.

I am suggesting that a more explicitly ideological position might have been more defensible than the piecemeal methodology actually adopted by the Court’s various enthusiasts for liberty of contract. But none of them took what could have been a more consistent and more easily defensible course. Curiously, none of the fifteen freedom of contract decisions identified by Phillips that invalidated regulatory legislation²²¹ either cited or quoted Field’s concurrence in *Butcher’s Union*, and only one, the earliest, quoted Bradley’s brief remark, in his concurrence, about the Declaration.²²² By the turn of the twentieth century, natural rights arguments were decidedly out of fashion, for which economic liberties paid dearly.

Conclusion

Holmes’ dissent in *Lochner* framed a two-count indictment that would echo through all subsequent excoriations of the case and of the eponymous era. As I rephrased and then examined the first count—that the Constitution expressed no “political economy,” no animating theory of government’s relationship to the individual and to the individual’s fundamental rights—it became difficult to see how the overarching Lockeanism of the founding period could be negated or deflected.

²¹⁹ Field wrote the opinion for a unanimous Court in *Barbier v. Connolly*, 113 U.S. 27 (1895) (holding that an ordinance restricting laundering in certain districts during nighttime hours is a legitimate exercise of the police power and does not offend the due process and equal protection guarantees of the Fourteenth Amendment).

²²⁰ *Id.* at 31.

²²¹ The cases checked by Shepardizing *Butcher’s Union* are the fifteen freedom of contract cases that overturned economic regulations from Phillips list, *supra* note 89. They are: *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner*, 198 U.S. 45 (1905); *Adair v. U.S.*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927); *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87 (1927); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). The five cases that relied on earlier cases are: *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922) (on *Allgeyer*); *Dorchy v. Kansas*, 264 U.S. 286 (1924) (on first *Chas. Wolff Packing*); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552 (1925) (applying first *Chas. Wolff Packing*); *Murphy v. Sardell*, 269 U.S. 530 (1925) (on *Adkins*); *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (on *Adkins*).

²²² *Allgeyer*, 165 U.S. at 590.

Holmes was just plain wrong about the Constitution: it did embody what he mistakenly called an economic theory, and that theory was resoundingly Lockean, and, I should add, not all that dissimilar from the anti-regulatory, natural rights, laissez-faire position of Holmes' much despised strawman, "Mr. Herbert Spencer," and his *Social Statics*.

On the second count—that the *Lochner* Court had exceeded its authority by trenching on what should have been left to legislative discretion, and that the results of this overreaching would be erratic and “mischievous”—the conclusion was mixed, and vindication of *Lochner* and its progeny much less clear. In evaluating this charge, the two lines of cases most intimately tied to *Lochner* and its eventual demise were examined—the maximum hours and minimum wage cases—and, undeniably erratic decision making occurred. For women, *Lochner's* protection for liberty of contract against maximum hours restrictions fell within four years, in *Muller*, and by the pen of one of liberty of contract's greatest enthusiasts, Justice Brewer. *Lochner* itself seemed to have been overruled in *Bunting*, sub silentio, as Chief Justice Taft would later put it, as early as 1917. While the leading minimum wage case, *Adkins*, commanded a fourteen year unbroken allegiance, its problem was always a logical one: that neither Sutherland nor, one might infer, any of his compatriots in the cause, could satisfactorily explain why the maximum hours cases had gone against liberty of contract but the minimum wage cases should not as well, making *West Coast Hotel* seem almost inevitable. That the results were “mischievous” proved harder to determine, since the maximum hours and minimum wage cases that had been invalidated did not discourage many states from retaining or adopting such laws, and any evaluation of mischief seemed necessarily driven by one's ideological proclivities. As for the element of the second count charging the Court with having exceeded its authority, I argued, rather, that it might not have gone far enough, and that it was too cautious in invalidating invasive regulatory legislation.

Finally, the natural-rights based “political economy” from Justice Bradley's *Slaughter-House* dissent, and Justice Field's concurrence in *Butchers' Union*, was explored as a path not taken by the *Lochner*-era Court. That path might have led to a more consistent due process adjudication, albeit more aggressive in invalidating overweening economic regulation. It certainly would have provided a more defensible philosophical mooring, and one that would have resonated with the American people at least until well into the 1930s.²²³ More defensible, principally, because it would have been explicitly tied to the values of the founders: individual liberty, limited government, and property rights. This would have neutralized the Progressives' ideological advantage in professing to be the champions of the will of the

²²³ Even the Democratic Party platform that Franklin Roosevelt ran on in 1932 contained several market-friendly elements; it called for a 25% reduction in federal expenditures, a balanced budget, tariff reform, and the “removal of government from all fields of private enterprise,” except to develop public works and natural resources. Regulatory enthusiasm, however, was much in evidence (available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=D1932>).

people, of majoritarian democracy itself, when bowing to legislatures and upholding interferences with freedom of contract and other economic liberties. By acquiescing to legislative proscriptions, the Progressives could satisfy their ideological proclivities, yet profess that they were not merely validating their own viewpoint. Grounding their arguments on inalienable rights as articulated by the founders and enshrined in our founding documents, the advocates of economic liberties could have countered the moral stance of the Progressives with a moral stance of their own.

Even if the Court had adopted a more ideologically consistent position in the Fieldian mold, the ultimate fate of liberty of contract under the Due Process Clauses and economic liberties more generally would likely have been the same. The statist ideologies of the Progressives and then of the New Dealers were at odds with the founders’ strongly held individualism and belief in the centrality of property rights. The Court’s libertarians shared those beliefs, but it is difficult to see how any theory of liberty of contract, no matter how it were grounded, could have withstood the onslaught from an alien, statist ideology. Progressives and New Dealers viewed legislatures as laboratories for social experimentation and the courts as virtually their cheerleaders, unless an explicit constitutional clause could be found that was breached beyond any fathomable doubt. Cases challenging economic regulation after *West Coast Hotel*, on the exceedingly rare occasions when they were even considered,²²⁴ would be assented to on the flimsiest of tests: mere reasonableness or a bare supposition that the legislature could have had some good reason or other for enacting it. With the regnancy of collectivist ideologies among the country’s political class by the mid-1930s and with Roosevelt’s opportunity to almost entirely reconstitute the Court after 1937, liberty of contract was doomed. Henceforth, the “living Constitution” would prevail.

²²⁴ See *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (holding that no due process objection could be discerned in a statute that prohibited opticians from fitting or duplicating eyeglass lenses without a prescription from an ophthalmologist or optometrist). Justice Douglas wrote for the Court that: “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” *Id.* at 488. *But see* *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (invalidating on due process grounds a state law requiring that pharmacies be owned only by licensed pharmacists). The latter case was decided during one of the high water marks of economic due process.